



ASYLUM SEEKER ADVOCACY PROJECT

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To Whom It May Concern:

The Asylum Seeker Advocacy Project (ASAP) respectfully submits the following comments to the Department of Justice and Department of Homeland Security's Notice of Proposed Rulemaking and Request for Comment on Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, RIN 1125-AA94 or EOIR Docket No. 18-0002, 85 FR 36264, issued June 15, 2020 ("the Notice"). ASAP also submits this comment in response to the proposed collection of information, OMB Control Number 1615-0067.

Interest in the Proposed Rule:

ASAP provides community support and legal services to individuals who have arrived at the Mexico-U.S. border to seek asylum, regardless of where they are currently located. Since its establishment, ASAP has provided community support to over 4,000 members, and successfully resolved more than 1,650 legal emergencies for clients using its unique remote representation model. ASAP has provided assistance to individuals in

defensive asylum proceedings in over 40 states, with a focus on supporting individuals in areas with little to no pro bono legal services. ASAP has represented asylum seekers before the Board of Immigration Appeals (BIA), the Department of Homeland Security (DHS), federal courts, and in administrative filings with United States Citizenship and Immigration Services (USCIS). ASAP also conducts trainings, creates guides and resources, and provides technical assistance to other attorneys.

ASAP routinely assists asylum applicants with the filing of applications for asylum, withholding of removal, and protection under the Convention Against Torture (“asylum applications”). During 2019, ASAP assisted in the preparation and filing of asylum applications for over 80 individuals. In 2020, ASAP is on track to assist over 100 individuals with filing an asylum application.

Department of Homeland Security and Department of Justice Notice:

On June 15, 2020, the Department of Homeland Security (DHS) and the Department of Justice (DOJ) published a Notice of Proposed Rulemaking and Request for Comment on Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, RIN 1125-AA94 or EOIR Docket No. 18-0002, 85 FR 36264, issued June 15, 2020 (“the Notice”), with a comments submissions due on July 15, 2020. The deadline for submission of comments on the proposed collection of information is August 14, 2020 and must include OMB Control Number 1615-0067.

The Notice makes myriad, sweeping changes to the legal standards and procedures for asylum, withholding of removal, the Convention Against Torture (CAT), and credible fear and reasonable fear interviews. ASAP describes and analyzes many of the changes in the below sections. However, ASAP was not able to address all of the proposed changes in detail given the sheer quantity and the minimal timeline the agencies allowed for submission of comments. Because of the multiple deficiencies explained below, ASAP objects to the Notice as a whole. ASAP further objects to the agency allowing only 30 days for the public to respond to the multitude of changes proposed in the 161 pages of the Notice.

Summary of Arguments

First, the agencies’ failure to explain the reasons for the proposed changes fatally doom the Notice by denying the public a meaningful opportunity to comment. The public cannot fully assess whether the agency has addressed all meaningful aspects of the problem, because the agency has, indeed, failed to identify the specific problem to which the Notice responds. Commentators cannot adequately assess whether the

reasons for the proposed changes satisfy the Constitution and other statutory requirements, nor can they evaluate evidence to determine whether the rule is rationally related to any purpose.

Second, many of the specific provisions of the Notice violate the Immigration and Nationality Act (INA), the U.S. Constitution, and U.S. Treaty obligations. Its legal and constitutional deficiencies are sweeping, and in many instances, ultra vires. The proposed changes would also make it extraordinarily hard, if not impossible, for those seeking safety in the United States to be granted asylum, withholding of removal, or protection under CAT. DHS and DOJ should therefore withdraw the Notice in its entirety. If the agencies decide to move forward with any of the proposed changes in the Notice, they must make significant changes and abandon all unlawful provisions.

Third, the Notice is unlawful because Acting Secretary Wolf holds his office in violation of both the Homeland Security Act and the Federal Vacancies Reform Act. Because Mr. Wolf holds his office unlawfully, we cannot designate authority to Mr. Mizelle to sign the Notice, as all his actions taken as Acting Secretary must be set aside as unlawful under the Administrative Procedure Act.

Fourth, the Notice violates the Rehabilitation Act because it introduces barriers to the asylum process that will prevent individuals with disabilities from meaningfully participating, without setting forth a process for identifying disabilities and providing reasonable accommodations or modifications.

Fifth, the proposed I-589 included with the supporting documents to the Notice violates the Paperwork Reduction Act. The proposed I-589 is significantly longer and would unnecessarily increase the amount of information collected, creating an undue burden on asylum seekers and nonprofits like ASAP.

I. The Agencies Have Failed to Meet the Basic Requirements of Notice and Comment Rule-Making, Depriving the Public of a Meaningful Opportunity to Participate

The Notice fails to meet the basic requirement for notice and comment rule-making that an agency identify the reasons for its proposed regulatory changes. Nowhere does the Notice include a clearly identifiable section or subheading describing the “purpose” or “reasons” for the proposed changes. Two sections of the proposed rule indicate that DHS and DOJ have made the indicated changes “for the reasons set forth in the preamble,” 85 FR 36291, 36298; but the word “preamble” does not

otherwise appear anywhere in the text of the Notice.¹ Nor does any subsection of the Notice or any of the discussion of changes to specific provisions of the Code of Federal Regulations explain the agencies' reasoning for implementing the proposed changes.

Because the agencies fail entirely to identify the reasons for the proposed regulatory changes, they have denied the public any meaningful opportunity to engage in a public comment. See, e.g., *Connecticut Light & Power Co. v. Nuclear Regulatory*

¹ The "Discussion" section of the Notice also utterly fails to make clear its purpose. (85 FR 36265). This two paragraph section states that "[a]s an expression of a nation's foreign policy, the laws and policies surrounding asylum are an assertion of a government's right and duty to protect its own resources and citizens, while aiding those in true need of protection from harm. See, e.g., *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972)." *Id.* Notably, *Mandel* is not an asylum case and does not concern immigrants fleeing persecution. *Mandel* also predates the Refugee Act of 1980 by 8 years. See Pub. L. 96-212, 94 Stat. 102 (1980).

In any event, the general proposition that asylum laws are "an assertion of a government's right and duty to protect its own resources and citizens, while aiding those in true need of protection from harm," does nothing to clarify the reasons for the specific changes the Notice makes to the regulations governing the CFI process and asylum, CAT, a withholding claims. At minimum the government is required to state how and why the specific changes it proposes further the United States asylum policy goals, and to provide sufficient evidence for the public to meaningfully assess whether the proposed changes were likely to achieve those goals. The present Notice utterly fails to do so.

Notably, the agencies stated account of asylum policy — for which it sites only an inapposite, anachronistic case — is also at odds with the purpose identified in the statutory text of the Refugee Act:

The Congress declares that it is the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands, including, where appropriate, humanitarian assistance for their care and maintenance in asylum areas, efforts to promote opportunities for resettlement or voluntary repatriation, aid for necessary transportation and processing, admission to this country of refugees of special humanitarian concern to the United States, and transitional assistance to refugees in the United States. The Congress further declares that it is the policy of the United States to encourage all nations to provide assistance and resettlement opportunities to refugees to the fullest extent possible.

Pub. L. 96-212 (S 643), 94 Stat. 102. The Refugee Act nowhere identifies the purpose of asylum law and policy as "protect[ion of the United States'] own resources and citizens." (85 FR 36265). To the contrary, the Act specifically notes that it is the "policy of the United States to encourage all nations to provide assistance and resettlement opportunities to refugees *to the fullest extent possible*." Pub. L. 96-212 (S 643), 94 Stat 102 (emphasis added). In so far as the NOTICE is motivated by a desire to *limit* asylum and humanitarian assistance opportunities below "the fullest extent possible," it violates the statutory purpose of the Refugee Act.

Comm'n, 673 F.2d 525, 530 (D.C. Cir. 1982), (“If the notice of proposed rule-making fails to provide an accurate picture of the reasoning that has led the agency to the proposed rule, interested parties will not be able to comment meaningfully upon the agency’s proposals” and “[a]s a result, the agency may operate with a one-sided or mistaken picture of the issues at stake in a rule-making.”). The agencies must provide sufficient detail on the reasons for the proposed rule in both law and evidence for the public to meaningfully evaluate their proposal. See *California v. Dep’t of the Interior*, 381 F. Supp. 3d 1153 (N.D. Cal. 2019). Because commentators do not know, for instance, whether the proposed legal changes to the standards for asylum, CFIs, CAT and withholding are meant to achieve any particular outcome, commentators cannot provide countervailing evidence that indicates the agencies’ changes will not achieve their goals.

Failing to sufficiently identify the reasons for the proposed changes also prevents commentators from adequately assessing whether the agencies’ reasons may run afoul of the Constitution or other statutes. For instance, commentators cannot fully assess whether the proposed changes are motivated by impermissible racial animus, as has been the case with other of the Administration’s immigration policy changes. See e.g., *Ramos v. Nielsen*, 336 F. Supp. 3d 1075, 1098 (N.D. Cal. 2018) (finding that plaintiffs provided sufficient evidence to raise a serious question that unconstitutional animus towards non-white, non-European immigrants motivated the Trump Administration’s Acting DHS Secretary’s decision to terminate Temporary Protected Status for certain groups, “even if the DHS Secretary or Acting Secretary did not ‘personally harbor animus ..., their actions may violate the equal protection guarantee if President Trump’s alleged animus influenced or manipulated their decision-making process.’”) (citations omitted). The third-country transit bar,² Migrant Protection Protocols (MPP)³ and expedited processing for “family unit” asylum cases⁴ are evidence that this administration is

² See Human Rights First, *Trump Administration Third-Country Bar is An Asylum Ban that Will Return Refugees to Danger*, (Sept. 2019), <https://www.humanrightsfirst.org/sites/default/files/Third-Country-Transit-Ban.pdf>.

³ See Human Rights Watch Report, “We Can’t Help You Here”: U.S. Returns Asylum Seekers to Mexico 1 (2019), https://www.hrw.org/sites/default/files/report_pdf/us_mexico0719_web2.pdf (“The Trump administration has pursued a series of policy initiatives aimed at making it harder for people fleeing their homes to seek asylum in the United States, separating families, limiting the number of people processed daily at ports of entry, prolonging detention, and narrowing the grounds of eligibility for asylum. In January 2019, the administration expanded its crackdown on asylum with a wholly new practice: returning primarily Central American asylum seekers to several border towns in Mexico where they are expected to wait until their US asylum court proceedings conclude, which could take months and even years.”).

⁴ See Jeffrey S. Chase, *EOIR Creates More Obstacles for Families*, (Dec. 13, 2018), <https://www.jeffreyschase.com/blog/2018/12/13/eoirs-creates-more-obstacles-for-families> (A former immigration judge stating that the FAMU docket is an effort at “gaming of the system to deny more asylum claims for [the administration’s] own political motives”).

attempting to make it harder for individuals who seek safe haven at the Mexico-U.S. border to win asylum and get on a path to citizenship.⁵ These proposed changes build on those efforts, making it nearly impossible for many asylum seekers to win relief, especially those who cross the Mexico-U.S. border.

Multiple statements by administration officials,⁶ including the President, have suggested a particular animus motivating immigration policies, directed at specific immigration populations on the basis of their racial and ethnic identities, and countries of origin.⁷ Recent research by legal scholars has also tied the immigration policies of this administration to nativist ideologies seeking to secure the ethnic composition of the United States as a “white majority” country.⁸

Given the sweeping nature of these proposed rule, the intention to prevent as many people as possible from winning asylum is clear. The present rule is likely part of an insidious agenda of discrimination meant to undermine valid legal claims to asylum as part of the administration’s ethno-nationalist political project.⁹ Such a project would necessarily run afoul of the constitutional guarantees of equal protection and Due

⁵ See Nicole Narea, *The Demise of America’s Asylum System Under Trump, Explained*, VOX (Nov. 5, 2019), <https://www.vox.com/2019/11/5/20947938/asylum-system-trump-demise-mexico-el-salvador-honduras-guatemala-immigration-court-border-ice-cbp>.

⁶ Senior White House official and immigration policy architect Stephen Miller in particular has been accused of holding and promoting white supremacist views. See, e.g., Joel Rose, *Leaked Emails Fuel Calls for Stephen Miller to Leave White House*, NPR (Nov. 26, 2019) <https://www.npr.org/2019/11/26/783047584/leaked-emails-fuel-calls-for-stephen-miller-to-leave-white-house> (detailing revelations from Miller’s emails while working as reporter at Breitbart News in which he promoted a number sources associated with white nationalist and racism); Dennis Carter, *It’s Time to be Honest about Stephen Miller, Whose Radical Vision for U.S. Immigration is Spreading*, REWIRE NEWS (May 14, 2018), <https://rewire.news/article/2018/03/14/time-honest-stephen-miller-whose-radical-vision-u-s-immigration-spreading/>.

⁷ See Jayashri Srikantiah & Shirin Sinnar, *White Nationalism as Immigration Policy*, 71 STANFORD L. REV. 197, 198-204 (2019), <https://review.law.stanford.edu/wp-content/uploads/sites/3/2019/02/71-Stan.-L.-Rev.-Srikantiah-Sinnar.pdf> (cataloging the President and other administration officials’ statements and explaining how they were justified as part of a white nationalist project); see also Max Greenwood, *Trump on Removing Confederate Statues: “They’re Trying to Take Away Our Culture,”* THE HILL (Aug. 22, 2017), <https://thehill.com/homenews/administration/347589-trump-on-removing-confederate-statues-theyre-trying-to-take-away-our>.

⁸ See, e.g., Reva Siegel and Duncan Hosie, *Trump’s Anti-Abortion and Anti-Immigration Policies May Share a Common Goal*, TIME (Dec. 13, 2019), <https://time.com/5748503/trump-abortion-immigration-replacement-theory/> (detailing how Trump Administration officials lauded Hungary’s efforts to ensure more white women are procreating in order to ensure the country remains a majority white country); see also Jonathan S. Blake, *How Ethno-Nationalism Explains Trump’s Early Presidency*, VICE (Feb. 26, 2017), https://www.vice.com/en_us/article/53qnxx/how-etho-nationalism-explains-trumps-early-presidency; Jayashri Srikantiah & Shirin Sinnar, *supra*, note **Error! Bookmark not defined.**

⁹ See, e.g., Jayashri Srikantiah & Shirin Sinnar, *supra*, note **Error! Bookmark not defined.** at 200–203.

Process.¹⁰ However, in the absence of stated reasons for this rule, commentators cannot fully raise these concerns, which likely obscures the animus that connects these proposed changes with this administration's other immigration policies.

Nor can commentators assess whether the Notice may be motivated by statutorily impermissible justification of trying to deter legitimate immigration claims. See *Aracely, R. v. Nielsen*, 319 F.Supp.3d 110 (D.D.C. 2018) (agency cannot consider deterrence in evaluating parole requests); *R.I.L-R v. Johnson*, 80 F.Supp.3d 164 (D.D.C. 2015) (agency cannot deny bond in order to deter others).

The agencies have denied the public the opportunity to meaningfully comment on the proposed rule, by failing to clearly identify its purpose. Commentators cannot adequately assess whether the reasons for the proposed changes satisfy the Constitution and other statutory requirements, nor can they evaluate evidence to determine whether the rule is rationally related to any purpose. The agencies therefore must retract the rule from the Federal Registry — if they wish to proceed, they must reissue the rules with a clearly identified purpose and rationale.

II. Analysis of the Proposed Rule's Divergence from Constitutional, Statutory and Treaty Obligations

In the following section, ASAP analyzes each sections of the Notice in detail, noting in particular where the proposed changes would violate the INA, Due Process guarantees required under the Fifth Amendment, and the United States' international treaty obligations. The Notice suffers from myriad deficiencies, and in many instances, its proposed changes so deviate from statutory and constitutional requirements as to be *ultra vires*. ASAP urges the agencies to remove all of the offending and unlawful provisions of the Notice. Notably, because the legal and constitutional deficiencies of the rule are so sweeping and comprehensive, ASAP does not believe any of its specific provisions can be salvaged in their current form.

