IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HUMAN RIGHTS FIRST,
805 15th Street, N.W., #900
Washington, D.C. 20005

Plaintiff,

v.

CHAD F. WOLF,
as Acting Secretary
Department of Homeland Security
U.S. Department of Homeland Security
245 Murray Lane, S.W.
Washington, D.C. 20528;

WILLIAM P. BARR,
as Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530;

KENNETH T. CUCCINELLI,
as Acting Director
U.S. Citizenship and Immigration Services
20 Massachusetts Avenue, N.W.
Washington, D.C. 20529;

ANDREW J. DAVIDSON,
as Asylum Division Chief
U.S. Citizenship and Immigration Services
20 Massachusetts Avenue, N.W.
Washington, D.C. 20529

Defendants.

Civil Action No. 1:20-cv-3764

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

(Violation of the Administrative Procedure Act, the Immigration and Nationality Act, Federal Vacancies Reform Act, and United States Constitution)

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PRELIMINARY STATEMENT

1. This case concerns the Trump Administration's unlawful attempt to abrogate the refugee protections codified in the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 *et seq.*, through agency rulemaking.

2. The Refugee Act of 1980 amended the INA to establish the contemporary asylum system in the United States. A landmark piece of legislation, it formalized the U.S. refugee admissions process and expressly aligned the U.S. asylum scheme with international law. The Act was drafted with bipartisan Congressional support in "an atmosphere of calm, compassionate, and careful deliberations."[1] It passed unanimously in the Senate and with strong bipartisan support in the House of Representatives.

3. By design, the Refugee Act codified the United States' longstanding commitment to providing safe refuge for individuals fleeing persecution. Beyond offering asylum applicants protection from their persecutors, the Refugee Act also offers them a path to a new life and full integration into U.S. society, extending asylum status to the refugee's spouse and children and allowing asylees to apply for permanent residence. 8 U.S.C. §§ 1158(b)(3), 1159.

4. The Trump Administration has made no secret that it seeks to make the United States *inhospitable* for refugees fleeing persecution, in direct contradiction to Congress's intent in passing the Refugee Act, as well as to the Act's plain language and international law.

5. President Trump has publicly and falsely called the asylum system "ridiculous,"[2]

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[1] Joint Hearings Before the Subcomm. on Immigration and Policy of the S. Comm. on the Judiciary and Subcomm. on Immigration, Refugees and International Law of the S. Comm. on the Judiciary, 97th Cong. 4 (1981) (statement of Hon. Alan K. Simpson, Chairman, Subcomm. on Immigration and Refugee Policy).

[2] Donald J. Trump (@realDonaldTrump), Twitter (Mar. 31, 2019, 7:41 PM), https://twitter.com/realDonaldTrump/status/ 1112500287577694208.

and a "scam."[3] President Trump has (mis-)described those fleeing persecution as "some of the roughest people you have ever seen. People that look like they should be fighting for the UFC."[4]

6. The Trump Administration has done all it can, and much it cannot legally do, to gut the rights of refugees seeking protection in the United States as codified in the INA. Given the foundational place the Refugee Act occupies in the U.S. immigration system, it is unsurprising that human rights groups and individuals seeking protection have challenged such actions in court. And courts have stayed and ultimately rejected the Administration's unrelenting efforts to undermine the U.S. asylum system.[5]

7. Undeterred by its mounting losses, on December 11, 2020, the Department of Justice ("DOJ") and the Department of Homeland Security ("DHS") (together, the "Agencies") jointly promulgated a final rule entitled "Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review," 85 Fed. Reg. 80,274 (the "Rule"). The Rule

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[3] Michelle Mark, *Trump Mocks Asylum-Seekers at the Border, Says They 'Look Like They Should Be Fighting for the UFC,'"* Business Insider (Apr. 6, 2019, 10:48 AM), https://www.businessinsider.com/trump-mocks-asylum-seekers-calls-system-scam-2019-4.

[4] *Id*.

[5] *See generally, e.g., E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242 (9th Cir. 2020) (upholding injunction against rule barring asylum for individuals who enter the country between ports of entry); *O.A. v. Trump*, 404 F. Supp. 3d 109 (D.D.C. 2019), *appeal pending*, No. 19-5272 (D.C. Cir.) (vacating rule barring asylum for individuals who enter between ports of entry); *E. Bay Sanctuary Covenant v. Barr*, 964 F.3d 832 (9th Cir. 2020) (upholding injunction against rule barring asylum to individuals who have transited through a third country en route to the United States as inconsistent with the relevant statutes and arbitrary and capricious); *Cap. Area Immigrants' Rights Coal. v. Trump*, 471 F.Supp.3d 25 (D.D.C. June 30, 2020), *appeal pending* No. 20-5372 (D.C. Cir.) (vacating third country transit rule for the agencies' failure to follow notice and comment procedures); *De Pena-Paniagua v. Barr*, 957 F.3d 88 (1st Cir. 2020) (finding the Attorney General's decision in *Matter of A-B-* rests on arbitrary reasoning); *A.B.-B., et al. v. Morgan*, No. 20-cv-846, 2020 WL 5107548 (D.D.C. Aug. 29, 2020) (enjoining memorandum permitting agents of CBP from conducting credible fear interviews); *Casa de Md., Inc. v. Wolf*, No. 8-cv-2118, 2020 WL 5500165 (D. Md. Sept. 11, 2020), *appeal pending*, No. 20-2217 (4th Cir.) (preliminarily enjoining enforcement of changes to the procedure by which asylum seekers can obtain employment authorization documents).

eviscerates the right to asylum and related forms of relief in the United States and grossly violates the United States' obligation of non-*refoulement* (*i.e.*, the obligation not to return noncitizens to countries in which they would face persecution).

8. Eschewing the Administration's prior piecemeal approach, the Rule is a frontal attack on the entire U.S. asylum system. It seeks to exclude from protection, and from the benefits of asylum and related forms of relief, the very applicants the Refugee Act sought both to shield from persecution and place on a path to full integration into American life. It alters the U.S. asylum process at each of its stages, including credible fear and reasonable fear interviews and adjudications in full removal and affirmative asylum proceedings. It is both procedural and substantive in nature, touching on nearly every existing standard for the consideration of asylum claims. This attempt to rewrite the Nation's asylum laws through rulemaking, if allowed to take effect, would shutter access to the asylum system for nearly all men, women, and children who seek refuge in the United States. Our laws do not permit such a result.

9. The Agencies entrusted by Congress to implement the Refugee Act have instead taken a sledgehammer to it. Their method is illegal: to use agency rulemaking to overturn decades of legislative action in plain violation of the INA. The goal is impermissible: to make the United States inhospitable and unavailable for refugees, in contravention of Congressional intent. The thinking is transparent: to publish an all-encompassing, omnibus asylum regulation in the hope that if anything sticks after the inevitable legal challenge, the Rule will somehow still succeed in undermining refugee protection.

10. The Rule is unlawful in many respects.

11. First, the current Acting Secretary of Homeland Security, who putatively authorized promulgation of the Rule, does not lawfully occupy that role, as four district courts

have already held. The Rule is therefore invalid.

12. Second, the Administration has exceeded its delegated authority and violated Constitutional separation of powers. The INA affords the Agencies the power to take actions "necessary for carrying out"[6] Congressionally-enacted immigration law; it does not grant them the power to change asylum law at will. If Congress intends to delegate power over matters that have major political and economic impact, such as the ones covered by the Rule, it is required to do so expressly. It did not do so here. And for good reason. Congress cannot delegate such broad powers over immigration to the Executive, because the Constitution vests Congress with power over the admission of noncitizens.

13. Third, the Rule unlawfully abrogates the INA by making it virtually impossible for anyone to obtain asylum and turns Congressional action in passing the Refugee Act on its head. It creates insurmountable procedural barriers; newly defines the term 'refugee' so narrowly as to largely eliminate the category altogether; and establishes new, punitive bars to asylum that would render any remaining eligible refugees ineligible for asylum. It invents a smorgasbord of new exclusionary grounds that have no relation to the INA; sets forth procedural rules that deny a meaningful opportunity for a hearing; changes preliminary screening criteria so as to exclude persons with valid claims for asylum from ever pursuing their claims; and makes modifications that will have a non-individualized and negative impact on particularly vulnerable groups, such as victims of gender-based violence, victims of gang violence, unaccompanied children, and those appearing *pro se* in immigration proceedings. And this is just a sampling of the Rule's deleterious changes that fundamentally undermine Congress's intent in passing the INA.

[6] 8 U.S.C. §§ 1103(a)(1); 1103(a)(3); 1103(g)(2).

14. Fourth, the Agencies' failure to adhere to rulemaking procedures and lack of reasoned analysis are a master class in how to violate the Administrative Procedure Act, 5 U.S.C. § 706(2) ("APA"). The Agencies failed to address that the Rule's changes will lead to hundreds of millions in losses to the United States economy and fisc; failed to respond in any meaningful way to the tens of thousands of comments that they received identifying serious problems with the Rule changes; failed to provide reasoned analysis for their drastic policy changes; failed to cite evidence to support of those policy changes; and, among numerous other defects, failed to provide sufficient time to complete the rulemaking process.

15. If allowed to stand, the Rule will eviscerate the ability of noncitizens fleeing persecution to obtain asylum and related relief in the United States. The United States will instead send refugees back to countries where they will face persecution, torture, and possible death—the very outcome Congress expressly designed the INA to avoid.

16. Plaintiff respectfully requests a nationwide order setting aside the Rule, enjoining its application, and providing such additional and other relief as is just and proper.

PARTIES

17. Plaintiff Human Rights First is a 501(c)(3) nonprofit, nonpartisan international human rights organization with offices in Washington, D.C.; New York, New York; and Los Angeles, California. It has worked since 1978 to protect refugees' rights and advocate for U.S. government policies that respect human rights. Human Rights First serves asylum seekers across the country, via its three offices.

18. Human Rights First operates a Refugee Representation program, one of the largest programs for pro bono legal representation of asylum seekers in the nation, through which it works in partnership with volunteer lawyers at leading law firms to provide legal representation without charge to asylum applicants unable to afford paid counsel. Human Rights First's in-house

attorneys and legal services coordinators also represent asylum seekers in immigration-related proceedings focusing on asylum and other protection-based forms of immigration status. Over the last 40 years, Human Rights First has helped tens of thousands of individuals who came to the United States fleeing persecution, torture, and threats of death. In 2019, over 97 percent of Human Rights First's clients were granted relief. Assisting non-citizens with asylum applications is a vital component of Human Rights First's organizational mission and accounts for much of the services Human Rights First provides.

19. Defendant Chad F. Wolf purportedly assumed the position of Acting Secretary of Homeland Security ("the Secretary") on November 13, 2019. He purports to direct United States Immigration and Customs Enforcement ("ICE"), United States Citizenship and Immigration Services ("USCIS"), and United States Customs and Border Protection ("CBP"). He is sued in his official capacity.

20. Defendant William Barr is the Attorney General of the United States ("Attorney General"). He directs the DOJ. He is sued in his official capacity.[7]

21. Defendant Kenneth T. Cuccinelli currently holds the title of Senior Official Performing the Duties of the Director of USCIS, the agency that employs the asylum officers who conduct credible fear screening interviews to determine whether individuals may apply for asylum before an immigration judge. He is sued in his official capacity.

22. Defendant Andrew Davidson, the Asylum Division Chief within USCIS, is

[7] Mr. Barr submitted his resignation on December 14, 2020, to take effect on December 23, 2020. *See* Letter from William P. Barr (Dec. 14, 2020), https://www.washingtonpost.com/context/read-william-barr-s-resignation-letter-to-president-trump/2b0820cb-3890-498a-bd46-c1b248049c70/. Plaintiff understands that Jeffrey A. Rosen will assume the position of Acting Attorney General on that date. *See, e.g.*, Katie Benner, *William Barr Is Out as Attorney General*, N.Y. TIMES (Dec. 14, 2020), https://www.nytimes.com/2020/12/14/us/ politics/william-barr-attorney-general.html.

responsible for overseeing the credible fear screening process and asylum adjudication within USCIS. He is sued in his official capacity.

NATURE OF ACTION

23. This is an action arising under the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 *et seq.*, the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.*, and the United States Constitution.

24. Plaintiff seeks a declaratory judgment that the final Rule entitled "Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review," 85 Fed. Reg. 80,274 (Dec. 11, 2020) is arbitrary, capricious, contrary to law, and beyond the authority of the Attorney General and the Acting Secretary to promulgate under the INA, the APA, and our Constitution. Plaintiff further seeks an injunction prohibiting Defendants from enforcing the Rule and such additional and other relief as is just and proper. In the alternative, Plaintiff seeks a stay of implementation of the Rule under 5 U.S.C. § 705 pending final relief.

JURISDICTION AND VENUE

25. This Court has jurisdiction under 28 U.S.C. § 1331, as the claims in this case arise under federal statutes, including the INA, 8 U.S.C. § 1101 *et seq*., and the APA, 5 U.S.C. § 701 *et seq*. Specifically, this Court has jurisdiction to review Plaintiff's claims that the Rule is inconsistent with the INA, and thus that its promulgation was *ultra vires*.

26. The declaratory, injunctive, and other relief Plaintiff seeks is authorized by 28 U.S.C. §§ 2201 and 2202. In addition, a stay of implementation of the Rule pending judicial review is authorized by 5 U.S.C. § 705.

27. Venue in this District is proper pursuant to 5 U.S.C. § 703 and 28 U.S.C. § 1391(e) because a substantial part of the events or omissions giving rise to the claim occurred at or in this District. Defendants are headquartered in Washington, D.C., and upon information and belief,

Defendants' decisions regarding the Rule have taken place and are being made in the District of Columbia.

FACTUAL ALLEGATIONS

I. THE REFUGEE FRAMEWORK

A. The Refugee Act

28. Congress enacted the Refugee Act of 1980 to "bring United States refugee law into conformance" with international law, as outlined under the United Nations Convention Relating to the Status of Refugees and the 1967 United Nations Protocol Relating to the Status of Refugees (the "Protocol").[8] The "motivation for the enactment of the Refugee Act" was the Protocol,[9] "to which the United States has been bound since 1968."[10]

29. In adhering to the Protocol, the United States committed itself to the substantive provisions of the 1951 Convention, including the core principle of non-*refoulement* enshrined in Article 33(1) of that treaty. The United States further committed itself to providing protections to noncitizens fleeing persecution and seeking safe refuge.

30. For a noncitizen to be eligible for asylum, the noncitizen must establish that he or she is a refugee under the INA, defined as follows:

> [A]ny person who is outside any country of such person's nationality … who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.[11]

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[8] *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 436–37 (1987).

[9] *Id.* at 424.

[10] *Id.* at 432–33.

[11] 8 U.S.C. § 1101(a)(42)(A); *see id.* § 1158(a)(1).

31. To demonstrate a well-founded fear of persecution, a noncitizen need not show that harm is certain or even more likely than not; a 1-in-10 chance of persecution is sufficient under U.S. Supreme Court precedent.[12]

32. A noncitizen who is ineligible for asylum may still apply for other forms of relief, including withholding of removal if the applicant can show "that it is more likely than not that he or she would be persecuted on account of" a protected ground if removed from the United States.[13] Alternatively, a noncitizen may be eligible for relief under the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT") if the applicant can show "that it is more likely than not that he or she would be tortured if removed to the proposed country of removal."[14]

B. The Illegal Immigration Reform and Immigrant Responsibility Act

33. In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), Pub. L. No. 104–208, 110 Stat. 3009–546, which created an expedited removal process for the deportation of certain individuals deemed inadmissible under the INA.

34. Out of a concern that expedited removal would prevent refugees from seeking and obtaining asylum—and thereby abrogate the United States' obligations under domestic and international law—Congress implemented the "credible fear" screening process to ensure that

[12] *Cardoza-Fonseca*, 480 U.S. at 430.

[13] 8 C.F.R. § 1208.16(b)(2); *see also* 8 U.S.C. § 1231(b)(3).

[14] 8 C.F.R. § 1208.16(c)(2). The CAT was signed by a representative of the President in 1998, and Article 3 of the Convention was implemented that year by Congress with the passage of the Foreign Affairs Reform and Restructuring Act of 1998. *See Omar v. McHugh*, 646 F.3d 13, 17 (D.C. Cir. 2011). In 1990, CAT was ratified by the U.S. Senate. *See id.*

individuals subject to expedited removal proceedings would have meaningful access to the asylum process.

35. Under those provisions, if a noncitizen facing expedited removal indicates any fear of returning to his or her home country, an immigration officer must refer the asylum seeker for a "credible fear" interview to be conducted by an asylum officer.[15]

36. Congress designed the credible fear process as an essential safeguard to prevent summary removals of asylum seekers. To satisfy the credible fear standard, an individual seeking to avoid *refoulement* need only demonstrate a "*significant possibility*, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the [noncitizen] could establish eligibility for asylum."[16] By design, the standard used in this initial screening is less burdensome than the standard used in the full hearing that follows for applicants who pass the credible fear interview.