Section A: Expedited Removal and Screenings in the Credible Fear Process

Credible fear (CF) and reasonable fear (RF) screenings are exactly that – merely screenings. Screenings are conducted by asylum officers from the United States Citizenship and Immigration Services (USCIS). Given the complexity of the law, these officers are not equipped to, and cannot, handle full adjudication of claims for asylum,

¹⁰ See, e.g., Susannah W. Pollvogt, *Unconstitutional Animus*, 81 *FORDHAM L. REV.* 887, 900-24 (2012) (describing unconstitutional animus in Supreme Court equal protection cases).

withholding of removal under INA 241(b)(3) (WH or “withholding”), or protection under the Convention Against Torture (CAT). Furthermore, adjudication of asylum, WH and CAT claims require a fact intensive inquiry to determine a person’s eligibility for these forms of protection.

The fundamental problem with requiring consideration of specific precedents and regulations, mandatory bars, etc. at the CF and RF stage (as the proposed regulations in Part A require) is that it is difficult, if not impossible, to do this correctly in accordance with the INA, Due Process required under the Fifth Amendment of the United States Constitution, and international treaty obligations at screenings, rather than full interviews or court hearings.

In so far as the proposed regulations in Part A attempt to squeeze too much into CF and RF screenings, DHS and DOJ risk violating the INA, Due Process, and international treaty obligations, which will result in more impact and individual litigation, with some courts refusing to give DHS and DOJ deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), and its progeny, depending on the issues. As we have already seen with litigation on the 2018 and 2019 Interim Final Rules, the impact and individual litigation to challenge these proposed regulations cause chaos that benefits no one, as different courts issue conflicting orders and injunctions, with no certainty for the asylum seekers, DHS, and DOJ. This likely outcome will cause the already overburdened immigration system to grind to a halt.

DHS and DOJ must address practical concerns related to the ability of asylum officers to adjudicate complex cases during what have been preliminary screenings, and the likelihood that this new process could violate statutory and constitutional rights of asylum seekers. Furthermore, the government must address the cost of likely litigation to challenge these proposed regulations as unlawful.

No retroactivity of asylum- and withholding-only proceedings

DHS and DOJ must amend the proposed regulation to clarify that it will not be applied retroactively to place people with positive CF into asylum-only or withholding-only proceedings rather than full removal proceedings under INA § 240. Since 1997, DHS has already placed millions of people whom it or DOJ have found to have positive CF into full removal proceedings. Several hundred thousand of these individuals are still in proceedings, given the backlog of cases pending in DOJ.

Due to no fault of their own, many asylum seekers have been waiting for years to have DOJ adjudicate their cases. Some subset of these individuals have since developed

significant ties to the United States, such as U.S. citizen or lawful permanent resident (LPR) families or U.S. employers who may be able to file immigrant petitions for them. If they are moved from full removal proceedings to asylum- or WH-only proceedings, they may be unable to become LPRs through their family or employment ties without having to return to countries where they may be in danger, as evidenced by their positive CF findings.

As the Supreme Court observed in the seminal case of *Bowen v. Georgetown University Hospital*:

[A] statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms. See *Brimstone R. Co. v. United States*, 276 U.S. 104, 122, 48 S.Ct. 282, 287, 72 L.Ed. 487 (1928) (“The power to require readjustments for the past is drastic. It ... ought not to be extended so as to permit unreasonably harsh action without very plain words”). Even where some substantial justification for retroactive rulemaking is presented, courts should be reluctant to find such authority absent an express statutory grant.

488 U.S. 204, 208-09 (1988). Given that the proposed regulations in Part A will upend the credible fear process that has been in effect for over two decades, DHS and DOJ must clarify that these changes will not apply retroactively to individuals who have already been found to have credible fear and been placed in full removal proceedings.

Role of precedents in the credible fear process

Proposed 8 C.F.R. section 1003.42(f) would require immigration judges to “apply relevant precedent issued by the Board of Immigration Appeals, the Attorney General, the federal circuit courts of appeals having jurisdiction over the immigration court where the Request for Review is filed, and the Supreme Court.” Such a mandate will harm CF applicants in a number of ways.

First, where there are circuit splits on issues involving asylum, WH, or CAT, DHS will be able to game the system by filing the Requests for Review with immigration courts in the circuits with law least favorable to the CF applicants, thereby preventing legitimate asylum seekers from passing CF review. In addition to encouraging DHS to game the system in this manner, proposed section 1003.42(f) will overload the immigration courts in the circuit court jurisdictions where DHS will choose to file the Requests for Review, thereby slowing down not only the CF and RF process, but also further overloading the

already overburdened immigration courts in those jurisdictions. That will harm all respondents in those immigration courts – many of whom are ASAP members – who have already been waiting for years to get their day in court. DHS and EOIR must address these concerns as they relate to basic ideas of fairness as well as agency operations.

Second, even where the precedent to be applied may be relatively clear, the application of precedents to a particular case require fact intensive inquiry under the law.¹¹ One such common situation in asylum and WH is determining whether nexus to one or more protected ground exists. As the federal courts have repeatedly held, “more than one central reason may, and often does, motivate a persecutor’s actions,” and “the assessment of a persecutor’s motivation presents a ‘classical factual question.’” *Cantillano Cruz v. Sessions*, 853 F.3d 122, 128 (4th Cir. 2017).

In order to accurately apply such circuit court precedents correctly in determining nexus, the immigration judge may need to conduct a fact specific review not very different than a full individual hearing. However, the application of precedents in a CF or RF screening – rather than a full USCIS asylum interview or a full individual hearing in immigration court – is a challenge, given the limited amount of time in such screenings, coupled with the complexity of evolving case law governing asylum, WH, and CAT. The result may be that some individuals will have their claims unfairly and prematurely rejected at the CF or RF review stage based on a cursory application of precedents that stem from full 240 removal proceedings.

Finally, current 8 C.F.R. section 208.30(e)(4) directs asylum officers to “consider whether the [noncitizen]’s case presents novel or unique issues that merit consideration in a full hearing before an immigration judge.” The proposed rule eliminates this provision without any explanation. DHS and DOJ should reinstate this provision to ensure that viable asylum claims are not excluded, but at the very least, they must provide an explanation and justification for eliminating this provision.

Confusing and possibly conflicting CF screening and review process

Proposed 8 C.F.R. sections 208.30(e)/1208.30(e) create a complicated roadmap of the various bars to asylum and withholding that must be considered in the CF process. The proposed rule appears to make what types of protection the applicants can apply for in immigration court dependent on what happened in the CF screening process.

¹¹ See *infra* comments to Part C, Sections 1 (Particular Social Group), 4 (Nexus), 5 (Internal Relocation), 7 (Firm Resettlement), and 8 (Rogue Officials).

This may violate the applicant's due process and statutory rights under INA 208 and INA 235(b)(1)(B)(iii)(III), if the asylum officer's decision to place the applicant in WH-only proceedings (versus asylum- and WH- proceedings) cannot be reversed by an IJ during the asylum- and/or WH-only proceedings. For example, proposed section 208.30(e)(5)(i)(B) appear to limit anyone whom the asylum officer found to be subject to an asylum bar in the CF process from applying for asylum in immigration court. If there is an IJ review of the asylum officer's CF determination (including whether the asylum officer correctly placed the applicant in asylum- and WH-proceedings, versus just WH-only proceedings) under the proposed section 1003.42, the IJ will have the last word on whether the applicant is eligible to apply for asylum in immigration court.

What is disturbingly unclear is what happens under the proposed section 208.30(e)(5)(i)(B) if there was no IJ review of the asylum officer's determination that the applicant was subject to a mandatory bar to asylum and should therefore be placed in WH-only, rather than asylum- and WH- proceedings. If the immigration judge discovers during the WH-only proceedings that the asylum officer erred during the CF process in determining that the applicant was subject to a mandatory bar to asylum, that IJ should be able to expand the WH-only proceedings to asylum- and WH- proceedings, so that the applicant can apply for asylum, as well as WH and CAT. To do otherwise would violate INA 235(b)(1)(B)(iii)(III), INA 208, and Due Process by unlawfully limiting the applicant's right to apply for asylum based on unreviewable error committed by an asylum officer during the CF process. DHS and DOJ must explain the reason for choosing such an inflexible procedure, must consider the negative impacts on asylum seekers, legal aid providers and local communities as a result.

DHS and DOJ's discussion on the scope and timing of IJ reviews on these types of proceedings also appear to contradict itself. DHS and DOJ first state that "[i]n those proceedings, the [noncitizen] would have the opportunity raise whether he or she was correctly identified as being subject to the bar(s) to asylum and withholding of removal and also pursue protection under the CAT regulations." 85 FR 36272. Yet just a couple of paragraphs later, DHS and DOJ state that "it is pointless and inefficient to adjudicate claims for relief in section 240 proceedings when it is determined that an [noncitizen] is subject to one or more of the mandatory bars to asylum or statutory withholding at the screening stage," 85 FR 36272.

Neither the proposed rules nor the discussion address what happens to individuals whom asylum officers determine should be placed into WH-only, rather than asylum- and WH- only proceedings, where the asylum officer's determination was not reviewed by an IJ during the CF process. If the IJ in WH-only proceeding is bound by

the asylum officer's determination at the CF screening stage, that would violate INA 235(b)(1)(B)(iii)(III).

Such hopelessly confusing and muddled interactions among proposed sections 208.30, 1003.42, and 1208.30 on fundamental issues such as the scope and timing of IJ review of the CF process helps no one – not the asylum seekers, the asylum officers, the IJs, or even the attorneys for the United States Immigration and Customs Enforcement (ICE) who represent DHS in immigration courts – and will lead to more litigation even as people who should have been allowed to apply for asylum are limited to WH and CAT or worse, removed before they can exercise their legal right to apply for these protections. As such, DHS and DOJ should not move forward with the proposed process as outlined, but to the extent the government moves forward, it must provide a mechanism for reviewing and remedying mistakes made during the CF process regarding asylum eligibility.

Eliminates the presumption for immigration judge review

As part of the proposed rule change, DHS flips the presumption for IJ review of negative fear determinations in proposed sections 208.30(g)(1) and 208.31. "If the [noncitizen] refuses to make an indication, DHS shall consider such a response as a decision to decline review." This reverses the presumption in the current regulation that a refusal to make an indication "shall be considered a request for review." 8 C.F.R. section 208.30(g)(1) (2020).

In support of this change, DHS and DOJ claim – without any data or evidence – that "[g]iven that the [noncitizen] has been informed of his or her right to seek further review and given an opportunity to exercise that right, referring an [noncitizen] to an immigration judge based on a refusal to indicate his or her desire places unnecessary and undue burdens on the immigration courts." 85 FR 36273. Such cursory and unsupported assertions are insufficient to justify a decades long presumption that IJ review does not merit agency deference under *Chevron*. DHS and DOJ must provide data or evidence supporting this assertion.

Deprives applicants of the right to be interviewed in the language of their choice

The changes made to the CF process in Part A are all the more problematic based on a change in the regulations not discussed at all by DHS and DOJ. Proposed 8 C.F.R. section 208.30(d)(5) changes the standard for what language an asylum seeker will be interviewed in from "language chosen by the [noncitizen]" to "language the [noncitizen] speaks and understands."

This unexplained change will disproportionately harm asylum seekers from countries such as Guatemala, from where many individuals speak languages such as Mam, Quiche, and others in addition to (or instead of) Spanish. If the CF applicant can no longer choose to be interviewed in a language that they speak and understand best, and may be forced to proceed in any language that they simply “speak[] and understand[],” as proposed 8 C.F.R. 208.30(d)(5) states, then errors that will send people who are legally eligible for protection back to danger will greatly increase, particularly when the lack of choice in language will be combined with the complex new legal requirements imposed by these proposed regulations.

DHS and DOJ must provide reasoning and justification for this proposed change, especially in light of the harm it would likely cause to indigenous language speakers.

Section B: Form I-589, Application for Asylum, Withholding of Removal, Filing Requirements

The proposed changes to the I-589 form, and the broad authority given to adjudicators to pretermite and even find applications frivolous before a full hearing on the merits, constitute a significant and unjustifiable departure from the current asylum process. In practice, these proposed changes will make the initial asylum application much more difficult for all asylum seekers and create insurmountable barriers to the asylum process for many. The proposed changes in Section B conflict with the INA and Due Process under the Fifth Amendment of the United States, and ASAP therefore urges DHS and DOJ to withdraw them in their entirety.

If DHS and DOJ decide to keep any portion of Section B – “Form I-589, Application for Asylum and for Withholding of Removal, Filing Requirements” – the agencies should amend the regulations to clarify that no part of Section B will not apply retroactively to individuals who file or will file their I-589 forms before this rule goes into effect. Applying Section B retroactively would raise additional due process concerns because it would likely lead to some asylum applications being rejected based on changed law without notice of the changes and without giving the applicant a meaningful opportunity to challenge them.

Frivolous Applications

DHS and DOJ do not take sufficient care when outlining changes as they relate to the finding of a frivolous asylum application. The current penalty for knowingly filing a frivolous asylum application is permanent ineligibility for any immigration benefits,

other than withholding of removal under INA § 241(b)(3) and CAT protection. INA § 208(d)(6); 8 CFR 208.20, 1208.20 (2019). Given the severity of this penalty, any finding of a frivolous asylum application must be made more carefully and with greater protections than are currently outlined in the Notice.

“Willful blindness” does not equal “knowingly”

Under INA § 208(d)(6), the penalty for filing a frivolous asylum application may be applied only after the Attorney General determines that the applicant “knowingly” made a frivolous asylum application. Notwithstanding the clear language of the statute, however, DHS and DOJ would expand “knowingly” to include “willful blindness” in the proposed 208.20(a)(2)/1208.20(a)(2).

DHS and DOJ do not define “willful blindness” in the proposed 208.20(a)(2)/1208.20(a)(2). In their discussion of the proposed regulation, they cite only one case – *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 769-70 (2011) – a patent infringement case, in support of expanding the statutory requirement of “knowingly” to include “willful blindness.” In doing so, DHS and DOJ twist the willful blindness requirement arising from a patent infringement case in order to apply it to the entirely different context of whether an asylum applicant filed a frivolous application.

The standard for willful blindness in *Global-Tech* is that “(1) the defendant must *subjectively believe* that there is a high probability that a fact exists, and (2) the defendant must take *deliberate actions* to avoid learning that fact.” *Global-Tech* at 767 (emphasis added). DHS and DOJ misapply this standard to frivolous asylum as “*aware[ness]* of a high probability that his or her application was frivolous and *deliberately avoided* learning otherwise.” 85 FR 36273 (emphasis added).

As the above comparison clearly show, DHS and DOJ leave out the subjective belief required in the first element of *Global-Tech*. Instead, the Departments’ discussion only requires “awareness of a high probability that his or her application was frivolous.” Likewise, DHS and DOJ alter “deliberate action” required in the second element of *Global-Tech* to “deliberate avoid[ance].”

Given the clear statutory mens rea requirement of “knowingly” in INA § 208(d)(6), coupled with the harsh penalty of permanent ineligibility for virtually all immigration relief, DHS and DOJ should not be allowed to expand “knowingly” to include “willful blindness” based on a cursory citation to a patent infringement case that sheds no light on how “knowingly” may be expanded to include “willful blindness” in filing a frivolous asylum application.

Unwarranted expansion of what constitutes “frivolous”

Proposed 8 CFR 208.20(c)(3), (4)/1208.20(c)(3), (4) expands the what constitutes a frivolous asylum application to include those “filed without regard to merits of the claim,” or “clearly foreclosed by applicable law.”

The federal courts have long observed that immigration laws are “second only to the Internal Revenue Code in complexity.” *Castro-O’Ryan v. INS*, 847 F.2d 1307, 1312 (9th Cir. 1987) (internal quotation omitted). Yet the proposed expansion would impermissibly penalize asylum applicants who cannot and would not know the complexities of immigration law, or risk being permanently barred from virtually all immigration relief.

Pro se asylum applicants

The injustice of applying such an expanded definition of what constitutes “frivolous” is self-evident when it comes to unrepresented asylum applicants. DHS and DOJ cannot and do not explain how pro se asylum applicants would know the “merits of [their] claim” or whether their claim is “clearly foreclosed by applicable law.” Asylum applicants who cannot afford a lawyer must prepare and file their application on their own, trying to do the best that they can by relying on families, friends, or even strangers who appear knowledgeable to them. This means that pro se asylum applicants sometimes consider claims that they heard were successful and sound similar to their own experiences, without knowing the legal merits of such claims, or whether they are clearly foreclosed by applicable law.

It is one thing to deny such asylum applications on substantive legal grounds. But it is entirely another to permanently bar unrepresented asylum applicants from virtually all immigration relief by finding their application to be frivolous if they happen to contain claims that lack merit or are clearly foreclosed by applicable law. This is a harsh and unfair provision that discriminates against asylum seekers who lack legal counsel, and therefore DHS and DOJ should withdraw these proposed changes.

Chilling effect on pro se assistance

ASAP currently helps unrepresented asylum seekers in removal proceedings file I-589s pro se,¹² as do other nonprofits around the country. Because work authorization

¹² Pro se assistance is permissible, and ASAP follows the contours of the settlement agreement in *NWIRP v. Sessions*, 2:17-cv-00716-RAJ (W.D. Wash. Apr. 17, 2019) to provide pro se assistance.

is tied to the filing of an I-589, many asylum seekers do not have the means to pay for private attorneys to prepare their I-589s. And nonprofits, like ASAP, do not have the capacity to provide full representation to all the asylum seekers in removal proceedings who need an attorney. As a result, the provision of pro se legal services is one of the only ways that many asylum seekers are able to access the defensive asylum process.

For nonprofits providing pro se assistance, this rule change will make it difficult to continue to meet this need. Currently, ASAP aims to provide basic information about the asylum process and then help the asylum seeker fill out the factual basis of their claim in response to the questions on the I-589 form. ASAP does not help the asylum seeker articulate specific particular social groups, nor does ASAP help the person include country conditions or expert evidence. This is because asylum seekers have been able to supplement their cases with a full body of evidence closer to their individual hearing date. The proposed I-589 has increased from 12 pages to 16 pages and includes questions that require legal analysis and an understanding of the complicated law on particular social groups. It will take substantial effort for ASAP to adapt its pro se program to help pro se individuals include the new required information, and the changes will substantially decrease the number of I-589s ASAP could do.

Even if ASAP could adapt our program to help asylum seekers understand the law enough to fill out the proposed complex I-589, ASAP would still have to help pro se asylum seekers explain why their claim isn't foreclosed by existing precedents to avoid a finding of frivolousness, which could lead them to be barred from immigration benefits. In that state of the world, ASAP would have to evaluate whether it would be feasible for us to continue to provide pro se assistance on I-589s at all. These proposed changes would cause a chilling effect on pro se assistance for I-589s, which would limit access to the asylum process for individuals in removal proceedings who lack counsel.

DHS and DOJ have also not made clear what purpose these changes serve in the defensive asylum context. Many unrepresented asylum seekers will still be in removal proceedings regardless of how difficult DHS and DOJ make it to submit the asylum application. Asylum seekers will therefore still need substantial assistance with the form, especially because it is only in English. If pro se assistance is not available, then unrepresented asylum seekers will have to turn to other sources for information and help. They will likely request more assistance and explanation from immigration judges and court staff, or their ICE officers. Or they may try to get assistance from *notarios*, or unlicensed individuals posing as attorneys, which will lead to misinformation. Either way, this will cause a substantial additional burden on DOJ and DHS, which the agencies have failed to address in the Notice.

DOJ itself has recognized the importance of the provision of basic legal information for the efficiency of the immigration court system. On EOIR's website offering self-help materials, EOIR has recognized that "respondents who have access to basic information require less assistance from court staff and are better prepared when they appear before an immigration judge. In addition, immigration judges can directly refer unrepresented respondents to the centers and the respondent can then obtain helpful information."¹³ A more complicated form that forecloses pro se assistance will create inefficiency and confusion in immigration court.

However, DOJ and DHS made no attempt to address the importance of pro se assistance and the provision of basic legal information in the Notice. DOJ and DHS should provide an analysis of how the substantial changes to the I-589 form, coupled with the adjudicators' broadened authority to find applications frivolous or pretermitted them, will affect the provision of pro se legal services for applicants in removal proceedings. DOJ and DHS should also evaluate the current benefit of such services, and the cost to the immigration system if they were no longer available.

Represented asylum applicants

Even for asylum applicants who are represented by counsel, DHS and DOJ fail to explain how these asylum applicants would know enough about the "merits of [their] claim" or whether their claim is "clearly foreclosed by applicable law" to control the actions of their attorneys. Proposed 8 CFR 208.20(c)(3-4)/1208.20(c)(3-4). Rather than grappling with this difficult issue, DHS and DOJ simply assert in footnote 20 of their discussion that "[i]f an [noncitizen] acts through an agent, the [noncitizen] will be deemed responsible for actions of the agent if the agent acts with apparent authority." 85 FR 36275, n. 20. The footnote then continues that "[i]f the [noncitizen] has signed the asylum application, he or she shall be presumed to have knowledge of its contents regardless of his or her failure to read and understand its contents." 85 FR 36276. For this proposition DHS and EOIR cites 8 CFR 208.3(c)(2)/1208.3(c)(2).

8 CFR 208.3(c)(2)/1208.3(c)(2) has been traditionally used to bind asylum applicants to the facts stated in asylum applications, regardless of who prepared the application. It is one thing to require asylum applicants to read their application and know what it says factually, although even that may be a challenge for applicants who have recently arrived in the United States and do not read English or even their own native language. However, it is entirely another thing to make asylum applicants

¹³ U.S. Department of Justice, Executive Office for Immigration Review, Self-Help Materials, <https://www.justice.gov/eoir/self-help-materials> (last updated Aug. 1, 2019).

responsible for knowing U.S. immigration law, such as which asylum claims may have merit, or whether a claim is “clearly foreclosed by applicable law.” Proposed 8 CFR 208.20(c)(4)/1208.20(c)(4)

As with anyone who hires lawyers, asylum applicants rely on their lawyers to know the law. It is one thing to deny asylum because the applicant, through their attorney, presented claims that lack merit. But it is entirely another thing to make asylum applicants permanently ineligible for any relief under our immigration laws because they have the misfortune of hiring an attorney or a *notario* who file asylum applications with USCIS so that they can be placed in removal proceedings, or raises claims that are foreclosed by applicable law. Moreover, even where the asylum applicants are represented by competent and knowledgeable counsel, the threat of a frivolous asylum finding may prevent both the applicants and the attorneys from raising cutting edge arguments that an adjudicator could potentially find to be without merit or clearly foreclosed by applicable law, and therefore frivolous.

Pressure for asylum applicants to withdraw I-589s under threat of frivolous finding

Proposed 208.20(f)/1208.20(f) allows asylum applicants to withdraw applications that may be found frivolous if they 1) withdraw it with prejudice; 2) accepts voluntary departure of 30 days or less if eligible under INA 240B(a); 3) withdraws any and all other applications for relief with prejudice; and 4) waives their right to appeal or a motion to reopen or reconsider. In the discussion, DHS and DOJ claim that these measures would “ameliorate the consequences of knowingly filing a frivolous asylum application.” 85 FR. 36277.

One, it is unclear whether the broad bars of proposed 208.20(f)/1208.20(f) may run afoul of the applicants’ due process rights, as well as their statutory rights under INA 208 and 240(b)(4), (c)(7), given the lack of exceptions for ineffective assistance of counsel or other changes circumstances.

Two, proposed 208.20(f)/1208.20(f) will likely be used by DHS, DOJ and even unscrupulous applicants’ attorneys to pressure applicants to withdraw their asylum applications if DHS or DOJ threaten to find that the application is frivolous.

DHS and DOJ must address the potential for a chilling effect these proposed changes will have on legitimate asylum applications, especially in cases where an asylum seeker is raising novel legal claims or unique facts. DHS and DOJ should also provide statistics for the number of unrepresented asylum seekers, and consider the effects of

these changes on their ability to access the asylum process or defend themselves in removal proceedings.

Pretermission of Legally Insufficient Applications

Proposed 8 CFR 1208.13(e) would create a brand new regulation that would require (“shall”) immigration judges to “pretermite and deny” any application for asylum, withholding of removal under INA § 241(b)(3), and CAT protection upon oral or written motion by DHS ((e)(1)) or on the judges’ own authority ((e)(2)) if the applicant “has not established a prima facie claim for relief or protection under applicable law.”

No guidance on what “a prima facie claim for relief or protection under applicable law” means

Proposed 1208.13(e) gives no guidance to immigration judges or the parties on what “a prima facie claim for relief or protection under applicable law” means. DOJ also fails to explain what this means in the discussion, but simply uses terms such as “purely legal issues,” “legally sufficient,” and “legally deficient asylum applications” (terms which may conflict with one another) interchangeably with “a prima facie claim for relief or protection under applicable law.”

DOJ provides only two concrete, but cursory, examples of situations where it believes that pretermission would be required under the proposed regulation. The first example is a quote from the Attorney General’s decision in *Matter of A-B-*, 27 I&N Dec. 316 (AG 2018). “Of course, if an [noncitizen]’s asylum application is fatally flawed in one respect – for example, for *failure to show membership in a proposed social group* ... an immigration judge or the Board need not examine the remaining elements of the asylum claim.” *A-B-* at 340, FR 36277. (emphasis added).

The second example is a citation to an unpublished decision from the U.S. Court of Appeals for the Second Circuit where, according to DOJ, the court found that “pretermission of an asylum application due to a *lack of a legal nexus to a protected ground* was not a due process violation”.FR at 36277 (describing the holding of *Zhu v. Gonzales*, 218 F. App’x 21, 23 (2d Cir. 2007)) (emphasis added).

But even the examples used by DOJ itself in the discussion are not “purely legal issues.” DOJ precedents require the applicants to provide significant oral and written evidence to establish these elements. For example, in the section entitled “Evidentiary Burdens,” the BIA observed in *Matter of M-E-V-G-*, a seminal decision on establishing particular social group, that:

[T]he applicant has the burden to establish a claim based on membership in a particular social group and will be *required to present evidence that the proposed group exists* in the society in question. The evidence available in any given case will certainly vary. However, a successful case will require evidence that members of the proposed particular social group share a common immutable characteristic, that the group is sufficiently particular, and that it is set apart from the society in some particular way. *Evidence such as country conditions reports, expert witness testimony, and press accounts of discriminatory laws and policies, historical animosities, and the like may establish that a group exists and is perceived as “distinct” or “other” in a particular society.* 26 I&N Dec. 227, 244 (BIA 2014) (emphasis added).

Yet DOJ (or DHS and DOJ, since it states “the Departments”¹⁴) observes in a footnote that “the Departments do not believe that requiring a sufficient level to determine whether or not an [noncitizen] has a prima facie case for asylum, statutory withholding of removal, or protection under CAT regulations would necessarily require a voluminous application.” 85 FR 36277 n. 26. However, the “evidentiary burden” for establishing a particular social group described by the BIA in *M-E-V-G-* directly contradict “the Departments” assertion that a “voluminous application” will not be required to survive pretermission under the proposed regulation.

DOJ cannot lawfully pretermit I-589s without giving applicants the opportunity to present testimony in immigration court.

Furthermore, showing the existence of a particular social group is just one of many situations in which evidence, often testimony, is required to establish eligibility for asylum, withholding, and CAT. The other example that DOJ gives in the discussion is nexus. To establish nexus, asylum applicants must show that religion, nationality, race, political opinion, or membership in a particular social group is at least one central reason why the persecutor did harm or will attempt to harm them. INA 208(b)(1)(B)(i). As the U.S. Court of Appeals for the Fourth Circuit has observed, this “assessment of a persecutor’s motivation presents a ‘classic factual question.’” *Cantillano Cruz*, 853 F.3d at 128.

¹⁴ It is worth noting that DOJ is speaking in one voice with DHS, who is one of the two parties in immigration courts, on the proposed regulation that would require pretermission of the opposing party’s application. Under these circumstances, it is unclear how DOJ can possibly argue that it can impartially and fairly adjudicate issues involving this proposed regulation in immigration courts and before the BIA.

Because the evidence required to establish nexus is necessarily specific to the respondent and what happened between them and the persecutors, testimony from the respondent and witnesses, if any, is almost always necessary to answer this classic question of fact. Given the lack of guidance in the proposed 1208.13(e) or DOJ's discussion, it is unclear how any asylum application where nexus is an issue can be pretermitted on that ground without an evidentiary hearing, notwithstanding its cursory citation to an unpublished Second Circuit case.

If DOJ intends to use the proposed 1208.20 to pretermite and deny I-589 applications without giving applicants the full opportunity to present testimonies from themselves and witnesses, it will violate the applicants' due process rights under Fifth Amendment of the U.S. Constitution, as well as the applicants' statutory rights under INA 240(b)(4)(B). See e.g. *Atemnkeng v. Barr*, 948 F.3d 231, 242 (4th Cir. 2020) (IJ violated asylum seeker's due process rights by rejecting her claims without first providing her with an opportunity to testify again on remand); *Al Khouri v. Ashcroft*, 362 F.3d 461 (8th Cir. 2004) (IJ violated the respondent's due process rights by limiting his testimony and circumscribing his ability to elaborate on the details of his claim by instructing him only to answer the questions asked).

Pretermittting asylum applications before a full individual hearing will also unlawfully interfere with the applicants' ability to meet their burden of proof for asylum under INA § 208(b)(1)(B). INA § 208(b)(1)(B)(i) directs the applicant "to establish that the applicant is a refugee within the meaning of such section, the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant." Under INA § 208(b)(1)(B)(ii), the respondent must "satisf[y] the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee." The respondent must also "provide evidence that corroborates otherwise credible testimony ... unless the applicant does not have the evidence and cannot reasonably obtain the evidence."

To ensure that the respondent has the opportunity to meet this burden of proof, INA 240(b)(4)(B) gives respondents "a reasonable opportunity to examine the evidence against the [noncitizen], to present evidence on the [noncitizen]'s own behalf, and to cross-examine witnesses presented by the Government."

Given the plain language of the proposed 1208.20, coupled with the truncated discussion justifying the proposed regulation, it is unclear how asylum applications can be pretermitted without violating the respondents' rights in removal proceedings under

INA § 240(b)(4)(B) and without interfering with their ability to meet their burden of proof for asylum under INA § 208(b)(1)(B).

DOJ does not understand the difference between questions of law, questions of fact, and mixed questions of law and fact.