37. The intentionally low threshold for demonstrating a credible fear accounts for the reality that credible fear interviews typically take place shortly after asylum seekers have completed their—often traumatic—journeys to the United States, and are often conducted in border processing centers where asylum seekers generally do not have access to attorneys. The comparatively low barrier to success at the credible fear stage also allows for the fact that many asylum seekers arrive in the United States without the time, resources, or expertise to identify and gather fully, upon arrival, the evidence necessary to prevail on their eventual asylum application.

38. The credible fear process includes another important limitation. In light of the abbreviated nature of these interviews, lack of ability to present evidence, and lack of access to

[15] *See* 8 U.S.C. § 1225(b)(1)(B)(ii); 8 C.F.R. § 235.3(b)(4).

[16] 8 U.S.C. § 1225(b)(1)(B)(v) (emphasis added).

attorneys, if a person meets the definition of a refugee but may be subject to a bar to relief, officers must flag those potential bars for future adjudication but nonetheless refer the applicant for full removal proceedings.[17]

39. If an asylum officer finds that an applicant has a credible fear of persecution or torture, the applicant is taken out of the expedited removal process to ensure further consideration of his or her claim for asylum and related relief.[18] In the regular removal process, the applicant has the time to develop a full record in support of his or her claim; the right to secure the assistance of counsel; the right to present that claim and evidence before an immigration judge at a trial-like hearing; and the ability to appeal an adverse decision to the Board of Immigration Appeals and a federal court of appeals. *See id.*

II. THE TRUMP ADMINISTRATION'S HOSTILITY TO REFUGEES

A. Implementation of Anti-Refugee Immigration Policies

40. The Trump Administration did not issue the Rule in a policymaking vacuum. It issued the Rule against a backdrop of innumerable executive branch efforts since 2017 to erode protections for persons who seek asylum in the United States. It finalized the Rule after President Trump's electoral defeat. It set the effective day for 30 days after publication—instead of the 60 required by the Congressional Review Act ("CRA"), 5 U.S.C. § 801(a)(3), for major rules—so that it would go into effect before January 20, 2021, when the new Biden Administration is set to be sworn in.

41. In April 2018, the U.S. government began implementing its "zero-tolerance" policy on immigration. In announcing the policy, then-Attorney General Jefferson B. Sessions III stated

[17] *See* 8 C.F.R. § 208.30(e)(5).

[18] *See* 8 U.S.C. § 1225(b)(1)(B)(ii).

his unfounded conclusion that "[t]he situation at our Southwest Border [was] unacceptable," and "necessitate[d] an escalated effort to prosecute those who choose to illegally cross our border."[19] Mr. Sessions continued: "To those who wish to challenge the Trump Administration's commitment to public safety, national security, and the rule of law, I warn you: illegally entering this country will not be rewarded, but will instead be met with the full prosecutorial powers of the Department of Justice."[20]

42. The Administration's "zero-tolerance" policy resulted in the forcible separation of child migrants from their parents, ostensibly so that the government could criminally prosecute the parents for illegal entry or reentry.[21] Before federal courts enjoined the practice of separating families, DHS had separated over 4,300 children from their families. As of late October, the United States remained unable to reunite 545 of those children with their families.[22]

43. The Administration's "zero-tolerance" policy applied even to asylum seekers. And the Administration implemented a series of regulations and policies in an effort to curb refugee protection.

44. Those anti-asylum efforts have been far-reaching and, all too often, have been preliminary enjoined by courts in light of the plaintiffs' likelihood of success or vacated altogether. These efforts include, *inter alia*:

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[19] *Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry*, U.S. Dep't of Just. (Apr. 6, 2018), https://tinyurl.com/y96nsut6.

[20] *Id.*

[21] *See* Miriam Jordan, *How and Why "Zero-Tolerance" Is Splitting Up Immigrant Families*, N.Y. TIMES (May 12, 2018), https://tinyurl.com/y73urcyj.

[22] *See* Teo Armus & Maria Sacchetti, *The Parents of 545 Children Separated at the Border Still Haven't Been Found. The Pandemic Isn't Helping*, WASH. POST (Oct. 21, 2020 6:28 PM) https://www.washingtonpost.com/nation/2020/10/21/family-separation-parents-border-covid/.

a. denying asylum to individuals who did not seek asylum in a country they passed through *en route* to the United States if that country is also a party to the Refugee Convention (interim final rule enjoined as unlawful);

b. restricting the number of asylum seekers who can be processed at a point of entry (currently enjoined pending case resolution);

c. removing asylum seekers to a Northern Triangle country (*i.e.*, Guatemala, El Salvador, or Honduras) to seek asylum there under bi-lateral asylum cooperative agreements that do not meet the legal standard for a safe third country (litigation pending);

d. reversing longstanding precedent to not abuse the self-certification process through an unprecedented increase in decisions by the Attorney General (one such action, *Matter of A-B-*, is pending at summary judgment with the decision permanently enjoined as to its application to the credible fear interview);

e. denying entry to immigrants who would not be covered by health insurance (currently enjoined pending case resolution);

f. prohibiting asylum seekers from obtaining work authorizations until after their claims have been pending for one year and barring work authorization to asylum seekers based on their manner of entry (currently enjoined as to plaintiffs pending case resolution);

g. violating non-*refoulement* obligations by turning back migrants and asylum seekers at the border during the coronavirus pandemic—including unaccompanied children—without any screening or adjudication at all (currently enjoined pending case resolution);

h. designating CBP officers to conduct credible fear interviews in place of asylum officers (currently enjoined pending case resolution);

i. denying asylum to anyone who entered the United States between ports of entry (currently enjoined pending case resolution);

j. revising the lesson plan on Credible Fear of Persecution and Torture Determinations to heighten the credible fear standard (vacated); and

k. creating seven new criminal bars to asylum eligibility (currently enjoined pending case resolution).

45. In April 2019, President Trump offered DHS employees full pardons if they faced any criminal repercussions for implementing his illegal immigration policies at the border.

According to the former Trump Administration Chief of Staff for DHS, after being told repeatedly that it was illegal to stop those seeking asylum from entering the United States, President Trump's response was, "I don't care. The bins are full."[23]

46. Little wonder, then, that even without the Rule, the Administration has drastically reduced the number of resettled refugees and asylum seekers in the United States. Specifically, the monthly number of affirmative applications for asylum fell by 68 percent between March 2017 and September 2019.[24] And annual refugee arrivals fell by a staggering 86 percent between fiscal year (FY) 2016 and FY2020.[25]

47. In addition, the denial rate for asylum claims in immigration court has increased from 54.6 percent at the start of the Trump presidency to 71.6 percent in fiscal year 2020.[26] The Administration's anti-immigration policies have resulted in this roughly 30 percent increase in the rate of denial.

48. The current asylum grant rate in immigration court is approximately 40 percent lower than the average during the presidencies of Barack Obama and George W. Bush.[27]

B. Public Statements by Administration Officials

49. Public statements by the President and senior Executive Branch officials have

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[23] Republican Voters Against Trump (@RVAT2020), Twitter (Aug. 25, 2020, 1:46 PM), https://twitter.com/RVAT2020/status/1298315862563323907.

[24] Migration Policy Institute, U.S. Annual Refugee Resettlement Ceilings and Number of Refugees Admitted, 1980–Present (2020).

[25] Michael T. Dougherty, Annual Report 2020, Citizenship and Immigration Services Ombudsman 42 (2020).

[26] TRAC, Asylum Denial Rates Continue to Climb (Oct. 28, 2020), https://trac.syr.edu/immigration/reports/630/.

[27] Human Rights First, Grant Rates Plummet as Trump Administration Dismantles U.S. Asylum System, Blocks and Deports Refugees 1 (2020), https://www.humanrightsfirst.org/sites/default/files/AdministrationDismantlingUSAsylumSystem.pdf.

reinforced the basic theme of the Administration's immigration policy: to deter any and all immigration, including by asylum seekers.