Finally, DOJ either misunderstands or misapplies 8 CFR 1240.11(c) in their discussion. 1240.11(c)(3) states that I-589s filed in immigration courts “will be decided by the immigration judge... after an evidentiary hearing to resolve factual issues in dispute.” While DOJ cites this exact language in 1240.11(c)(3) with the term “factual” highlighted (85 FR 36277), it goes on to claim without any support that “[n]o existing regulation requires a hearing when an asylum application is legally deficient.” *Id.*

As discussed above, most issues in asylum, withholding, and CAT (including the two examples given by DOJ involving PSGs and nexus), are questions of fact or mixed questions of law and fact, requiring the submission and examination of written and oral evidence. Contrary to DOJ’s unsupported assertion, the plain language of 1240.11(c)(3) requires “an evidentiary hearing” if there are any “factual issues in dispute.” As previously discussed, PSG and nexus necessarily involve facts specific to the applicants, the persecutors, and/or their countries and are therefore present “factual issues in dispute.”

DOJ’s reliance on *Abudu* to support pretermission is misplaced.

The only other analogy that DOJ relies on for pretermission is motion to reopen, citing *INS v. Abudu*, 485 U.S. 94, 104 (1988). In *Abudu*, the Supreme Court states that:

[W]e granted certiorari ... not to decide the substantive issues of what constitutes a prima facie case for establishing eligibility for asylum on the basis of a well-founded fear of persecution, or of what standard of review applies, either initially or on motion to reopen, when the BIA rests its grant or denial of relief squarely on prima facie case grounds, but rather to determine the standard a Court of Appeals must apply when reviewing the BIA's conclusion that an [noncitizen] has not reasonably explained his failure to assert his asylum claim at the outset. Id. (emphasis added).

Yet DOJ cites *Abudu* in claiming that “pretermission due to a failure to establish prima facie legal eligibility for asylum is akin to a decision by an immigration judge or the BIA denying a motion to reopen to apply for asylum on the same basis,” 85 FR 36277,

notwithstanding the clear language of the Supreme Court in *Abudu* describing the scope of its decision to the contrary.

Proposed 1208.20(e) violates Due Process and INA 240(b)(4)(B).

Finally, proposed 1208.20(e)(1) states that immigration judges “must consider any response to [DHS written or oral] motion before making a decision,” but provides no timeframes or procedures for doing so. More disturbingly, proposed 1208.20(e)(2) states that immigration judges should give “at least 10 days’ notice” before pretermining an I-589 application and “must consider any filings by the parties within the 10-day period” before issuing a decision.

First, proposed 1208.20(e)(2) does not require immigration judges to state the reasons why they believe the applications should be preterminated. But unless the immigration judges specify the grounds on which the applications may be preterminated, the parties will have no idea what issues they should address and/or what evidence they should present.

Second, assuming that parties will even receive the judge’s notice to preterminate the application before the 10 day period passes, it is utterly unreasonable to give parties 10 days or less to gather any necessary evidence and prepare a written brief to present their case on whether an application should be preterminated. To preterminate applications under these circumstances would certainly be a violation of the applicants’ due process rights, as well as their statutory rights to present their case under INA § 240(b)(4)(B). DHS and DOJ should therefore withdraw the proposed changes regarding pretermination in their entirety

Section C: Standards for Consideration During Review of an Application for Asylum or for Statutory Withholding of Removal

The proposed changes in Section C would significantly alter substantive law on asylum, withholding of removal, and the Convention Against Torture (CAT) to make it nearly impossible for applicants to be granted protection. DHS and DOJ did not provide adequate analysis in proposing these sweeping changes, which contradict well-established principles and precedents. ASAP urges the agencies to withdraw the proposed changes in Section C to ensure that asylum, withholding of removal, and CAT remain available as potential avenues of relief for individuals fleeing harm.

If DHS and DOJ decide to move forward with any portion of Section C, the agencies should at least amend the regulations to clarify that none of the changes will

apply retroactively to individuals who file or will file their I-589 forms before this rule goes into effect. There is a longstanding presumption against retroactivity in American jurisprudence, which cautions against retroactively applying a new legal standard without an opportunity to address it. See, e.g., *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994); *Retail, Wholesale & Dep't Store Union v. N.L.R.B.*, 466 F.2d 380, 390 (D.C. Cir. 1972). Many individuals have already prepared and submitted their I-589s and supporting evidence based on the expectations created through long-standing caselaw, and it would unjust to apply the drastic proposed changes to their cases retroactively.

The Notice Conflicts with BIA and Federal Court Caselaw on Membership in Particular Social Groups (PSGs)

Three-part test for PSGs

The first part of the proposed 8 CFR 208.1(c)/1208.1(c) codifies the three-part test for particular social group (PSG) under the 2014 BIA decisions in *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014), and *Matter of W-G-R-*, 26 I&N Dec. 208 (BIA 2014). It also adds the requirement that the proposed PSG “cannot be defined exclusively of the alleged persecutory acts or harms and must also have existed independently of the alleged persecutory acts or harms that form the basis of the claim.”

While DHS and DOJ assert in their discussion that the proposed 208.1(c)/1208.1(c) “codify the longstanding requirements,” they either ignore or at best pay lip service to federal court precedents that have explicitly rejected DOJ’s PSG analysis. For example, DHS and DOJ fail to mention, much less discuss, the U.S. Court of Appeals for the Seventh Circuit’s continuing rejection of the three-part test. See e.g. *Cece v. Holder*, 733 F.3d 662 (7th Cir. 2013) (en banc).

List of disfavored claims masquerading as PSGs

DHS and DOJ also fail to acknowledge and meaningfully deal with federal court precedents that they disagree with in their discussion of the second part of the proposed 8 CFR 208.1(c)/1208.1(c). This part of the proposed regulation is a list of claims that DHS and DOJ “in general would not favorably adjudicate.” The “non-exhaustive” list is as follows:

1. Past or present criminal activity or association (including gang membership);
2. Presence in a country with generalized violence or a high crime rate;
3. Being the subject of a recruitment effort by criminal, terrorist, or persecutory groups;

4. Targeting of the applicant for criminal activity for financial gains based on perceptions of wealth or affluence;
5. Interpersonal disputes of which governmental authorities were unaware or uninvolved;
6. Private criminal acts of which governmental authorities were unaware or uninvolved;
7. Past or present terrorist activity or association;
8. Past or present persecutory activity or association; or
9. Status as an [noncitizen] returning from the United States.

85 FR at 36279.

First, the plain language of the proposed 208.1(c)/1208.1(c) makes it clear that the items on this list are not PSGs, but rather types of claims that DHS and DOJ do not like. Second, even if some of the claims on this disfavored list can be construed to fit under existing DOJ or federal court precedents governing PSGs, the broad and imprecise descriptions of the claims on this list make it difficult to determine whether these “groups” have in fact been addressed in existing precedents. For example, DHS and DOJ fail to cite any precedents to justify the inclusion of “past or present terrorist activity or association,” or “past or present persecutory activity or association.” 85 FR at 36279. Third, DHS and DOJ fail to mention, much less analyze and meaningfully address, federal court precedents that have explicitly held that the “groups” on the disfavored list may in fact constitute PSGs under certain case and/or country-specific circumstances.¹⁵

DHS and DOJ’s failure to engage with existing precedents governing PSGs is fatal to this “general” list of disfavored “groups,” because PSG determination is intended to be case-specific. As the BIA observed in *Acosta* over three decades ago, “[t]he particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis.” *Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985). Given the case specific nature of PSG determinations, DHS and DOJ cannot simply create a list of claims that they do not like, then assert that these types of cases are “generally insufficient to demonstrate a particular social group that is cognizable” without providing sufficient legal and/or factual justifications that would override the

¹⁵ Following is a necessarily partial and cursory list of such precedents, given the extremely limited amount of time that DHS and DOJ gave to stakeholders for comments on a rule which will transform virtually every aspect of the law governing asylum, withholding, and CAT. Former gang members – *Martinez v. Holder*, 740 F.3d 902 (4th Cir. 2014); *Oliva v. Lynch*, 807 F.3d 53 (4th Cir. 2015); *Urbina Mejia V. Holder*, 597 F.3d 360 (6th Cir. 2010); *Benitez Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009). Witness to criminal activities – *Henriquez Rivas v. Holder*, 707 F.3d 1081 (9th Cir. 2013) (en banc); *Gashi v. Holder*, 702 F.3d 130 (2d Cir. 2012); *Garcia v. U.S. Att’y Gen*, 665 F.3d 496 (3d Cir. 2011). Land ownership – *Cordoba v. Holder*, 726 F.3d 1106 (9th Cir. 2013); *N.L.A. v. Holder*, 744 F.3d 425 (7th Cir. 2014).

longstanding case-specific nature of PSG determinations. See *Ordonez-Azman v. Barr*, No. 17-982-ag at 14 (2d Cir. July 13, 2020) (stating that the BIA “appear[ed] to have imposed a general rule, untied to any specific country or society” in analyzing a particular social group related to former gang members and “[i]f so, failed to adhere to its own precedents disclaiming per se rules and requiring a fact-based inquiry into the views of the relevant society...”).

Finally, while DHS and DOJ claim in the discussion that “the regulation does not foreclose that, in rare circumstances, such facts could be the basis for finding a particular social group, given the fact and society specific nature of this determination,” this is not clear in the regulatory language. First, DHS and DOJ fail to explain why PSGs may be found only in “rare circumstances,” given the existing federal court precedents that have found PSGs in circumstances that appear on the list of disfavored claims. Second, the existence of a generally disfavored claims list, coupled with the lack of explicit regulatory language that PSG determination is case-specific, will confuse and mislead Immigration Judges and Asylum Officers into categorically denying all claims that they believe are on the disfavored list, without taking into account “the fact- and society-specific nature” in each case as they are required to do under longstanding federal court and DOJ case law governing PSG determination.

The list of generally disfavored claims is particularly dangerous in combination with some of the other proposed regulations in this Notice. For example, DHS and DOJ fail to provide any guidance to Asylum Officers and Immigration Judges on whether or how they should use this list of disfavored claims in relation to the credible fear process, premitting an asylum application before a full individual hearing, or issues of frivolousness. Using this list of disfavored claims to deny credible or reasonable fear, premit an I-589 application, or find an asylum application to be frivolous would violate the applicants’ constitutional right to Due Process under the Fifth Amendment and their statutory right to present evidence in removal proceedings under INA 240(b)(4)(B) for the following reason set forth by the BIA:

[T]he applicant has the burden to establish a claim based on membership in a particular social group and will be required to present evidence that the proposed group exists in the society in question.... Evidence such as country conditions reports, expert witness testimony, and press accounts of discriminatory laws and policies, historical animosities, and the like may establish that a group exists and is perceived as “distinct” or “other” in a particular society.

M-E-V-G-, 26 I&N Dec. at 244.

However, such a heavy evidentiary burden to establish PSG cannot and should not be met at the credible or reasonable fear screening. Nor should an asylum application be pretermitted or found to be frivolous prior to an individual hearing in immigration court based on the above generalized list of disfavored claims. To do any of these things before the applicant has had “a reasonable opportunity to examine the evidence against the [noncitizen], to present evidence on the [noncitizen]’s own behalf, and to cross-examine witnesses presented by the Government” would deprive the applicants of their constitutional right to Due Process and their right to meet the burden of proving that a PSG exists in their particular case under INA § 240(b)(4)(B).

DHS and DOJ must ensure that applicants have the opportunity to fully present their evidence regarding membership in a particular social group in an individual hearing before an Immigration Judge. DHS and DOJ should remove this list of disfavored claims.

Procedural requirements specific to PSG claims

The third part of the proposed 208.1(c)/1208.1(c) is what DHS and DOJ describe as “procedural requirements specific to asylum and withholding claims premised on a particular social group.” Specifically, that part of the proposed regulation states that:

No [noncitizen] shall be found to be a refugee or have it decided that the [noncitizen]’s life or freedom would be threatened based on membership in a particular social group in any case unless that person first articulates on the record, or provides a basis on the record for determining, the definition and boundaries of the alleged particular social group. 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.

DHS and DOJ claim that this is a codification of the recent BIA precedent in *Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. 189 (BIA 2018). However, the language in proposed 208.1(c)/1208.1(c) is far broader in scope than *W-Y-C- & H-O-B-*, which is limited to whether new PSGs can be raised on appeal to the BIA.

As with the second part of the proposed 208.1(c)/1208.1(c), denying asylum and statutory withholding to people who cannot “articulate on the record, or provide a basis on the record for determining, the definition and boundaries of the alleged particular social group” *unless and until the applicants have had the full opportunity given to them*

under the law to present evidence would violate INA §§ 208, 241(b)(3), 240(b)(4), and 240(c)(6) and (7).

Given the explicit reference to “an immigration judge,” no PSGs may be waived under proposed 208.1(c)/1208.1(c) during credible or reasonable fear process, or during affirmative asylum process before USCIS. As with the second part of the proposed 208.1(c)/1208.1(c), the applicants’ rights under INA § 240(b)(4)(B) to present evidence, coupled with their burden to provide evidence to establish PSGs under *M-E-V-G-*, should prevent any immigration judge from waiving any possible PSGs unless and until the applicants have had a full individual hearing where they can present documents and testimony. To do otherwise would violate the applicants’ rights under INA § 240(b)(4)(B) and Due Process to present evidence regarding PSGs.

Likewise, for the reasons discussed below, even after a full individual hearing on the respondents’ application for asylum and statutory withholding, applicants may not be barred from proposing new PSGs in motions to reopen or reconsider.

Proposed 208.1(c)/1208.1(c) states that “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 for ineffective assistance of counsel.” However, applicants in immigration courts have long had a right to file motions to reopen or reconsider that have since been codified in statute and regulations. INA § 240(c)(6) governs motions to reconsider. The only statutory limitation on the content of motions to reconsider is that they “shall specify the errors or law or fact in the previous order and shall be supported by pertinent authority.” INA § 240(c)(7) governs motions to reopen. The only statutory limitation on the content of motions to reopen is that they “shall state the new facts that will be proven at a hearing to be held if the motion is granted and shall be supported by affidavits or other evidentiary material.” *Id.*

For purposes of agency deference under Chevron, the statutory language is clear. There is nothing in INA § 240(c)(6) and (7) that allows DHS and DOJ to arbitrarily limit the content of motions to reconsider or reopen by barring the introduction of new PSGs, as long as the motions meet the other requirements of INA § 240(c)(6) and (7).

This is particularly the case with motions to reopen based on ineffective assistance of counsel, which are explicitly singled out in the proposed 208.1(c)/1208.1(c). Immigrants have long had a right to counsel of their choosing at no expense to the government, again since codified in the statute and regulations. INA § 240(b)(4)(A), 8 CFR Part 292; See also *Olvera v. INS*, 504 F.2d 1372 (5th Cir. 1974). Immigrants’ right to

file motions to reopen based on ineffective assistance of counsel have long been recognized in immigration law. See e.g. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988).

Counsel's failure to "articulate on the record, or provide[] a basis on the record for determining, the definition and boundaries of the alleged particular social group" would constitute ineffective assistance of counsel even under current law given *Matter of W-Y-C- & H-O-B-*, and even more so if the proposed 208.1(c)/208.1(c) goes into effect. Yet notwithstanding the devastating consequences of such ineffective assistance of counsel to the applicants, DHS and DOJ fail to explain why and how the law would permit them to categorically bar motions to reopen based on ineffective assistance of counsel under these circumstances, when such bar would be a clear violation of applicants' due process and statutory rights under INA § 240.

The only justification that DHS and DOJ provide in the discussion is "to encourage the efficient litigation of all claims" and "to avoid gamesmanship and piecemeal analyses." Again, such arguments fail to address the legal defects with the blanket bar on the introduction of new PSGs in motions to reopen or reconsider discussed above. Even as policy, such limited conclusory claims unsupported by evidence argue against giving any deference to DHS and DOJ on this issue. The closest thing to law cited by DHS and DOJ is 8 CFR 1003.23(b)(3), which is limited to discretionary relief and therefore does not apply to statutory withholding, which would also be affected by the proposed 208.1(c)/1208.1(c).

ASAP represents a mother and children who were denied asylum and withholding of removal after prior counsel failed to adequately investigate and present their claims, including by failing to argue for viable particular social groups. Our clients successfully submitted a Motion to Reopen to the BIA. The BIA found that the prior counsel's "deficiencies prevented complete presentation of [their] claims and full representation of their case" and remanded the case for further proceedings. On remand, the IJ denied their claims without a hearing and based solely on the written record. In so doing, the IJ prevented ASAP's clients from remedying their prior counsel's deficiencies, and again deprived them of a full and fair hearing on their claims. In fact, the Fourth Circuit recently left little doubt that an IJ's failure to provide an asylum seeker a meaningful opportunity to present probative evidence of their claims on remand violates basic due process protections. See *Atemnkeng v. Barr*, 948 F.3d 231, 242 (4th Cir. 2020) (IJ violated asylum seeker's due process rights by rejecting her claims without first providing her an opportunity to testify again on remand). A new hearing on the merits is essential to ensure that ASAP's clients, and similarly situated individuals, have the opportunity to correct the factual and legal deficiencies caused by prior ineffective counsel and fully present their claims for relief for the first time. DOJ and DHS should therefore remove the language barring motions to reopen or reconsider.

The Notice Introduces an Inappropriately Limited Definition of Political Opinion

Proposed 8 CFR section 208.1(d)/1208.1(d) redefines “political opinion” as “one expressed by or imputed to an applicant in which the applicant possesses an ideal or conviction in support of the furtherance of a discrete cause related to a state or unit thereof.” 85 FR at 36300.

One, the new definition of “political opinion” is unclear. What exactly does “an ideal or conviction in support of the furtherance of a discrete cause related to a state or unit thereof” mean? DHS and DOJ provide a long list of what “political opinion” is not in the second part of the proposed regulation, but the agencies fail to provide any guidance to the applicants or the adjudicators as to what this confusing new definition means.

Two, the plain language of this definition of political opinion is too narrow. To limit the definition of political opinion to “an ideal or conviction in support of the furtherance of a discrete cause *related to political control of a state or a unit thereof*, 85 FR at 36300, goes beyond any existing federal court or DOJ precedents governing political opinion, including *Saldarriaga v. Gonzales*, 402 F.3d 461, 467 (4th Cir. 2005), the only case cited by DHS and DOJ in support of the new limited definition of political opinion. In *Saldarriaga*, the Fourth Circuit stated that “whatever behavior an applicant seeks to advance as political, it must be motivated by *an ideal or conviction of sorts* before it will constitute grounds for asylum.” *Id.* at 466 (emphasis added). However, it did not tie the “ideal or conviction of sorts” in any way to “political control of a state or a unit thereof,” as the proposed 208.1(d)/1208.1(d) attempts to do.

A political opinion need not involve “political control of a state or a unit thereof.” To use a very current example in the United States, people across the political spectrum have been reacting to the killing of George Floyd and other Black individuals by the police. However, depending on where people are on the political spectrum, they are not likely to agree on whether or how such killings should be addressed, much less who should have “political control of a state or a unit thereof.” Some may not even have a preference for what, if anything, ought to be done, and are simply expressing their opinions. But all those reacting to these killings by engaging in whatever speech and activities that they see fit have political opinions and are engaging in political activities, by any common understanding of the terms “political opinion” and “political activity.”

Moreover, DHS and DOJ’s proposed limitations would define political opinion much more narrowly than it is understood in the context of core First Amendment jurisprudence; courts have long-held that a diverse set of activities, including organizing by minority groups outside of the official channels of state sanctioned political parties,

constitutes core political speech. See, e.g., *Nat'l Ass'n for Advancement of Colored People v. Button*, 371 U.S. 415, 431, 83 S. Ct. 328, 337, 9 L. Ed. 2d 405 (1963) (“Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association. This right was enshrined in the First Amendment of the Bill of Rights. Exercise of these basic freedoms in America has traditionally been through the media of political associations. *Any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents.* All political ideas cannot and should not be channeled into the programs of our two major parties. History has amply proved the virtue of political activity by minority, dissident groups ...[citations omitted]. The NAACP is not a conventional political party; but the litigation it assists, while serving to vindicate the legal rights of members of the American Negro community, *at the same time and perhaps more importantly, makes possible the distinctive contribution of a minority group to the ideas and beliefs of our society.* For such a group, association for litigation may be the most effective form of political association.”) (emphasis added).

DHS and DOJ should provide justification for why their proposed changes to political opinion in the asylum context differ so greatly from the general understanding of political opinion, from previous case law on political opinion asylum claims, and from the concept of political speech under the First Amendment.

Set of Disfavored Claims

As with PSGs, the second part of proposed 208.1(d)/1208.1(d) is another set of claims that DHS and DOJ “in general will not favorably adjudicate.” Such claims include:

[C]laims of [noncitizen]s who claim a fear of persecution on account of a political opinion defined solely by generalized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerilla, or other non-state organizations absent expressive behavior in furtherance of a cause against such organizations related to efforts by the state to control such organizations or behavior that is antithetical to or otherwise opposes the ruling legal entity of the state or a legal sub-unit of the state.

84 FR 36291.

As with the new definition of political opinion, this part of the proposed 208.1(d)/1208.1(d) is confusingly written and therefore difficult to understand. One, the plain language of the proposed regulation appears to bar “in general” all political opinion claims based on “generalized disapproval of, disagreement with, or opposition to ... *non-state organizations.*” (emphasis added). In support of barring political opinion

claims involving non-state organizations, DHS and DOJ state that “BIA case law makes clear that a political opinion involves a cause against a state or political entity, rather than against a culture,” but only cite a single BIA case from 1996 in support of this proposition. *Matter of S-P-*, 21 I&N Dec. 486, 494 (BIA 1996). 85 FR at 36279.

However, *S-P-* does not support DHS and DOJ’s assertion. *S-P-* did not involve a political opinion claim based on “generalized disapproval of, disagreement with, or opposition to ... non-state organizations.” Rather, the *en banc* Board in *S-P-* granted the respondent’s application for asylum based on political opinion imputed to him by the Sri Lankan government. Therefore, the out-of-context quote from *S-P-* that DHS and DOJ cite is dictum, at best, and the holding of *S-P-* itself has nothing to do with DHS and DOJ’s assertion that “BIA case law makes clear that a political opinion involves a cause against a state or political entity, rather than against a culture.” DHS and DOJ cite no other BIA cases to support their statement regarding BIA case law.

The only other support that DHS and DOJ rely on to justify their general bar on political opinion cases involving non-state actors is a citation to paragraphs 80 to 82 of the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protections. 85 FR at 36279. However, DHS and DOJ fail to mention the actual UNHCR position on political opinion claims involving non-governmental actors. If DHS and DOJ had more carefully examined the February 2019 UNHCR Handbook that they cite, they would have found the UNHCR Guidelines on International Protection, which Volker Türk, the UNHCR Assistant High Commissioner for Refugees, describes in the foreword as “a series of legal positions on specific questions of international refugee law” which “complement and update the Handbook and should be read in combination with it.”¹⁶ UNHCR Guidelines on International Protection No. 7 and 12 deal specifically with “violence perpetrated by organized gangs, traffickers, and other non-State actors, against which the State is unable or unwilling to protect.”¹⁷

Other UNHCR Guidelines, such as UNHCR Guideline on International Protection No. 10, appear to directly contradict the proposed regulation on the issue of political opinion and non-state organizations. For example, paragraph 51 of the UNHCR Guidelines on International Protection No. 10 states that “[t]he political opinion ground is broader than affiliation with a particular political movement or ideology; it concerns ‘any opinion on any matter in which the machinery of the State, government, society, or

¹⁶ Volker Türk, *Foreword to UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection* 9–10 (Feb. 2019), <https://www.unhcr.org/en-us/publications/legal/5ddfc47/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html>.

¹⁷ *Id.* at 10.

policy may be engaged.”¹⁸ In explicit opposition to the proposed 208.1(d)/1208(d), paragraph 53 UNHCR Guideline on International Protection No. 10 states that “[o]bjection to recruitment by non-State armed groups may also be an expression of political opinion.”¹⁹

In addition, as a matter of policy and common sense, political opinions and activities are often linked to “generalized disapproval of, disagreement with, or opposition to ... non-state organizations.” For example, in the United States, people regularly disapprove of and disagree with non-governmental actors such as athletes who choose to kneel during the national anthem. People also protest non-governmental actors, such as Planned Parenthood and doctors who provide abortions. Yet such opinions and activities are commonly understood to constitute political opinions and activities. See, e.g., *McCullen v. Coakley*, 573 U.S. 464, 496 (2014) (finding that a state statute had violated the First Amendment by failing to adequately tailor its restrictions on protests outside abortion clinics, therefore depriving the petitioners of a right “to converse with their fellow citizens about an important subject on the public streets and sidewalks.”).

DHS and DOJ should consider how the above limitations to political opinion violate long-standing precedent and international obligations. None of the authorities cited in the Notice support or justify the changes to the consideration of political opinion claims. DHS and DOJ should therefore remove the limited definition of political opinion and the list of disfavored claims.

Requiring “behavior” undermines imputed political opinions

Finally, requiring “*expressive behavior* in furtherance of a cause against such organizations related to efforts by the state to control such organizations[,] or *behavior* that is antithetical to or otherwise opposes the ruling legal entity of the state or legal sub-unit of the state” undermines the well-established concept of imputed political opinion as political opinion by requiring “behavior” as a component of political opinion. See e.g. *Singh v. Holder*, 764 F.3d 1153, 1159 (9th Cir. 2014) (“It is settled law that an applicant may establish a political opinion for purposes of asylum relief by showing an ‘imputed political opinion.’”) (internal citation omitted).

¹⁸ UNHCR, Guidelines on International Protection No. 10 11 (Nov. 2014), <https://www.unhcr.org/en-us/publications/legal/529efd2e9/guidelines-international-protection-10-claims-refugee-status-related-military.html>.

¹⁹ *Id.*

The very nature of imputed political opinion is that the persecutor is imputing or attributing a political opinion to the person that they have harmed or are attempting to harm, whether or not that person actually holds that political opinion. For this reason, “expressive behavior in furtherance of a cause” or “behavior that is antithetical to or otherwise opposes the ruling legal entity of the state or a legal sub-unit of the state” is not likely to exist in imputed political opinion cases, since the applicant need not in fact hold any political opinions, much less act on them. Imputed political opinion depends on what the persecutor believes, not what the person being persecuted believes. Therefore, requiring “behavior” would undermine virtually all imputed political opinion claims.

DHS and DOJ fail to address this important ramification in their discussion of the proposed 208.1(d)/1208.1(d). In fact, they add a footnote to the discussion to further limit the types of “expressive behavior” that would support political opinion claims. Without any citations or analysis, DHS and DOJ claim that “[e]xpressive behavior is not generally thought to encompass acts of civic personal responsibility such as voting, reporting a crime, or assisting law enforcement in an investigation.” 85 FR 38680 fn. 30.

In conclusion, the foregoing discussion clearly shows that DHS and DOJ have failed to conduct the analysis required for deference under *Chevron* and *Brand X*. DHS and DOJ should therefore provide further analysis and consider removing this section.

The Notice Introduces New Standards for Persecution without Adequate Analysis or Justification

The Notice arbitrarily raises the type and level of harm required to “exigent threat”

One, the proposed 8 C.F.R. 208.1(e)/1208.1(e) raises the type and level of harm required to establish persecution, to “actions so severe that they constitute an exigent threat.” “[E]xigent threat” appears to be a new legal term and standard in asylum and INA § 241(b)(3) withholding, yet DHS and DOJ fail to mention the heightened standard in their discussion. Furthermore, even the cases cited by DHS and DOJ in their discussion – much less other longstanding federal court and BIA precedents on type and level of harm – do not require “exigent threat” to establish persecution. The Merriam-Webster dictionary defines “exigent” as “requiring immediate aid or action.” This is not the current standard for the type and level of harm that rises to the level of persecution.²⁰ Yet DHS and DOJ fail to even mention, much less meaningfully address and justify, why the standard for type and level of harm required to establish persecution should be

²⁰ See Ira J. Kurzban, Kurzban’s Immigration Law Sourcebook, 731-43 (16th ed. 2018-19).

raised to “exigent threat,” as would be necessary for agency deference to the heightened standard under *Chevron* and *Brand X*.

Conflict with existing law on “pattern and practice”

Two, as with PSGs and political opinion, the second part of the proposed 208.1(e)/1208.1(e) is yet another “nonexhaustive” list of harms that DHS and DOJ will not find to be persecution. Most problematic of the harms that DHS and DOJ will not recognize as persecution is the following:

The existence of laws or government policies that are unenforced or infrequently enforced do not, by themselves, constitute persecution unless there is credible evidence that those laws or policies have been or would be applied to an applicant personally.

However, the requirement that an applicant be harmed personally by laws or policies contradicts longstanding regulation and case law on “pattern and practice.” Specifically, 8 CFR 208.13(b)(2)(iii)/1208.13(b)(2)(iii) states that:

[T]he asylum officer or the immigration judge shall not require the applicant to provide evidence that there is a reasonable possibility he or she would be singled out individually for persecution if:

(A) The applicant establishes that there is a pattern or practice in his or her country of nationality or, if stateless, in his or her country of last habitual residence of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion; and

(B) The applicant establishes his or her own inclusion in, and identification with, such group of persons such that his or her fear of persecution upon return is reasonable.

First, DHS and DOJ fail to even mention the existence of their own regulation on pattern and practice. Second, the only attempt that DHS and DOJ make to address the conflict between the proposed 208.1(e)/1208.1(e) and the well-established law governing pattern and practice comes in a parenthesis to the sole case that they cite on this issue, *Wakkary v. Holder*, 558 F.3d 1049, 1061 (9th Cir. 2009).

While acknowledging that under *Wakkary* (not to mention 8 CFR 208.13(b)(2)(iii)/1208.13(b)(2)(iii)), “an applicant is not required to establish that his or her government would personally persecute the [noncitizen] up on return if he or she can establish a pattern or practice of persecution against a protected group to which they belong,” DHS and DOJ summarily dismiss the conflict between existing law on pattern and practice and the proposed changes in the Notice by noting that the governmental conduct must be “systematic” and “sufficiently widespread.” 85 FR at 36280. However, they fail to explain why “the existence of laws or government policies” does not demonstrate a pattern or practice of persecution in and of themselves, regardless of how often the laws or policies are enforced, nor what would constitute infrequent enforcement that would justify nullification of existing regulation and precedents on pattern and practice. Such paltry discussion provides insufficient grounds for agency deference under *Chevron* and *Brand X*.

The Notice Introduces Unclear and Unjust Standards for Nexus

As with PSGs, political opinion, and persecution, the proposed 8 CFR 208.1(f)(1)(i)-(viii)/1208.1(f)(1)(i)-(viii) present a fourth “nonexhaustive” list of claims that DHS and DOJ “in general, will not favorably adjudicate.” The claims are as follows:

- (i) Interpersonal animus or retribution;
- (ii) 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;
- (iii) Generalized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerilla, or other non-state organizations absent expressive behavior in furtherance of a discrete cause against such organizations related to control of a state or expressive behavior that is antithetical to the state or a legal unit of the state;
- (iv) Resistance to recruitment or coercion by guerilla, criminal, gang, terrorist or other non-state organizations;
- (v) The targeting of the applicant for criminal activity for financial gain based on wealth or affluence or perceptions of wealth or affluence;
- (vi) Criminal activity;
- (vii) Perceived, past or present, gang affiliation; or
- (viii) Gender.