50. For his part, President Trump has made no secret of his disdain for the Nation's duly-enacted immigration laws, including the asylum laws:

a. On June 21, 2018, the President tweeted: "We shouldn't be hiring judges by the thousands, as our ridiculous immigration laws demand, we should be changing our laws, building the Wall, hire Border Agents and Ice and not let people come into our country based on the legal phrase they are told to say as their password." Donald J. Trump (@realDonaldTrump), Twitter (June 21, 2018, 8:12 AM).

b. On June 30, 2018, the President tweeted: "When people come into our Country illegally, we must IMMEDIATELY escort them back out without going through years of legal maneuvering." Donald J. Trump (@realDonaldTrump), Twitter (June 30, 2018, 3:44 PM).

c. In the same speech, President Trump attacked the content of the asylum laws passed by Congress: "Think of it. Somebody walks into our country, reads a statement given by a lawyer, and we have a three-and-a-half-year court case for one person." The President called the laws that Congress has passed "incompetent, very, very stupid laws," and said that the immigration laws are "not archaic; they're incompetent. It's not that they're old; they're just bad."

d. On March 31, 2019, President Trump tweeted: "The Democrats are allowing a ridiculous asylum system and major loopholes to remain as a mainstay of our immigration system. Mexico is likewise doing NOTHING, a very bad combination for our Country. Homeland Security is being sooo very nice, but not for long!" Donald J. Trump (@realDonaldTrump), Twitter (Mar. 31, 2019, 7:41 PM).

e. In a speech on April 5, 2019, President Trump made clear that his Administration would eliminate the option of asylum, including for legitimate refugees. "So, as I say, and this is our new statement: The system is full. Can't take you anymore. Whether it's asylum, whether it's anything you want, it's illegal immigration. We can't take you anymore. We can't take you. Our country is full. Our area is full. The sector is full. Can't take you anymore, I'm sorry. Can't happen. So turn around. That's the way it is."[28]

[28] *Remarks by President Trump in Roundtable on Immigration and Border Security*, Calexico, California (April 5, 2019) <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-roundtable-immigration-border-security-calexico-california/>.

f. In that same speech, President Trump continued with the incredible claim that lawyers, officers of the court, help "gang members" fill out false asylum applications and that asylum is a "hoax." "Asylum — you know, I look at some of these asylum people; they're gang members. They're not afraid of anything. They have lawyers greeting them. They read what the lawyer tells them to read. They're gang members. And they say, 'I fear for my life. I…' They're the ones that are causing fear for life."[29]

51. The foregoing statements reflect a hostility at the highest levels of the Trump Administration to the Congressionally-enacted immigration system and asylum claims specifically, especially those filed by individuals from Central America. The statements also demonstrate the Administration's desire to block access to asylum by all possible means.

52. The numerous anti-refugee pronouncements and actions taken by the Trump Administration reinforce the conclusion that the Rule, rather than implementing the statutory scheme for asylum protection enacted by Congress, in fact is a mere pretext for ending asylum altogether.

III. ISSUANCE OF THE RULE

53. On June 15, 2020, USCIS, DHS, and the Executive Office for Immigration Review at DOJ issued a Joint Notice of Proposed Rulemaking entitled, "Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review," 85 Fed. Reg. 36,264. DHS and DOJ proposed to amend regulations governing credible fear determinations and provided a new standard of review. The Departments further proposed changes to the regulations regarding asylum, statutory withholding of removal, and withholding and deferral of removal under CAT. And they proposed amendments related to the standards for adjudication of applications for asylum and statutory withholding. The text of the proposed Rule ran 43, three-column pages.

54. The Agencies required any comments to be submitted within 30 days, *i.e.*, by

[29] *Id.*

July 15, 2020. The 30-day period ran over the July 4th holiday weekend and coincided with the challenging work environment created by the COVID-19 pandemic, compressing the time for response even further. The Agencies received over 87,000 comments with many of these comments highlighting first that 30 days was an insufficient period of time to comment fully on the proposed Rule, given its breadth and scope.

55. On December 11, 2020, Defendants published the final version of the Rule. In response to comments, the Agencies made only five minor adjustments to the text of their proposed regulations; they did not remove any provisions or change them in any real substantive way.[30]

56. The provisions of the Rule are identified below in the order that they appear and under the sub-headings used by the Agencies:[31]

1. Expedited Removal and Screenings in the Credible Fear Process

1) Changes current regulations to place noncitizens who pass credible fear interviews into INA Section 235(a) [8 U.S.C. § 1225(b)(1)] proceedings, instead of INA Section 240 [28 U.S.C. § 1229(b)(4)] proceedings, thereby severely restricting the due process and scope of relief afforded to those noncitizens;

2) Changes current regulations to limit immigration judges ("IJs") to consider only precedent binding on the jurisdiction in which they sit, a change that this Circuit has already enjoined as arbitrary and capricious when made in a different regulation;[32]

3) Eliminates duplication among DHS and DOJ functions;

[30] 85 Fed. Reg. at 80,275–76; *see also id*. at 80,274–75 (noting thirteen additional "non-substantive" changes and four changes related to accidental deletions or redundancies in the proposed regulations' text). In response to comments' concerns about the Rule's applicability to existing cases, the Agencies suggest that the Rule will only apply prospectively (although its language is less than clear). *See* 85 Fed. Reg. at 80,380. This was arguably the most noteworthy change between NPRM and the final Rule, as the Agencies "recognize[d] that the potential retroactivity of the rule was not clear in the NPRM." *Id.* Human Rights First expects that if the Rule goes into effect, individuals will seek to be added as plaintiffs to an amended complaint.

[31] 85 Fed. Reg. at 80,276–84.

[32] *Grace v. Barr*, 965 F.3d 883, 903 (D.C. Cir. 2020).

4) Raises the statutory withholding of removal screening standard and torture-related screening standard under the CAT regulations for noncitizens in expedited removal;

5) Changes the credible fear process to include:

(a) consideration of possibility of internal relocation in the home country and whether a bar to asylum applies, considerations that have never before been part of the credible fear process and that individuals in that process are entirely unequipped to handle; and

(b) requiring those who receive negative fear determinations to ask affirmatively for review by an immigration judge, a possibility that many will not understand.

2. *Form I-589, Application for Asylum and for Withholding of Removal, Filing Requirements*

1) Expands the definition of a "frivolous" application, which carries with it the extreme penalty of being barred for life from any immigration benefit:

(a) by changing the current regulatory definition that is premised on a fabricated material element to any finding of willful or willfully blind conduct even if it does not impact any material element of the filing;

(b) by changing the current regulation that permits only an IJ or the Board of Immigration Appeals ("BIA") to make a finding of frivolousness to allowing an asylum officer to make such a finding as well; and

(c) by permitting a finding of frivolousness if the application is deemed to be clearly prohibited by applicable law, even though "applicable law" in the asylum context is often highly complex and hotly debated even among experienced practitioners and courts;

2) Permits an IJ to deny an application for asylum, withholding of removal or CAT protection without any hearing at all and to instead decide the claim on the papers;

3) Limits the meaning of particular social groups ("PSGs") by announcing that a specific list of PSGs currently recognized under the law will no longer be cognizable;

4) Restricts the scope of political opinion to include only, "an ideal or conviction in support of the furtherance of a discrete cause related to political control of a state or a unit thereof" and expressly excluding numerous types of political opinions;

5) Restricts the concept of persecution to include only, "an extreme concept of a severe level of harm," and expressly excludes numerous types of actions the Agencies and the courts have routinely found to constitute persecution for decades;

6) Narrows the definition of nexus (the required connection between the persecution and one or more of the protected grounds in the refugee definition) to make it almost impossible to make the required showing by identifying categories of conduct that will not be considered to create a nexus sufficient to establish asylum or withholding of removal, including cases involving interpersonal animus; cases where the persecutor has not targeted or manifested an animus against other members of the particular social group; and cases where persecution is based on gender, gang affiliation, or resistance to gang recruitment;

7) Prohibits IJs from considering evidence of cultural stereotypes in making the nexus determination;

8) Expands what can constitute internal relocation in the home country, making it easier for a fact-finder unreasonably to conclude that the applicant should be returned to the home country;

9) Expands the types of acts that can constitute a discretionary basis for denial of an application, including unlawful entry in the United States, even though the INA expressly states that an individual is entitled to seek protection irrespective of the manner of entry; the noncitizen's failure to seek asylum in one country through which she transmitted before arriving in the United States, a change patently designed to deny applications of all those coming through the Mexican border; and the use of fraudulent documents to enter the United States, even though those fleeing persecution often have to do just that to escape their persecutors;

10) Bars refugees from asylum based on a finding that they had "firmly resettled" in a third country even if they were not offered permanent residence in another country, so long as an adjudicator decides they somehow "could have" sought some status in that country, and regardless of their safety in or ties to that country; and

11) Denies protection to refugees who have been tortured by a police officer or member of the military if an adjudicator deems the officer to be a "rogue official."