85 FR 36292.

This list will look familiar by now because it duplicates many of the claims that have already been barred in the proposed regulation on PSGs²¹ or the proposed regulation on political opinion.²²

Nexus is a question of fact specific to each case.

One fundamental problem with codifying a list of generally disfavored claims on nexus is that nexus is “a classic factual question.” *Crespin Valladares v. Holder*, 632 F.3d 117, 128 (4th Cir. 2011). Determining the existence of nexus – whether the applicant was harmed or will be harmed *on account of* one or more of the five protected grounds for asylum and withholding – requires the adjudicator to consider facts specific to each case, such as direct or indirect evidence of the persecutor’s motivation(s) for harming or attempting to harm the applicant. See *INS v. Elias Zacarias*, 502 U.S. 478, 484 (1992).

As the Fourth Circuit observed in *Crespin Valladares*, “the IJ’s nexus determination qualifie[s] as a finding of fact entitled to deference.” Neither the BIA or the circuit courts may “simply substitute[] its own judgment for that of the IJ.” *Id.* (citing *Kabba v. Mukasey*, 530 F.3d 1239, 1246 (10th Cir. 2008)). Yet that is exactly what the list in proposed 208.1(f)(1)(i)-(viii)/1208.1(f)(1)(i)-(viii) would do. It would substitute DHS and DOJ’s general disapproval of certain types of claims over an asylum officer or an immigration judge’s determination on nexus based on their evaluation of the evidence specific to the applicant’s case.

DHS and DOJ fail to acknowledge “mixed motive” cases.

Furthermore, as the law governing nexus in asylum and withholding have long acknowledged, the persecutor may have more than one motive for wanting to harm the applicant. In asylum, INA 208(b)(1)(B)(i) places the burden of proof on the applicant to “establish that race, religion, nationality, membership in a particular social group, or

²¹ Proposed 8 CFR 208.1(c)/1208.1(c) – “[P]ast or present criminal activity or association (including gang membership); presence in a country with generalized violence or a high crime rate; being the subject of a recruitment effort by criminal, terrorist, or persecutory groups; the targeting of the applicant for criminal activity based on financial gain based on perceptions of wealth and influence; interpersonal disputes of which governmental authorities were unaware or uninvolved; past or present persecutory activity or association; or status as an [noncitizen] returning from the United States.”

²² Proposed 8 CFR 208.1(d)/1208.1(d) – “[G]eneralized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerilla, or other non-state organizations absent expressive behavior in furtherance of a cause against such organizations related to efforts by the state to control such organizations or behavior that is antithetical to or otherwise opposes the ruling legal entity of the state or legal unit of the state.”

political opinion was or will be at least *one central reason* for persecuting the applicant.” (emphasis added).

In withholding of removal under INA 241(b)(3), there is a circuit split on what an applicant must show to establish nexus. The Sixth and the Ninth Circuits have explicitly held that the plain language of INA 241(b)(3) requires applicants applying for withholding of removal to show only “a reason,” rather than “one central reason” required for asylum under INA 208(b)(1)(B)(i), to establish a nexus in statutory withholding cases. *Guzman Vasquez v. Barr*, 959 F.3d 253 (6th Cir. 2020); *Barajas Romero v. Lynch*, 846 F.3d 351 (9th Cir. 2017). Prior to those cases, however, the Third Circuit – in a footnote – cited with approval *Matter of C-T-L-*, 25 I&N Dec. 341 (BIA 2010), where the Board held that the one central reason standard in INA 208(b)(1)(B)(i) also applies to withholding of removal under INA 241(b)(3). *Gonzalez-Posadas v. Attorney Gen. U.S.*, 781 F.3d 677, 685 n.6 (3d Cir. 2015).

It is telling that DHS and DOJ fail to mention any of the above issues in their discussion on nexus, much less discuss them in depth and explain how a list of generally disfavored claims on nexus may be reconciled with the case- and fact- specific nature of establishing nexus. The proposed 208.1(f)(1)/1208.1(f)(1) also fails to acknowledge – much less provide any guidance to adjudicators – on mixed motive cases. Such glaring gaps in the drafting of the proposed regulation and discussion fail to meet the standard for agency deference under *Chevron* and *Brand X*.

While the discussion acknowledges that “the regulation does not foreclose that, at least in rare circumstances, such facts could be the basis for finding nexus, given the fact specific nature of this determination,” such admission of the fact specific nature of nexus is not explicitly stated in the regulatory language. First, DHS and DOJ do not explain why this should only happen in “rare circumstances,” especially given how common mixed motive cases are. Second, the fact that this acknowledgment is only in the discussion but not in the proposed regulation itself will lead some asylum officers and immigration judges to categorically deny all claims on the list, without taking into account “fact specific nature” in each case as the law requires. Such categorical denials may be ultra vires of INA 208, 240(b)(4)(B), and 241(b)(3) if they were the basis of premitting I-589 applications under proposed 8 CFR 208.13(e)/1208.13(e), since the applicants would not have had the full opportunity to present direct and indirect evidence on nexus, as is their right to do under INA 240(b)(4)(B).

“Evidence based on stereotypes”

Proposed 8 CFR 208.1(g)/1208.1(g) would bar the admission of “evidence promoting cultural stereotypes about an individual or a country, including stereotypes based on race, religion, nationality, or gender.” The proposed regulation itself fails to provide any guidance on what such evidence may be. In their discussion of this proposed regulation, DHS and DOJ point to a footnote in *Matter of A-B-*, 27 I&N Dec. 316, 336, n. 9 (AG 2018), which refer to a single piece of evidence – “an unsourced partial quotation from a news article eight years earlier” to support a “charge that Guatemala has a ‘culture of machismo and family violence’”. Based on that single piece of evidence from a single footnote of a single case, DHS and DOJ propose a regulation which would take the unprecedented step of categorically barring a type of evidence in support of asylum and withholding.

The categorical bar on evidence may be ultra vires. INA 208(b)(1)(B)(ii) and 240(c)(4)(A) and (B) places the burden of proof on the applicant for asylum and withholding of removal to show eligibility for relief by presenting corroborative evidence. Furthermore, INA 240(b)(4)(B) gives respondents the right to “present evidence on the [noncitizen]’s own behalf.” The Federal Rules of Evidence do not apply in immigration courts, so virtually all evidence presented by either DHS or the respondents are admissible, with immigration judges determining the proper weight to be given to each evidence. To categorically bar a type of evidence that the parties can submit may well be ultra vires of these sections of the INA, not to mention a possible violation of due process under the Fifth Amendment of the U.S. Constitution.

The proposed rule is also unclear on what evidence would be barred. It is not clear what constitutes “evidence promoting cultural stereotypes about an individual or a country based on race, religion, nationality, or gender” that would be subject to the categorical bar under the proposed 208.1(g)/1208.1(g). As discussed above, the only example that DHS and DOJ gave in their discussion was a single piece of evidence – “an unsourced partial quotation from a news article eight years earlier” to support a “charge that Guatemala has a ‘culture of machismo and family violence’”. While the specific evidence presented in *A-R-C-G-* may have not been to the Attorney General’s liking, there have been numerous expert testimonies and in-depth organizational studies going back several decades on this very issue and routinely accepted by the federal courts as well as DHS and DOJ. However, neither the proposed regulation or the accompanying discussion provides any guidance on whether DHS and DOJ will now bar such well accepted evidence. Such lack of clarity will cause more, rather than less, confusion and additional litigation.

The Notice Arbitrarily Introduces New Standards for Internal Relocation

The proposed 8 CFR 208.13(b)(3)/1208.13(b)(3) (asylum) and 8 CFR 208.16(b)(3)/1208.16(b)(3) (withholding) rewrite the existing regulation entitled “[r]easonableness of internal relocation,” eliminating factors specific to the applicants. While the current regulation directs adjudicators to consider factors such as “whether the applicant would face other serious harm in the place of suggested location; 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 family ties,” the proposed regulation eliminates all those factors. In their place, they put the following:

[T]he totality of the relevant circumstances regarding an applicant’s prospects for relocation, including the size of the country of nationality or last habitual residence, the geographic locus of the alleged persecution, the size, numerosity, and reach of the alleged persecutor, and the applicant’s demonstrated ability relocate to the United States in order to apply for asylum.

As a comparison of the current and proposed regulations clearly show, the proposed regulation eliminates any factors that would assist the adjudicators to determine whether and how a specific applicant may fare in their country of nationality and instead forces the adjudicators to only consider whether the applicant can be sent back regardless of their personal circumstances.

The only explanation that DHS and DOJ provide for such a wholesale change of factors for consideration in internal relocation is that the current regulations “inadequately assess the relevant considerations in determining whether internal relocation is possible, and if possible, whether it is reasonable to expect the asylum applicant to relocate.” 85 FR 36282. However, this does not justify the elimination of all factors that may affect a specific applicant’s ability to internally relocate, such as the person’s age, gender, health, and social and family ties. For example, a healthy, well-educated adult who has financial resources, family and friends in another part of the country will likely have an easier time relocating internally than a sick child without a parent or guardian or financial resources, who do not know anyone in a different part of the country. Yet the proposed regulation deletes common sense factors such as the applicant’s age, gender, health, and social and family ties for consideration by the adjudicators.

The Notice also demonstrates hostility to non-governmental persecutor cases. Under the current regulations, DHS has the burden of showing the reasonableness of

internal relocation once the applicant has demonstrated past persecution, regardless of whether the persecutor is the government or a non-governmental actor. In contrast, the proposed 8 CFR 208.13(b)(3)(iii)/1208.13(b)(3)(iii) and 208.16(b)(3)(iii)/1208.16(b)(3)(iii) shifts the burden of proof for internal relocation to the applicants even after they have established past persecution, if the persecutor is a non-governmental actor. In addition, they will have to meet this burden using the new factors in the proposed 8 CFR sections 208.13(b)(3)/1208.13(b)(3) and 208.16(b)(3)/1208.16(b)(3).

Finally, proposed sections 208.13(b)(3)(iv)/1208.13(b)(3)(iv) and 208.16(b)(3)(iv)/1208.16(b)(3)(iv) categorically prohibit adjudicators from considering “gang members, rogue officials, family members who are not themselves government officials, or neighbors who are not themselves government officials” as government or governmentally sponsored persecutors. However, other than stating that this prohibition is “[f]or ease of administering these provisions,” the discussion fails to explain why or how such a blanket prohibition is justified. Such a categorical bar will prohibit adjudicators from considering the quasi-governmental features of certain entities, such as MS-13 or Barrio 18 in El Salvador, Guatemala, and Honduras, or case-specific evidence presented by applicants on whether and when “rogue officials” may in fact have been acting in their governmental capacity.

DOJ is or should be aware of the deep connections between nongovernmental actors and the government in some countries. For example, DOJ was involved in the case against former Honduran congressman, and brother of the current President of Honduras, Tony Hernández. The DOJ press release stated that Hernández “coordinated and, at times, participated in providing heavily armed security for cocaine shipments transported within Honduras, including by members of the Honduran National Police and drug traffickers armed with machineguns and other weapons. Hernández also used members of the Honduran National Police to coordinate the drug-related murder of Franklin Arita in 2011, and he used drug-trafficking associates to murder a drug worker known as “Chino” in 2013.”²³ When the government and criminal organizations are so entangled, including at the highest levels, it becomes difficult to distinguish between “gang members,” “rogue officials,” and the government itself. DHS and DOJ should therefore withdraw these proposed changes, or at least provide a reasoned explanation for making this distinction in the context of internal relocation.

²³ Department of Justice, Former Honduran Congressman Tony Hernández Convicted In Manhattan Federal Court Of Conspiring To Import Cocaine Into The United States And Related Firearms And False-Statements Offenses (October 18, 2019), available at <https://www.justice.gov/usao-sdny/pr/former-honduran-congressman-tony-hern-ndez-convicted-manhattan-federal-court-conspiring>

Many of ASAP's clients have suffered past persecution by nongovernmental actors, including those who had connections to the government and the police force. One of ASAP's clients was gang raped by members of Barrio 18 based on her relationship to a former police officer who had resisted the gang's influence over the police force. In another case, a client's father was murdered, and she received hundreds of death threats after she and her father ran for mayor in two nearby towns. In another case, ASAP's client was kidnapped at the age of 15 and forced to marry a gang member. He violently beat her and raped her for years, including while she was pregnant. She reported her captor to the police many times, but the police never took any action. DOJ and DHS have not provided sufficient justification for shifting the burden of proof to these clients, or to the many asylum seekers who are similarly situated.

The Notice Introduces Unprecedented Discretionary Factors that Would Nullify INA 208

In the proposed 8 CFR 208.13(d)/1208.13(d), DHS and DOJ create a brand new and unprecedented regulation in asylum and immigration law that attempts to eliminate asylum officers' and immigration judges' unique ability to exercise discretion, taking into account the facts of each particular case.

The first part of the proposed regulation, sections 208.13(d)(1)/1208.13(d)(1), lists "significant adverse discretionary factors" against discretionary grant of asylum, as follows:

- (i) Unlawful entry or attempted unlawful entry into the U.S.
- (ii) Failure to apply for protection in at least one country during transit to U.S.
- (iii) Use of fraudulent documents to enter U.S.

Id.

Under the plain language and structure of the proposed 208.13(d)/1208.13(d), these "significant adverse discretionary factors" appear to be categorical bars to asylum with no exceptions. *Id.*

Next, proposed 208.13(d)(2)(i)/1208.13(d)(2)(i) lists nine other "adverse discretionary factors," the mere presence of which will bar asylum officers and immigration judges from exercising their discretion in favor of an asylum applicant:

- (A) Spent more than 14 days in any one country immediately prior to their arrival in the United States unless s/he applied for protection in that country;
- (B) Transited through more than one country on the way to United States unless s/he applied for protection in that country;

- (C) Would be subject to mandatory denial of asylum under 8 CFR. 208.13(c)/1208.13(c) but for changes to criminal conviction or sentence;
- (D) Cumulatively accrued more than one year of unlawful presence of more than one year cumulatively prior to filing the I-589;
- (E) Failure to file taxes or fulfill tax obligations; also, failure to report taxable income;
- (F) Two or more prior asylum applications denied for any reason (no discussion of this subsection in the discussion);
- (G) Withdrew or abandoned an I-589;
- (H) Failure to attend asylum interview at USCIS; or
- (I) Failure to file a motion to reopen a final removal order based on changed country conditions within one year.

Id.

Unlike the “significant adverse discretionary factors” in proposed 208.13(d)(1), there appears to be two very limited exceptions to favorable exercise of discretion for these nine “adverse discretionary factors” in the proposed 208.13(d)(2)(ii)/1208.13(d)(2)(ii) in 1) in extraordinary circumstances, such as those involving national security or foreign policy, or 2) where the applicant demonstrates by clear and convincing evidence that denial of asylum will result in exceptional and extremely unusual hardship to the applicant.

DHS and DOJ overturns *Matter of Pula* without saying so

Traditionally, the exercise of discretion in immigration and asylum law is a balancing test of positive and negative factors specific to each case. See *Matter of Marin*, 16 I&N Dec. 581 (BIA 1978); *Matter of Pula*, 19 I&N Dec. 467 (BIA 1987). In contrast, the proposed 208.13(d)/1208.13(d), even though entitled “[d]iscretion,” is solely comprised of mandatory and virtually mandatory negative factors and gives adjudicators no guidance on any positive factors that should be considered in a balancing test on the exercise of discretion.

DHS and DOJ repeatedly cite to *Matter of Pula* in support of the proposed 208.13(d)/1208.13(d), but the proposed regulation would in fact nullify *Pula*. *Pula* is the seminal BIA precedent which created the carefully balanced and reasoned framework on the exercise of discretion in asylum cases. Asylum officers and immigration judges have followed this longstanding precedent for the last four decades without any issues. The contrast between *Pula* and the proposed 208.13(d)/1208.13(d) could not be starker.