57. The final Rule was signed by Attorney General William P. Barr and Senior Official Performing the Duties of DHS General Counsel Chad R. Mizelle, on the authority of Purported Acting Secretary of Homeland Security Chad Wolf.

58. The Rule makes every part of the asylum process more difficult for applicants, as demonstrated by the following graphic. The result is that individuals' meritorious claims will be foreclosed at each stage of the new process.


Current Rule
VS
New Rule
Credible Fear Determination
New Rule More or Less Restrictive?
CFI with Asylum Officer
WoR CAT: "Significant Possibility"
Less
More
WoR CAT: heightens standard
Bars not considered at CFI
Less
More
Mandatory bars applied at CFI
Internal Relocation not considered until merits
Less
More
IR considered at CFI and burden on applicant
CFI Negative Decision
Review by IJ unless applicant declines it
Less
More
Requires affirmative review request
IJ can consider case law
Less
More
Limits consideration of case law
CFI Positive Decision
Placed into 240 proceedings (full immigration options)
Less
More
235 proceedings only (less available relief and process)
Consideration of Asylum Claim
Applicant gets opportunity for hearing before IJ judge
Less
More
IJ can deny application without merits hearing
Frivolous = deliberately fabricated
Less
More
Expands definition of frivolous
Claim Adjudication
Persecution definition intended to comport with international standards
Less
More
Severely limits "persecution" definition
Political opinion definition intended to comport with international standards
Less
More
Severely limits "political opinion" definition
PSG (Particular Social Group) can be defined throughout process
Less
More
Severely limits when PSG can be raised
PSG not subject to any regulatory bars
Less
More
PSG subject to numerous regulatory bars
Nexus
Less
More
Severely limits nexus
Admission of country conditions evidence
Less
More
Severely limits type of admissible evidence
Burden on government to establish internal relocation possible
Less
More
Shifts burden on internal relocation
Firm resettlement relatively limited
Less
More
Expands scope of firm resettlement as bar to asylum
Adjudicators vested with discretion
Less
More
Enumerates "discretionary" adverse factors that adjudicators are required to consider

IV. THE AGENCIES LACK AUTHORITY TO PROMULATE THE RULE

A. Acting Secretary Chad Wolf Lacked Authority to Promulgate the Rule

59. Under 8 U.S.C. § 1103, the Secretary of Homeland Security is charged with the administration and enforcement of immigration laws, including laws governing asylum. This power is limited, as addressed below, but the Agencies face an additional and independent barrier to the Rule's implementation: the purported Acting DHS Secretary has no authority to exercise the duties of that role. In addition, his tenure is in violation of the Federal Vacancies Reform Act ("FVRA"), 5 U.S.C. § 3345 *et seq.*

60. Below, Plaintiff provides a chronology of key events discussed in the paragraphs that follow to clarify the convoluted history.

April 9, 2019	Then-DHS Secretary Kirstjen Nielsen amends Delegation Order 00106 but leaves unaltered the provision that states that in the event of resignation of the DHS Secretary, the order of succession is governed by Executive Order 13753
April 10, 2019	Secretary Nielsen resigns and vacates office; Commissioner of U.S. Customs and Border Protection Kevin McAleenan assumes office in an acting capacity in contravention of Delegation Order 00106
November 8, 2019	Mr. McAleenan purports to amend Delegation Order 00106 to change the succession order so that Chad Wolf—then Under Secretary for Strategy, Policy, and Plans—is next in line for acting secretary
November 13, 2019	Mr. Wolf first purports to assume office in acting capacity
August 14, 2020	GAO report finds Mr. Wolf to be acting without authority
September 10, 2020	Mr. Wolf's nomination for DHS Secretary is submitted to Senate[33]; Administrator of the Federal Emergency Management Agency Peter Gaynor purports to exercise authority of DHS Secretary in issuing succession order placing Mr. Wolf in line (again) to assume acting role

[33] As of December 20, 2020, the Senate has not confirmed Mr. Wolf.

September 11, 2020	Federal district court (D. Md.) finds that plaintiffs are likely to succeed on merits of argument that Mr. Wolf is acting without lawful authority
September 29, 2020	Second district court decision (N.D. Cal.) finds that plaintiffs are likely to succeed on merits of argument that Mr. Wolf is acting without lawful authority
October 8, 2020	Third district court decision (D.D.C.) finds that plaintiffs are likely to succeed on merits of argument that Mr. Wolf is acting without lawful authority
November 14, 2020	A fourth federal district court (E.D.N.Y.) decision strikes down agency action by Mr. Wolf, finding him to be acting without lawful authority; Mr. Gaynor purports to exercise the authority of acting DHS Secretary in issuing another succession order that would again place Mr. Wolf in line to assume the acting role
November 16, 2020	Mr. Wolf, purportedly occupying the role of acting secretary, attempts to ratify all actions he has taken November 13, 2019, to this date
December 2, 2020	Chad Mizelle, Senior Official Performing the Duties of General Counsel, exercised signature authority purportedly delegated by Mr. Wolf to sign final Rule at issue in this case

61. Acting DHS Secretary Chad Wolf, who reviewed and approved the proposed rule and delegated signature authority to Chad Mizelle, did so without authority because he did not properly occupy the role of Acting Secretary either when the proposed Rule was issued or when the final Rule was promulgated.

62. At the time the last Senate-confirmed DHS Secretary Kirstjen Nielsen vacated office, DHS's Delegation Order 00106, issued pursuant to the Homeland Security Act ("HSA"), 6 U.S.C. § 101 *et seq.*, outlined that the order of succession was governed by Executive Order 13753 in the event of a vacancy.

63. When former Secretary Nielsen left in April 2019, Commissioner of U.S. Customs and Border Protection Kevin McAleenan assumed office in an acting capacity. But Mr.

McAleenan was not next in line pursuant to Executive Order 13753.

64. After assuming office, Mr. McAleenan purported to amend Delegation Order 00106 in November 2019 to change the succession order in the event of vacancy so that Mr. Wolf—then Under Secretary for Strategy, Policy, and Plans—would be next in line to take over as acting secretary.

65. Because Mr. McAleenan had not lawfully assumed the office of "Acting Secretary" of DHS pursuant to Delegation Order 00106, and because only the Secretary may designate such "further order of succession" pursuant to 6 U.S.C. § 113(g)(2), Mr. McAleenan's changes to the succession order that resulted in Mr. Wolf assuming the role were without authority.[34] In addition, even if Mr. McAleenan were properly designated Acting Secretary, his tenure would have expired in early November 2019 prior to his issuance of the amended succession order. Moreover, because Mr. McAleenan was not Senate confirmed, he lacked the authority to alter the order of succession.

66. Because the amendment to the order of succession that placed Mr. Wolf in the role of Acting Secretary was not validly promulgated, he lacked authority to assume that role when he purported to do so on November 13, 2019. In addition, even if Mr. Wolf were properly designated Acting Secretary, his authority would have expired in June 2020.

67. On September 10, 2020, Mr. Wolf's nomination for the role of DHS Secretary was submitted to the Senate. Under the FVRA, an official may not serve in an acting capacity if "the President submits a nomination of such person for appointment to such office."[35]

68. Also on September 10, 2020, but prior to the receipt by the Senate of Mr. Wolf's

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[34] *See, e.g. Batalla Vidal v. Wolf*, 16-cv-4756 & 17-cv-5228, 2020 WL 6695076 at *1 (E.D.N.Y. Nov. 14, 2020); U.S. Gov't Accountability Off., Legality of Service of Acting Secretary of Homeland Security and Service of Senior Official Performing the Duties of Deputy Secretary of Homeland Security 1 (Aug. 14, 2020), https://www.gao.gov/assets/710/708830.pdf.

[35] 5 U.S.C. § 3345(b)(1)(B).

nomination, Administrator of the Federal Emergency Management Agency Peter Gaynor purported to exercise the authority of DHS Secretary in issuing another succession order that would again place Mr. Wolf in line to assume the acting role if not for the restrictions of the FVRA.

69. On November 14, 2020, Mr. Gaynor again issued a succession order that, if valid, would place Mr. Wolf in the position of acting secretary.

70. On November 16, 2020, Mr. Wolf, purportedly occupying the role of Acting Secretary, attempted to ratify all actions he had taken from November 13, 2019, until that date. However, Mr. Wolf remained ineligible to serve in that role under the FVRA. In addition, Mr. Gaynor lacked authority to alter the succession order both because such action was taken "in the alternative"[36] and because he was not Senate confirmed.[37] As a result, Mr. Wolf had no authority under the HSA to assume the acting role.

71. Because Mr. Wolf exercised the powers of a vacant office when he approved the Rule, pursuant to the FVRA, the Rule "shall have no force or effect."[38] In addition, because Mr. Wolf approved the Rule without authority, it is invalid under the APA as agency action that is "not in accordance with law" or "in excess of . . . authority."[39]

B. The Agencies Do Not Have the Power to Change Asylum Law At Will

72. The Agencies lack delegated authority to make the changes to asylum law reflected in the Rule. The Agencies can point to no statutory delegation of authority that authorizes them

[36] *Batalla Vidal*, 2020 WL 6695076 at *9.

[37] *Nw. Immigrant Rights Proj. v. U.S. Citizenship & Immigration Servs.*, 1:19-cv-3283, 2020 WL 5995206, at *24 (D.D.C. Oct. 8, 2020).

[38] 5 U.S.C. § 3348(d)(1).

[39] *Casa de Md., Inc. v. Wolf*, No. 8:20-cv-02118, 2020 WL 5500165, at *23 (D. Md. Sept. 11, 2020).

to change asylum law at will so as to make it nearly impossible for an individual to obtain relief.

73. The Agencies' general authority to take actions "necessary for carrying out" the immigration laws passed by Congress, as provided in 8 U.S.C. §§ 1103(a)(1), 1103(a)(3), and 1103(g)(2) is not unfettered and cannot justify the actions taken here.[40] Specifically, this general power to implement immigration law does not encompass the power to take actions that override Congressional intent or that are otherwise inconsistent with the statutory scheme.[41] The Agencies elevate the purported goal of efficiency by eviscerating measures enacted to prevent *refoulement*, and thus their actions run afoul of the clear principle that executive agencies may not exercise their statutory authority to promulgate regulations that "pervert the meaning of the statute." *Aid Ass'n for Lutherans v. U.S. Postal Serv.*, 321 F.3d 1166, 1172, 1175 (D.C. Cir. 2003).

74. Likewise, the Agencies' attempt to rely on 8 U.S.C. § 1158 for the Agencies' actions is also unavailing. Section 1158(b)(2)(C) authorizes the Attorney General to establish "limitations and conditions" on asylum eligibility beyond those enacted by Congress, but that provision requires that any additional criteria be "consistent with" the text of § 1158 as a whole. *See E. Bay Sanctuary Covenant v. Barr*, 964 F.3d 832, 849 (9th Cir. 2020) (noting that "[t]he legislative history of IIRIRA emphasizes the importance Congress attached to the constraints on the Attorney General's discretion to prescribe criteria for asylum eligibility").

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[40] *See Colo. River Indian Tribes v. Nat'l Indian Gaming Comm'n*, 466 F.3d 134, 139 (D.C. Cir. 2006) ("An agency's general rulemaking authority does not mean that the specific rule the agency promulgates is a valid exercise of that authority.").

[41] *See, e.g.*, *Perez-Sanchez v. U.S. Att'y Gen.*, 935 F.3d 1148, 1156 (11th Cir. 2019) (the INA "empowers the Attorney General to 'establish such regulations . . . as the Attorney General determines to be necessary for carrying out this section.' 8 U.S.C. § 1103(g)(2). It does not allow the Attorney General to override Congress's grant of authority." (alteration in original) (citation omitted)); *Gulf Fishermens Ass'n v. Nat'l Marine Fisheries Serv.*, 968 F.3d 454, 465 (5th Cir. 2020) ("The grant of authority to promulgate 'necessary' regulations cannot expand the scope of the provisions the agency is tasked with 'carry[ing] out.'" (alteration in original) (citation omitted)).

75. The authority that the Agencies usurped in enacting the Rule is irreconcilable with the separation of powers. "Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935). Accepting the scope of authority the Agencies claim in this case would force the Court to consider whether such a broad delegation of authority violates separation of powers. It does.

76. Further, broad interpretation of the INA's general grants of authority would run afoul of the major questions doctrine, which is based on the expectation that Congress speaks clearly when it delegates the power to make "decisions of vast economic and political significance."[42] Congress did not expressly delegate to the Agencies to overhaul the asylum system. But had it wanted to do that, assuming *arguendo* that it could, it needed to do so expressly because the Rule undoubtedly implicates "question[s] of deep 'economic and political significance' that [are] central to this statutory scheme."[43] The Rule itself recognizes that it "raises novel legal or policy issues,"[44] and that the "changes are likely to result in fewer asylum grants annually."[45]

V. THE RULE EVICERATES ASYLUM IN THE UNITED STATES

77. Each of the Rule's provisions is designed to make it more difficult for a noncitizen to obtain refuge in the United States. Working together, also as designed, the provisions make it virtually impossible for a refugee to obtain humanitarian protection.

78. The provisions are unlawful, contrary to the plain language of the INA, arbitrary

[42] *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014).

[43] *King v. Burwell*, 576 U.S. 473, 486 (2015).

[44] 85 Fed. Reg. at 80,383 (citing Executive Order 12866(3)(f)(4)).

[45] *Id.* at 80,384.

and capricious, and violate international law.

A. The Rule Upends the Credible Fear Interview Process

79. Congress created the procedures for noncitizens seeking asylum at the border in IIRIRA. In IIRIRA, Congress balanced the desire for a swift process to remove most persons deemed to be inadmissible to the United States upon arrival at an airport or border with the need to ensure that noncitizens fleeing persecution not be faced with *refoulement* (*i.e.*, the forcible return of persons to a country where they are liable to be subjected to persecution).[46]

80. The expedited removal procedure in IIRIRA includes an initial screening to determine whether the individual has a "credible fear of persecution" if returned to his or her home country. It defines "credible fear" as "a significant possibility, taking into account the credibility of the statements made by the alien in support of [his or her] claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum."[47]

81. As the D.C. Circuit explicitly recognized earlier this year, IIRIRA's "comprehensive scheme" for identifying aliens with potentially valid asylum claims was intended to do more than simply ensure the "efficient removal of aliens with no lawful authorization to remain in the United States."[48] As the Court explained, IIRIRA "has a second, equally important goal: ensuring that individuals with valid asylum claims are not returned to countries where they could face persecution."[49]

82. The Agencies claim that they have "streamlined" this process even further than

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[46] H.R. 2202, 104th Cong. (1995); S. 1664, 104th Cong. (1996); INA § 235 (b)(1)(B)(v).

[47] 8 U.S.C. § 1225(b)(1)(B)(v).

[48] *Grace v. Barr*, 965 F.3d 883, 887, 902 (D.C. Cir. 2020).

[49] *Id.* at 902 (citing H.R. Rep. No. 104-469, pt. 1, at 158 (1996) ("Under this system, there should be no danger that an alien with a genuine asylum claim will be returned to persecution.")).

Congress did to reduce administrative burdens. The Agencies provide no evidentiary support for the proposition that the process needs to be streamlined further or that their changes accomplish such a goal, much less that their proposed approach would maintain the respect for U.S. treaty obligations to refugees that Congress strove to honor in the Refugee Act and IIRIRA. To the contrary, the Rule upends that careful balance in several ways, all weighed towards making asylum unobtainable in practice. It ensures the very *refoulement* that Congress worked prudently to avoid.

1. The Rule Denies a Full Immigration Hearing to Individuals Who Pass Credible Fear Interviews.

83. Under Provision 1.1 of the Rule, noncitizens who pass their credible fear interviews will be placed instead into "asylum-and-withholding-only" proceedings under INA Section 235 [8 U.S.C. § 1225(b)(1)]. Currently, any noncitizen who passes initial "credible fear" screenings, as well as certain asylum seekers who receive positive "reasonable fear" determinations, are placed into full removal proceedings, known as INA Section 240 [8 U.S.C. § 1229(b)(4)] proceedings.

84. Asylum-and-withholding-only proceedings do not allow asylum seekers to apply for other forms of immigration relief for which they may be (or become) eligible, nor do they include the procedural protections afforded in full removal proceedings.[50]

85. The Agencies concede that this change is a departure from a regulation, and the reasoning behind it, that has been in place since 1997.[51]

86. The NPRM recounted that in 1997, the "former Immigration and Naturalization Service ('INS') explained that it was choosing to initiate [full removal] proceedings in this context

[50] 85 Fed. Reg. 80,278 (citing Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10,312 (Mar. 6, 1997)).

[51] *Id.* at 80,288.

because the remaining provisions of [8 U.S.C. § 1225(b)] beyond those governing credible fear review, were specific to aliens who do not have a credible fear and because the statute was silent as to procedures for those who demonstrated such a fear."[52] That reasoning was and remains correct.