When there are concerns about the manner in which an asylum applicant came to the United States, *Pula* requires asylum officers and immigration judges to consider “the totality of circumstances and actions of an [noncitizen] in his flight” in determining how much weight to give to any circumvention of orderly refugee procedures, versus the reasons for such circumventions. 19 I&N Dec. at 473. The BIA then provides the adjudicators with a comprehensive list of both negative and positive factors to balance. *Pula* is worth quoting at length, because it shows how a balancing test on the exercise of discretion in asylum cases really work:

[W]hether the [noncitizen] passed through any other countries or arrived in the United States directly from his country, whether orderly refugee procedures were in fact available to help him in any country he passed through, and whether he made any attempts to seek asylum before coming to the United States. In addition, the length of time the [noncitizen] remained in a third country, and his living conditions, safety, and potential for long-term residency are also relevant. For example, an [noncitizen] who is forced to remain in hiding to elude persecutors, or who faces imminent deportation back to the country where he fears persecution, may not have found a safe haven even though he has escaped to another country. Further, whether the [noncitizen] has relatives legally in the United States or other personal ties to this country which motivated him to seek asylum here rather than elsewhere is a factor to consider. In this regard, the extent of the [noncitizen]’s ties to any other countries where he does not fear persecution should also be examined. Moreover, if the [noncitizen] engaged in fraud to circumvent orderly refugee procedures, the seriousness of the fraud should be considered. The use of fraudulent documents to escape the country of persecution itself is not a significant adverse factor, while at the other extreme, entry under the assumed identity of a United States citizen with a United States passport, which was fraudulently obtained by the [noncitizen] from the United States government, is very serious fraud.

In addition to the circumstances and actions of the [noncitizen] in his flight from the country where he fears persecution, general humanitarian considerations, such as an [noncitizen]’s tender age or poor health, may also be relevant in a discretionary determination. A situation of particular concern involves an [noncitizen] who has established his statutory eligibility for asylum but cannot meet the higher burden required for withholding of deportation. Deportation to a country where the [noncitizen] may be persecuted thus becomes a strong possibility. In such a case, the

discretionary factors should be carefully evaluated in light of the unusually harsh consequences which may befall an [noncitizen] who has established a well-founded fear of persecution; the danger of persecution should outweigh all but the most egregious of adverse factors.

Id. at 473-74.

As this lengthy excerpt shows, *Pula* requires asylum officers and immigration judges to consider the asylum applicant as a whole, including all applicable negative and positive factors specific to that individual. In addition, *Pula* asks the adjudicators to also consider the unique nature of asylum, where the applicant may be harmed or killed if returned to the country that they fled. That is different than other forms of discretionary relief in immigration law, such as cancellation of removal. Given that adjudicators do not need to exercise their discretion unless and until the applicants have first shown that they are legally eligible for asylum, the exercising of discretion in asylum is different than exercising discretion in other forms of discretionary relief in immigration law, because the adjudicator will be sending individuals back to countries where they may be persecuted on purely discretionary grounds.

For this reason, *Pula* held that while “the circumvention of orderly refugee procedures ... can be a serious adverse factor, ... it should not be considered in such a way that the practical effect is to deny relief in virtually all cases. This factor is only one of a number of factors which should be balanced in exercising discretion.” Furthermore, the BIA in *Pula* withdrew the prior BIA precedent, *Matter of Salim*, 18 I&N Dec. 311 (BIA 1982), “insofar as it suggests that the circumvention of orderly refugee procedures alone is sufficient to require the most unusual showing of countervailing equities.” *Pula* at 473.

“Significant adverse discretionary factors” in proposed 208.13(d)(1)/1208.13(d)(1) are mandatory, not discretionary.

Now compare the BIA’s thoughtful and comprehensive balancing test in *Pula* with the proposed 208.13(d)/1208.13(d). In contrast to *Pula*, using the applicants’ travel and manner of entry to U.S. “to deny relief in virtually all cases” is precisely what the proposed regulation attempts to do.

One, the proposed 208.13(d)(1)(i), (iii)/1208.13(d)(1)(i), (iii) would categorically deny asylum to any applicant who entered or attempted to enter the United States unlawfully or used fraudulent documents to enter the United States. Such categorical bars are even worse than *Matter of Selim*, the case overturned by the BIA in *Pula*, since *Selim* merely found “the fraudulent avoidance of an orderly refugee process to be an

extremely adverse factor,” rather than a mandatory bar to asylum, as the proposed 208.13(d)(1)(i) and (iii)/1208.13(d)(1)(iii) do.

In addition, the proposed 208.13(d)(1)(ii)/1208.13(d)(1)(ii) goes even further by mandatorily denying asylum to virtually everyone who did not apply for protection in another country before coming to the United States. In contrast, under *Pula*, whether an applicant could and/or should have applied for protection in another country would be one of many factors that adjudicators should consider under the totality of the applicant’s specific circumstances.

Such broad, mandatory bars to asylum cannot be justified as an exercise of discretion. Agency discretion has never been used – or abused – in such a fashion in asylum. Insofar as DHS and DOJ attempt to use their “discretion” to categorially bar those who are legally eligible for asylum in the proposed 208.13(d)(1)/1208.13(d)(1), it will be found to be ultra vires of INA 208.

Adverse discretionary factors under 208.13(d)(2)/1208.13(d)(2)

In addition to the “significant adverse discretionary factors” which serve as mandatory bars to asylum in proposed 208.13(d)(1)/1208.13(d)(1), proposed 208.13(d)(2)(i)(A)-(I)/1208.13(d)(2)(i)(A)-(I) add another nine “adverse discretionary factors” which would also bar asylum unless the applicant can meet the impossibly high standard set for exceptions in the proposed 208.13(d)(2)(ii)/1208.13(d)(2)(ii).

One, some of the factors in the proposed 208.13(d)(2)(i)(A)-(I)/1208.13(d)(2)(i)(A)-(I) have not previously been considered adverse factors at all. For example, the fact that an asylum applicant “spent more than 14 days in any one country” on their way to the United States is currently not an adverse factor at all. Nor is having had “two or more prior asylum applications denied for any reason” currently considered an adverse factor. Yet DHS and DOJ fail to explain why they have decided to make these adverse discretionary factors that would bar asylum in virtually all situations. 85 FR 36284.

Two, in contrast to *Pula*, the proposed 208.13/1208.13 (d)(2) does not allow the adjudicators to consider the specific circumstances of how an adverse discretionary factor came about, or the severity of such an adverse discretionary factor. Under the plain language of the proposed regulation, the mere presence of an adverse discretionary factor in the proposed 208.13/1208.13 (d)(2)(i)(A)-(I) would bar the adjudicator from favorably exercising their discretion in an asylum case unless the applicant can “by clear and convincing evidence, demonstrate[] that the denial of the

application for asylum would result in exceptional and extremely unusual hardship to the [noncitizen]." 85 FR 36294.

As discussed above, this is not the traditional and current balancing test for exercise of discretion in discretionary immigration relief in general and asylum in particular. See *Matter of Marin*, 16 I&N Dec. 581 (BIA 1978); *Matter of Pula*, 19 I&N Dec. 467 (BIA 1987).

The heightened standard for 212(h) relief should not be used for asylum applicants.

DHS and DOJ cite to 8 CFR 212.7(d)/1212.7(d) as the only other example where they "have issued regulations on discretionary considerations." 85 FR 36283. Even more importantly, they adopt the regulatory language and the heightened standard of 212.7(d)/1212.7(d) in the proposed 208.13(d)(2)(ii)/1208.13(d)(2)(ii) by requiring the applicant "by clear and convincing evidence, [to] demonstrate[] that the denial of the application for asylum would result in exceptional and extremely unusual hardship to the [noncitizen]." In doing so, DHS and DOJ ignore the very different nature of the populations affected by the current 8 CFR 212.7(d)/ 1212.7(d) versus the proposed 8 C.F.R. 208.13(d)(2)(ii)/1208.13(d)(2)(ii), and fail to provide a reasoned explanation for why the same standards should apply to such different populations.

Current 8 C.F.R. 212.7(d)/1212.7(d) applies to "immigrant [noncitizen]s who are inadmissible under section 212(a)(2) of the Act in cases involving violent and dangerous crimes" but are nonetheless statutorily eligible for a waiver under INA 212(h)(2). In contrast, the proposed 8 C.F.R. 208.13(d)(2)(ii)/1208.13(d)(2)(ii) applies to all asylum applicants who have met the statutory and regulatory eligibility for asylum.

First, asylum applicants who are inadmissible under INA 212(a)(2) because they have been convicted of violent and dangerous crimes are either 1) already statutorily barred from asylum under INA 208(b)(2)(A)(ii), or 2) barred under the normal balancing tests for discretionary reliefs in immigration asylum law discussed above.

Second and more importantly, the vast majority of people that would be subject to the proposed 8 CFR 208.13(d)(2)(ii)/1208.13(d)(2)(ii) – i.e. all asylum applicants who have met the statutory and regulatory eligibility for asylum – have no criminal records whatsoever. Furthermore, they may be persecuted if returned to the countries from which they fled. Yet DHS and DOJ have chosen to apply the same heightened standard of "exceptional and extremely unusual hardship" to these very different populations without any explanation, much less a detailed and reasoned one.

Proposed 208.13(d)/1208.13(d) would nullify INA 208

When giving guidance to agency adjudicators on the discretionary component to a statutory relief, federal courts issuing precedents or agencies issuing regulations cannot nullify the statute. For example, the Supreme Court has observed that “if the Attorney General determined that any entry fraud or misrepresentation, no matter how minor and no matter what the attendant circumstances, would cause her to withhold waiver, she would not be exercising the conferred discretion at all, but would be *making a nullity of the statute.*” *INS v. Yang*, 519 U.S. 26, 31 (1996). (emphasis added).

The mandatory bars to asylum under the proposed 208.13(d)(1)/1208.13(d)(1) and the heightened standard in the proposed 208.13(d)(2)(ii)/1208.13(d)(2)(ii) are such nullifications of INA 208. Under the guise of discretion, any and all asylum applicants who have met the legal requirements for asylum but has a “significant adverse discretionary factor” under the proposed 208.13(d)(1)/1208.13(d)(1) would be barred from asylum without any exceptions.

Likewise, any and all asylum applicants who have a single “adverse discretionary factor” listed in the proposed 208.13(d)(2)(i)(A)-(I)/1208.13(d)(2)(i)(A)-(I) would be barred from asylum unless they meet the heightened standard of “exceptional and extremely unusual hardship.” Such an inflexible rule is not an exercise of discretion, but a nullification of the very statute that the regulation is intended to implement. Exceptional and extremely unusual hardship has never been the standard for the exercise of discretion in asylum, and DHS and DOJ fail to provide a reasoned explanation as to why the agency believes such a seismic change in asylum law is required.

In conclusion, while DHS and DOJ claim that they are “build[ing] on the BIA’s guidance regarding discretionary asylum determinations and codify specific factors in the regulations for the first time” with repeated citations to *Pula*, the discussion above clearly shows that they are in fact overruling *Pula* in the proposed 208.13(d)/1208.13(d) without admitting that they are doing so, nor providing a reasoned justification for why they are overturning a well-established precedent that has worked well for over four decades. While DHS and DOJ’s policy choices in this proposed regulation are problematic for reasons discussed above, the fact that they did so citing *Pula*, the very case that holds just the opposite, demonstrates that the federal courts reviewing these regulations should not be given DHS and DOJ *Chevron/Brand X* deference on the proposed 208.13(d)/1208.13(d)(2).

DHS and DOJ should therefore completely withdraw the proposed “significant adverse discretionary factors” and “adverse discretionary factors” as they conflict with the statute and existing caselaw.

The Notice Arbitrarily Changes Standards for Firm Resettlement

The proposed 8 CFR 208.15/1208.15 replaces the existing regulations on firm resettlement. While DHS and DOJ’s discussion of firm resettlement repeatedly cites *Matter of A-G-G-*, 25 I&N Dec. 486 (BIA 2011), the seminal BIA precedent on firm resettlement, DHS and DOJ do not seem to know, or know and simply ignore, the content of *A-G-G-*.

The BIA’s in-depth discussion of the history of the firm resettlement bar in *A-A-G-* makes it clear that from its inception in the aftermath of World War II to the present day, the concept of firm resettlement has always been about whether an asylum applicant “has acquired a new nationality, and enjoys the protection of the country of his new nationality.” *A-G-G-* at 490 (quoting the 1951 United Nations Convention Relating to the Status of Refugees). Given this rationale for the firm resettlement bar, it does not make sense for the proposed 208.15(a)(2)/1208.15(a)(2) to bar asylum applicants for firm resettlement simply because they were able to physically reside in a country for a year a year or more. The criterion for firm resettlement is not physical presence, but whether the applicant had, or could have had but refused to apply for, legal status and protection from that country.

Two, DHS and DOJ again ignore *A-G-G-* when it shifts the burden of proof on firm resettlement to the asylum applicants. *A-G-G-* held that “[i]n the first step of the analysis, the DHS bears the burden of presenting prima facie evidence of an offer of firm resettlement.” *A-G-G-* at 501. The BIA explained that it assigned the initial burden of proof to DHS because “the circuit courts of appeals have held that the DHS bears the initial burden of establishing that ‘evidence indicates’ that a mandatory bar to relief applies.” *Id.* Yet DHS and DOJ fail to address *A-A-G-* or the underlying circuit court decisions at all in their discussion on burden shifting.

The Notice Introduces an Unreasonable Definition of Willful Blindness

The proposed 8 CFR 208.18(a)(1)/1208.18(a)(1) excludes from the definition of “torture” acts or lack of action by public officials who are “not acting under color of law.” The proposed 8 CFR 208.18(a)(7)/1208.18(a)(7) limits awareness required for “acquiescence” to actual knowledge or willful blindness and defines “willful blindness” as being “aware of a high probability of activity constituting torture and deliberately

avoid[ing] learning the truth.” *Id.* The proposed 8 CFR 208.18(a)(1)/1208.18(a)(1) further adds that “the official must have been charged with preventing the activity as part of his or her duties to intervene.” *Id.*

The new definition of “willful blindness” under the proposed 8 CFR 208.18(a)(7)/1208.18(a)(7) requires CAT applicants to prove the unprovable. Without access to and active cooperation of the public official at issue (which the applicant clearly does not have), the applicant will not be able to show that the public official “was aware of a high probability of activity constituting torture and deliberately avoided learning the truth.” *Id.*

DHS and DOJ erred by adopting the mens rea standard designed to “give officials due process notice of what conduct was criminal” and using it for the entirely different purpose of requiring CAT applicant to demonstrate that another person – the public official who acquiesced in their torture – “was aware of a high probability of activity constituting torture and *deliberately avoided* learning the truth.” (emphasis added).

Requiring evidence of subjective frames of mind such as awareness and deliberate avoidance makes sense in its original context of giving public officials due process notice that their actions or the lack thereof may have criminal ramifications under CAT. However, using the same standard for a different person – not the public official but rather the person who was tortured – to prove the mens rea of the public official who may have acquiesced in their torture, does not make sense and places an impossible burden on the CAT applicant.

Lacking access to and active cooperation of the public official, a CAT applicant would never be able to show that the official “was aware of a high probability of activity constituting torture and deliberately avoided learning the truth.” They would never be able to show that the official “deliberately avoided knowing the truth,” rather than “recklessly disregarded the truth, or negligently failed to inquire.”

It is unreasonable to require the CAT applicant to prove the mens rea of another human being, much less a public official who has acquiesced in their torture. Under this impossible standard, virtually no CAT applicant will be able to show that a public official acquiesced in their torture. DHS and DOJ should withdraw the proposed changes related to CAT.