87. Although the relevant statutory language remains the same, the Rule disregards it and claims instead that the statute also permits those who pass credible fear interviews to be relegated to asylum-and-withholding-only proceedings.[53] This about-face is both contrary to law and unsupported by any basis for the change.

88. Section 1229a(a)(3) makes full removal proceedings the exclusive and default proceedings unless otherwise specified. Congress did not specify that refugees are not subject to full removal proceedings, and they therefore fall within the general rule of section 1229a that provides for full removal proceedings.

89. Congress specifically identified those asylum seekers who were to receive asylum-and-withholding-only proceeding hearings: stowaways[54]; Visa Waiver Program entrants (except "on the basis of an application for asylum"); and Guam and Northern Mariana Islands Visa Waiver Program entrants (also ineligible to contest their removal except on the basis of an application for asylum).[55] Nowhere else did Congress specify that individuals who pass credible fear interviews are to receive only limited immigration court proceedings.

90. The Conference Report to IIRIRA confirms this: "If the officer finds that the alien

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[52] NPRM, 85 Fed. Reg. at 36,266; *see also* 85 Fed. Reg. at 80,288 (citing the explanation in the NPRM).

[53] 85 Fed. Reg. at 80,299.

[54] 8 U.S.C. § 1225(a)(1), (2).

[55] *Id.* § 1182(l), (2).

has a credible fear of persecution, the alien shall be detained for further consideration of the application for asylum under *normal non-expedited removal proceedings.*"[56]

91. The Agencies contend that placement of asylum seekers into expedited removal proceedings "best aligns with the overall purpose of the expedited removal statute to provide a streamlined and efficient removal process for certain aliens designated by Congress."[57] Not so. The legislative aim is reflected in IIRIRA's plain language: once a noncitizen passes the initial fear screening, she is to be taken out of expedited removal proceedings precisely so that her claims for relief can be thoroughly considered. The Agencies' reasoning also ignores that in passing IIRIRA, Congress had two goals: ensuring that noncitizens inadmissible to the United States under 8 U.S.C. § 1182(a)(6)(C) and/or § 1182(a)(7) were not permitted to stay in the United States while also ensuring that refugees with legitimate asylum claims were not subject to *refoulement*.

92. The Agencies also contend that, "the better interpretation is to place aliens with positive credible fear determinations into limited asylum-and-withholding-only proceedings."[58] Even if the text were ambiguous, the Agencies would nonetheless have failed to engage in reasoned rulemaking because they do not explain why this interpretation is preferable. Nor could they. There is no basis to assert that preventing individuals from pursuing valid applications for relief is better policy. To be sure, it is a different policy, but that does not make it better.[59]

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[56] H.R. Rep. No. 104-828, at 209 (1996) (Conf. Rep.) (emphasis added).

[57] 85 Fed Reg. at 80,289.

[58] 85 Fed. Reg. at 80,288.

[59] For example, the Rule would effectively foreclose the ability of an immigration judge in Section 235 proceedings from considering T visa (visa provided to victims of human trafficking), U visa (visa provided to victims of crimes who have suffered physical harm and cooperate with law enforcement), and Violence Against Women Act (immigration relief for victims of domestic violence) relief. Certain noncitizens who legitimately fear persecution if returned to their home countries are better candidates for these visa options than for asylum.

2. The Rule Limits the Case Law IJs Can Consider

93. Provision 1.2 of the Rule requires immigration judgesreviewing credible fear determinations to apply precedents only of the Circuit in which the judge sits.[60] Currently, asylum officers and IJs can apply the most favorable precedent available.

94. Under USCIS policy, asylum officers conducting credible fear interviews generally apply "the interpretation most favorable to the applicant."[61] Thus, applicants either receive the benefit of the doubt—because officers apply the most favorable Circuit law—or are at least treated equally across Circuits because officers apply nationally uniform guidance.

95. Though the Administration earlier attempted to reverse this policy by requiring asylum officers to apply the "law of the circuit" policy instead, the D.C. Circuit rejected this change outright because the Administration had not acknowledged the change, much less explained why it was necessary. *Grace*, 965 F.3d at 901–02.

96. The Rule does not grapple with this legal reversal as to asylum officers, and instead seeks to limit the precedent that IJs can consider. But this new restriction encounters at least two difficulties. As in *Grace*, the Agencies still do not explain why it is necessary to limit the case law that those adjudicating applications—be they asylum officers or IJs—can consider. And, because of *Grace*, the Rule would now create the illogical situation that an asylum officer must apply the most favorable case law (as has been the case for decades) but the IJ reviewing the very same application would only be permitted to review precedent within the Circuit that he or she sits. The Agencies nowhere acknowledge, much less attempt to address, this discrepancy. Instead, they

[60] 85 Fed. Reg. at 80,277.

[61] *Grace v. Whitaker*, 344 F. Supp. 3d 96, 140 n.26 (D.D.C. 2018), *aff'd in part, rev'd in part and remanded sub nom. Grace v. Barr*, 965 F.3d 883 (D.C. Cir. 2020).

dryly decline to respond to "comments centering on an asylum officer's consideration of precedent as that issue was not addressed in this rule."[62]

97. This outcome is inefficient and illogical. Contrary to the Agencies' contention, this is not a "reasonable" rule.[63]

3. The Rule Heightens the Statutory Screening Standard for Withholding of Removal and CAT Protection

98. Provision 1.4 heightens the standard of proof in credible fear screenings from a significant possibility to a ***reasonable possibility*** that the applicant would be persecuted on account of a protected ground and eligible for withholding of removal, or that they would be eligible for relief under CAT. The credible fear standard for asylum would remain "significant possibility."[64]

99. This change violates the plain language of the INA. In the refugee context, Congress defined "credible" as "significant," not "reasonable."[65]

100. Section 1225(b)(1)(B) provides the only statutory guidance for interviews of refugees in the INA, and withholding and CAT are lesser forms of asylum protection. Accordingly, the Agencies have historically applied the same standard in credible fear interviews uniformly across all three forms of relief.[66]

101. The Agencies' move from a singular standard to two, despite the claimed rationale

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[62] 85 Fed. Reg. at 80,290.

[63] *Id.* at 80,291.

[64] *Id.* at 80,277.

[65] 8 U.S.C. § 1225(b)(1)(B)(v).

[66] *See* Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10,312, 10,318, 10,337 (1997) (treating asylum, withholding, and CAT the same for credible fear purposes).

of making the process more "streamlined and efficient,"[67] calls their reasoning into question. Their suggestion that it is "illogical and inefficient to screen for three potential forms of protection under the same standard" is absurd on its face. A single standard is necessarily more efficient, and the credible fear interview does not address the merits of a claim, only whether the claim should receive further review. And rather than increasing "harmoniz[ation]," the Rule creates a two-tiered, more complicated credible fear screening process without compelling justification.[68]

102. The Agencies claim that raising the standard would "serve to screen out more cases that are unlikely to be meritorious at a full hearing, which will allow the overburdened immigration system to focus on cases more likely to be granted."[69] But Congress designed the initial threshold screening standard to be comparatively low precisely because individuals are screened in exceedingly challenging circumstances (almost always, detention) following what are often long and treacherous journeys, and the initial screening is not meant to be a determination on the merits of any claim.[70] Congress also sought to further its goal of avoiding *refoulement*.[71] And the Departments implicitly recognize they are undercutting this goal.[72]

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[67] 85 Fed. Reg. at 80,276.

[68] The Agencies fall back on the fact that individuals' ultimate burden of proof on credible fear is higher with withholding of removal and CAT claims than with asylum claims. But adjudicators make that decision *after* the individual has the opportunity to develop their case, including by collecting evidence and having time to seek assistance of counsel. The preliminary question of whether someone is afraid is a vitally important one, and it demands a single and low bar.

[69] 85 Fed. Reg. at 80,293.

[70] *See id*. at 80,294 (quoting 142 Cong. Rec. S11491 (daily ed. Sept. 27, 1996) (statement of Senate Judiciary Committee Chairman Orrin Hatch) (acknowledging "Congress's intent to create 'a low screening standard for admission into the usual full asylum process'")).

[71] *See, e.g., Grace*, 965 F.3d at 902.

[72] *See id*. at 80,293 ("The Departments recognize that a higher screening standard may make it more difficult to receive a positive fear determination").