Section D: Information Disclosure

Current 8 CFR sections 208.6 and 1208.6 already provide DHS and DOJ with broad authority to disclose information in an individual's I-589 application and/or CF/RF process when necessary.

First, 8 CFR 208.6(a) and 1208.6(a) allow the Secretary of the Homeland Security and the Attorney General to disclose such information in their discretion. Second, current 8 CFR 208.6 and 1208.6(c) provide a long list of situations where disclosure is explicitly allowed, as follows:

- (1) Any United States Government official or contractor having a need to examine information in connection with:
 - (i) The adjudication of asylum applications;
 - (ii) The consideration of a request for a credible fear or reasonable fear interview, or a credible fear or reasonable fear review;
 - (iii) The defense of any legal action arising from the adjudication of, or failure to adjudicate, the asylum application, or from a credible fear determination or reasonable fear determination under 208.30 or 208.31;
 - (iv) The defense of any legal action arising from the adjudication of which the asylum application, credible fear determination, or reasonable fear determination is a part; or
 - (v) Any United States Government investigation concerning any criminal or civil matter; or

- (2) Any Federal, State, or local court in the United States considering any legal action:
 - (i) Arising from the adjudication of, or failure to adjudicate, the asylum application, or from a credible fear or reasonable fear determination under 208.30 or 208.31; or
 - (ii) Arising from the proceedings of which the asylum application, credible fear determination, or reasonable fear determination is a part.

Notwithstanding these already broad and discretionary exceptions to disclosure, the Notice adds even more exceptions to disclosure in subsections (d) and (e) to the proposed 8 CFR 208.6 and 1208.6. However, these subsections are overbroad, unclear, often duplicative, and will harm people fleeing violence.

The U.S. government has long acknowledged that these nondisclosure regulations:

safeguard[] information that, if disclosed publicly, could subject the claimant to retaliatory measures by government authorities or non-state actors in the event that the claimant is repatriated, or endanger the security of the claimant's family members who may still be residing in the country of origin. Moreover, public disclosure might, albeit in rare circumstances, give rise to a plausible protection claim where one would otherwise not exist by bringing an otherwise ineligible claimant to the attention of the government authority or non-state actor against which the claimant has made allegations of mistreatment.²⁴

DHS and DOJ fail to acknowledge these important rationales against disclosure of asylum-related information in the Notice discussion. They do not even attempt to explain whether and how they balanced the rationales for disclosure versus the rationales against disclosure in coming up with the proposed regulation. Nor do DHS and DOJ explain why they cannot investigate "fraud and abuse" or "criminal activity" under the broad exceptions that already exist in the current 208.6 and 1208.6(a) and (c).

The new exceptions to disclosure in proposed 208.6 and 1208.6(d) and (e) undermine important rationale against overbroad disclosures of asylum-related information.

First, the scope of information subject to disclosure in proposed 208.6 and 1208.6 (d) and (e) is too broad. (d) and (e) would permit disclosure of:

[A]ny information contained in an application for asylum, withholding of removal under section 241(b)(3) of the Act, or protection under regulations issued pursuant to the Convention Against Torture's implementing legislation, any relevant and applicable information supporting that application, and any relevant and applicable information regarding an [noncitizen] who has filed such an application, and any relevant and applicable information regarding an [noncitizen] who has been the subject of a reasonable fear or a credible fear determination...

²⁴ USCIS Asylum Division, Fact Sheet: Federal Regulation Protecting the Confidentiality of Asylum Applicants, October 18, 2012, <https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/2012/December%202012/Asylum-ConfidentialityFactSheet.pdf>

85 FR 36301.

Second, the situations in which deeply personal and private information about asylum seekers may be released are vague and overbroad. As examples, 208.6 and 1208.6 (d)(1)(i) would permit DHS and EOIR to disclose asylum- or CF/RF-related information “[a]s part of an investigation of adjudication of the merits of that application or of any other application under the immigration laws.” Subsection (d)(1)(iv) would permit disclosure “to deter, prevent, or ameliorate the effects of child abuse.” Subsection (d)(1)(v) would permit disclosure “as part of any proceeding arising under the immigration laws.”

Insofar as these subsections would permit the disclosure of an asylum seeker’s personal and private information for use in other people’s immigration proceedings, DHS and DOJ may put asylum seekers’ or their families’ lives at risk. For example, DHS and DOJ may wind up exposing women and their children who fled from abusive spouses and/or parents or letting gangs such as MS 13 or Barrio 18 know that people fled to the United States to escape harm by them.

Such failure to acknowledge important policy considerations against disclosure and balance competing interests for and against disclosure, combined with the overbroad scope of information that may be disclosed and the vague circumstances under which such information may be released, clearly argue against giving DHS and DOJ deference under *Chevron*. DHS and DOJ should therefore withdraw Section D in its entirety.

III. The Notice Must be Set Aside as Unlawful because the Acting Secretary of DHS Lacks Lawful Authority to Authorize its Promulgation

The Notice indicates that Acting DHS Secretary Chad Wolf has “delegate[ed] the authority to electronically sign this document to Chad R. Mizelle,” 85 FR 36290, but Mr. Wolf cannot designate this authority to Mr. Mizelle, because Mr. Wolf holds the office of Acting DHS Secretary unlawfully. Mr. Wolf does not have a valid legal claim to the office of DHS Secretary under either the orders of succession proscribed by the Homeland Security Act or the Federal Vacancies Reform Act (FVRA), the only two possible statutory routes under which an Acting DHS Secretary may hold office. See 6 U.S.C 113(g); 5 U.S.C § 3345. Under section 3348 of the Federal Vacancies Reform Act (FVRA) all actions taken in an unlawfully held position — including designating authority to Mr. Mizelle to promulgate this rule — “shall have no force or effect.” *Id.* § 3348. Furthermore, actions taken by an acting official who holds office illegally also violate the Administrative

Procedure Act because they are “not in accordance with law,” and must accordingly be held “unlawful and set aside.” 5 U.S.C. § 706(2)(A).

Mr. Wolf’s appointment is the fruit of a poisoned tree that began when then-DHS Secretary Kirstjen Nielsen resigned. A November 15, 2019 letter by members of Congress to the Comptroller General of the United States details the succession issues that began when Kevin McAleenan was installed as Secretary of Homeland Security to replace Secretary Nielsen.²⁵ At the time of Secretary Nielsen’s departure, Executive Order 13753 set out the order of succession for DHS in the event of a Secretary’s “resignation.” See Exec. Order No. 13753, 81 Fed. Reg. 90667 (Dec. 9, 2016); see also, Department of Homeland Security, *DHS Orders of Succession and Delegation of Authorities for Named Positions* (Dec. 15, 2016) as amended (Apr. 10, 2019) (indicating that any changes Nielsen made to the orders of DHS succession applied only “in the event [the Secretary is unavailable] to act during a disaster or catastrophic emergency.”) Under the Executive Order, Mr. McAleenan was not next in line to head DHS after Secretary Nielsen’s resignation, but rather, at minimum, two Senate confirmed officials should have preceded him.²⁶ Accordingly, Mr. McAleenan had no valid legal claim to the office of the Secretary under the Homeland Security Act’s succession provisions. And even if Mr. McAleenan could arguably have had authority under the FVRA, that authority expired after 210 days in office per the terms of that statute. See 5 U.S.C. § 3346(a)(1).

Changes that Mr. McAleenan later made to the order of DHS succession on November 8, 2019 were what ostensibly rendered Mr. Wolf Acting Secretary by order of succession. Department of Homeland Security, *Amendment to the Order of Succession for the Secretary of Homeland Security* (Nov. 8, 2019). These changes, however, were also unlawful because Mr. McAleenan held the office of Acting DHS Secretary unlawfully, in violation of both the Homeland Security Act and the FVRA. Because Mr. Wolf’s appointment as Acting Secretary of Homeland Security was a result of the unlawful changes that Mr. McAleenan made to the order of succession, he too has no valid legal claim to the office of the Secretary. Just like Mr. McAleenan, all of Wolf’s actions taken as Acting DHS Secretary therefore “shall have no force or effect,” 5 U.S.C. § 3348, and must be held “unlawful and set aside,” 5 U.S.C. § 706(2).

²⁵ See Letter from Bennie G. Thompson, Chairman, Committee on Homeland Security, and Carolyn B. Maloney, Acting Chairwoman, Committee on Oversight and Reform, to Gene Dodaro, Comptroller General of the United States (Nov. 15, 2019) [hereinafter Thompson and Maloney, Letter] [available at <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/191115%20T%20Dodaro%20re%20Letter%20to%20GAO%20on%20Wolf-Cuccinelli%20Appointment.pdf>].

²⁶ See Thompson and Maloney Letter at 2.

The government must articulate a lawful basis of Mr. Wolf's delegate the legal authority to Mr. Mizelle to promulgate this regulation, and if unable to do so, remove it from the federal registry.

IV. The Notice Violates the Rehabilitation Act by Failing to Notice Disability and Provide Accommodations

The Notice proposes changes to the asylum process that will likely lead to violations of the Rehabilitation Act, but DOJ and DHS fail to acknowledge the need for reasonable accommodations or safeguards. As explained above, the proposed changes set forth in this Notice would make the asylum process extremely difficult for unrepresented individuals by requiring knowledge of complex immigration laws at every stage. In addition to conflicting with the INA and due process protections, the proposed regulations would also exclude many asylum seekers with disabilities from meaningfully accessing the asylum process, thus violating the Rehabilitation Act.

In ASAP's experience, many asylum seekers arriving at the Mexico-U.S. border have severe trauma-related disabilities that are further exacerbated by their detention in the United States. ASAP's clients have frequently been diagnosed with Posttraumatic Stress Disorder (PTSD) and major depression, which "substantially limit[]" their "major life activities."²⁷ Many asylum seekers also have mental disabilities that would prevent them from adequately representing themselves or even understanding the proceedings. The government has already been informed that many asylum seekers have a disability under the Rehabilitation Act. In January 2016, over 200 civil rights, faith, and labor organizations signed a letter to then-Secretary Johnson and Attorney General Lynch informing them that a substantial proportion of asylum seekers in removal proceedings had a disability.²⁸

Mental disabilities often prevent individuals from fully sharing the facts of their cases, or from recalling traumatic events related to their claims. For example, some symptoms of PTSD would make it difficult to complete a CF or RF interview, or to fill out an I-589. People with PTSD may have difficulty remembering "key features of the traumatic event."²⁹ People with PTSD may also avoid any reminders of the traumatic event, including their own thoughts and feelings.³⁰ Under the new proposed rules,

²⁷ 42 U.S.C. § 12102(1).

²⁸ Yale Law School, WIRAC: Immigration Raids Target Disabled (Jan. 5, 2016), <https://law.yale.edu/yls-today/news/wirac-immigration-raids-target-disabled>.

²⁹ National Institute of Mental Health, Post-Traumatic Stress Disorder, <https://www.nimh.nih.gov/health/topics/post-traumatic-stress-disorder-ptsd/index.shtml> (last visited July 14, 2020).

³⁰ *Id.*

adjudicators could pretermite I-589 applications without a hearing, making it difficult for asylum seekers with PTSD to explain their symptoms, including through a psychological expert. This would likely result in immigration judges pretermiteing some asylum applications because the applicant was unable to present the full facts of their case due to disability.

For individuals with mental disabilities that affect their competency, the requirements at the CF and RF stage and at the I-589 stage would seem to require counsel as a reasonable accommodation. In *Franco-Gonzales v. Holder*, a federal district judge ordered U.S. Immigration and Customs Enforcement (ICE), the Attorney General, and EOIR to provide legal representation to immigrant detainees with mental disabilities who were facing deportation.³¹ Here, too, many asylum seekers may have mental disabilities that would prevent them from understanding or adequately participating in their proceedings. Yet, the government does not acknowledge this or set forth any mechanism for identifying or accommodating such disabilities. DHS and DOJ should consider processes for determining when individuals have disabilities, and the type of accommodations that should be provided.

Failure to provide for reasonable modifications accommodating the disabilities of asylum seekers constitutes a violation of civil rights statutes protecting persons with disabilities. 29 U.S.C. § 794; 42 U.S.C. § 12102(1); 28 C.F.R. § 35.130; 6 C.F.R. §§ 15.1-15.70. The Rehabilitation Act prohibits government agencies from discriminating against individuals on account of qualifying disabilities. 29 U.S.C. § 794; 42 U.S.C. § 12102(1); 28 C.F.R. § 35.130. DHS regulations require that DHS agencies provide reasonable modification to disabled individuals, pursuant to the Act. 6 C.F.R. §§ 15.1-15.70.

DHS and DOJ must consider the effect of this rule on individuals with disabilities and discuss which safeguards and accommodations should be made in compliance with the Rehabilitation Act. DHS and DOJ must also consider what additional burdens this rule would create to identify and provide reasonable accommodations for individuals with disabilities. DHS and DOJ should remove any language in this rule that would prevent asylum seekers with disabilities from meaningfully accessing or participating in the asylum process.

V. The Proposed Changes to the I-589 Form Are Not Necessary and Violate the Paperwork Reduction Act

The proposed changes to the I-589 form violate the Paperwork Reduction Act (PRA). The PRA was enacted in part to reduce the burden paperwork can cause to

³¹ See *Franco-Gonzales v. Holder*, 767 F. Supp. 2d 1034 (C.D. Cal. 2010).

individuals and nonprofit institutions. See 44 U.S.C. § 3501(1). Here, the proposed changes to the I-589 result in four additional pages and numerous additional questions and sub-questions. The proposed I-589 form therefore demands significant additional information and time from asylum applicants, and by extension from nonprofits like ASAP that assist asylum seekers in completing the I-589 form.

This additional information is unnecessary because asylum applicants typically provide more documentation, including legal arguments prepared by an attorney, before and during an asylum interview or individual hearing. See 44 U.S.C. § 3508 (“Before approving a proposed collection of information, the Director shall determine whether the collection of information ... is necessary for the proper performance of the functions of the agency...”). Adding these questions to the I-589 effectively requires asylum seekers and their attorneys to submit the information twice: once with the initial application and again closer to the actual adjudication of the merits of the claim.

To the extent that the changes to the I-589 are intended to allow for pretermission of asylum applications without a hearing in immigration court, such a process would violate due process protections under the Fifth Amendment of the U.S. Constitution, as the added questions are mostly factual in nature. The ability to pretermit cases is therefore not a legitimate reason for increasing the collection of information on the I-589 form. See 44 U.S.C. § 3501 (listing “ensur[ing] that the creation, collection, maintenance, use, dissemination, and disposition of information by or for the Federal Government is *consistent with applicable laws...*” as one of the purposes of the Paperwork Reduction Act) (emphasis added). If the changes are not intended to replace a hearing on the factual bases of a person’s claim, then the additional questions on the I-589 only add an additional burden on asylum seekers to provide information that could be provided closer to, or during, the hearing. As such, the proposed changes are in violation of the Paperwork Reduction Act.

Conclusion

The proposed changes set forth in this Notice would drastically change the United States asylum system, making it impossible for many individuals fleeing persecution to ever receive asylum, withholding of removal, or protection under the Convention Against Torture. The sweeping changes represent a significant departure from well-established caselaw and from current practice and norms before DHS and DOJ. Many of the proposed changes also conflict with the INA, the U.S. Constitution, and international treaties. Despite these dramatic changes, the Notice does not clearly state its purpose or provide adequate justification or reasoning. Nor did the agencies allow for sufficient time for the public to respond to the 161-page Notice.

For these reasons, DHS and DOJ should withdraw the proposed changes in their entirety to ensure that the United States can remain a safe haven for those seeking asylum and other forms of protection.

Thank you for your time and consideration.

Sincerely,



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