103. The Rule does note that the Trump Administration has attempted to implement this higher screening standard for individuals subject to the July 16, 2019 Interim Final Rule (third-country transit ban) and the ban on asylum for those who cross the border between ports of entry. Predictably, every court to have considered these changes has declared them unlawful and they are, as of this filing, barred from being implemented.[73]

4. The Rule Makes it Harder to Pass the Credible Fear Interview

104. Provision 1.5 makes it substantially harder to clear the credible fear process in at least three different ways:

a. It specifically incorporates into the credible fear determination an evaluation of the possibility of internal relocation (including placing the burden of proof on that issue on the applicant);[74]

b. It includes consideration of the existence of any bars to asylum;[75] and

c. It requires individuals who have been denied a credible fear interview to affirmatively ask for review of that decision by an immigration judge.[76]

105. Individually and together, these procedural changes alter the careful balance that Congress struck in IIRIRA. Altering that balance is beyond the authority that Congress delegated to DHS and DOJ.

i. Internal Relocation and Eligibility Bars

106. The Rule requires asylum officers to consider internal relocation and eligibility bars as part of the credible fear process.[77]

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[73] *E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242 (9th Cir. 2020); *O.A. v. Trump*, 404 F.Supp.3d 109 (D.D.C. 2019).

[74] 85 Fed. Reg. at 80,390.

[75] *Id.* at 80,390; 80,393.

[76] *Id.* at 80,392; 80,399.

[77] *Id*. at 80,390.

107. The 1951 Convention requires a holistic analysis of internal relocation that assesses both the possibility and the reasonableness of internal relocation based upon the applicant, persecutor, and country's specific facts.[78]

108. An asylum seeker first entering the country while fleeing persecution has limited or no opportunity to present the facts of his or her case, much less to gather and present country conditions or other evidence responsive to the question of whether internal relocation is viable.[79] For those reasons, this factor should not be adjudicated in a screening interview.

109. The Rule would also require asylum officers to consider eligibility bars enumerated in 8 U.S.C. § 1158 at the credible fear stage instead of the merits stage of the claim, and then determine whether the bar would also apply to withholding of removal or relief under CAT.

110. The bars depend upon fact-finding that is inappropriate at the credible fear screening stage. The bars are frequently and heavily litigated[80] and should be adjudicated at the merits stage when the applicant has the opportunity to submit proper records and briefing, and when the applicant is far more likely to have an attorney.

111. The Agencies claim that the Rule is designed "to improve the efficiency and integrity of the overall system."[81] To the contrary: placing additional review burdens on the individuals conducting credible fear interviews will lead to greater burdens on the system and less efficiency, as common sense dictates that interviews will now take longer and be more complex.

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

[79] 85 Fed. Reg. at 80,294 (summarizing comments).

[80] *Id.* (summarizing comment saying the same).

[81] *Id.* at 80,285.

Moreover, immigration officials will now have to assess the applicability of these bars for every single applicant screened during the credible fear process, whereas currently officials need only assess these bars as to those who pass the interview stage.

112. Many commenters expressed the concern that Provision 1.5 would essentially combine the credible fear interview with the merits hearing, which is especially problematic given that individuals arriving at the border are often tired and traumatized and have not had appropriate time to prepare.[82] The Agencies claim that these commenters "failed to acknowledge the multiple layers of review inherent in the screening."[83] This is not responsive. Relying upon a necessarily-constrained review process to catch inevitable errors instead of maintaining the status quo where eligibility bars and the possibility of intra-country relocation are decided as part of the fact-intensive, evidentiary stage of adjudication does not "improve the efficiency and integrity of the overall system."[84]

ii. Review of Denials

113. Under current regulations, a noncitizen's failure to indicate whether she or he wishes to seek review of an initial, negative credible fear determination is treated as a request for review.[85] This existing framework tilts in favor of review, as Congress intended.

114. Existing procedures require the immigration officer conducting the credible fear interview to inform the applicant of the right to IJ review. DHS has historically treated the applicant's silence as a request for IJ review because many refugees are in such a state of panic and bafflement that they are afraid to talk about their fears of return, or are unable to understand

[82] *Id.* at 80,294.

[83] *Id.* at 80,295.

[84] *Id.* at 80,285.

[85] 8 C.F.R. § 208.30(g); 8 C.F.R. § 208.31; 8 C.F.R. § 1208.30(g)(2).

the concept of IJ review of a negative credible fear finding. This is particularly true after an applicant has just been told that he or she has received a negative fear determination.

115. The Agencies ignore this reality. No doubt expecting that most noncitizens will not know to ask for further review, the Rule amends current regulations to require a noncitizen to ask affirmatively for review by an immigration judge if he or she receives a negative credible fear determination.[86]

116. This change violates the plain terms of the INA. Under 8 U.S.C. § 1225(b)(1)(B)(iii), "[t]he Attorney General shall provide *by regulation* and upon the alien's request for prompt review by an immigration judge of a determination under subclause (I) that the alien does not have a credible fear of persecution" (emphasis added). Creating a regulation that requires an individual request review by an immigration judge if his or her credible fear determination is denied would render the first clause of this provision—"by regulation"—superfluous.

117. The change is also arbitrary. In responding to the many comments on this issue, the Agencies' claimed, "it would be unusual for an alien who has already undergone" the preliminary stages of the process to "be unaware of the nature of the process."[87] The Agencies cannot seriously believe that, and they certainly provide no support for this counter-intuitive speculation. The United States' immigration system is "complex" and "a legal specialty of its own."[88] Individuals with little to no understanding of U.S. asylum law and procedure, who often cannot even understand English, and who typically receive information about the process through

[86] *Id.* at 80,392; 80,399.

[87] *Id*. at 80,296.

[88] *Padilla v. Kentucky*, 559 U.S. 356, 369 (2010).

telephonic encounters with officers conducting credible fear interviews and mediated by interpreters also working telephonically, cannot be expected to know asylum procedure. Moreover, often refugees are hesitant to sign papers that require affirmative consent because they cannot understand the content and fear that they are agreeing to be deported.

118. Additionally, the Agencies admit that they "do not maintain data on how many individuals refuse to request immigration judge review of a negative credible fear finding."[89] Indeed, they claim it is rare for individuals to refuse review by an immigration judge. If so, then what precisely the change is designed to do—other than capture those who do not know to ask for review—is unknowable. The Agencies' decision to proceed in promulgating this change despite their lack of factual support and instead on their personal "belie[f] [that] it is reasonable," is not sufficient under the APA.

B. The Rule Upends Consideration of Applications for Asylum and Related Relief

1. The Rule Unlawfully Defines "Frivolous" Too Expansively

119. Provision 2.1 of the Rule expands the definition of a "frivolous" application to encompass applications "filed without regard to the merits of the claim," and those that are "clearly foreclosed by applicable law."[90] If an asylum application is found to be frivolous, the consequences are extraordinary: a complete bar on the applicant from seeking *any* form of immigration to the United States *for life*.[91] Thus, the INA provides that for the bar to apply the applicant must have "knowingly made a frivolous application for asylum."[92]

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[89] *Id.*

[90] 85 Fed. Reg. at 80,389, 80,398.

[91] 8 U.S.C. §1158(d)(6).

[92] *Id.*

120. For decades, administrative regulations have provided that an asylum application is deemed "frivolous" only if it contains "direct fabrication of material elements."[93]

121. The Rule also adds an interpretation of "knowingly" to include willful blindness; allows asylum officers to make frivolousness findings in affirmative applications; and removes the requirement that immigration judges provide an opportunity for the applicant to account for discrepancies or possible inaccuracies.[94]

122. The Agencies contend that the current definition "did not adequately capture the full spectrum of claims that would ordinarily be deemed frivolous,"[95] and that the new definition will "disincentivize[] the filing of meritless asylum application," which presently "take up significant immigration court resources."[96] They make this assertion without any evidentiary support, much less a quantification of the allegedly "frivolous" applications that are supposedly clogging the courts. They do not identify what percentage of claims are in fact ultimately determined to be frivolous. Presumably, if frivolous applications were indeed taking up significant resources, that problem would have been quantified somewhere previously.

123. Against this dubious benefit, the Agencies do not even attempt to weigh the attendant harms. They simply state that "the Departments do not believe that the proposed rule allows immigration judges or asylum officers to treat legitimate asylum requests as frivolous."[97] But asylum law is complex and changes over time—making whether a claim is "clearly foreclosed

[93] *Id.*; 8 C.F.R. § 208.20.

[94] 85 Fed. Reg. at 80,279.

[95] *Id.* at 80,301.

[96] *Id.* at 80,300.

[97] *Id.* at 80,299.

by applicable law" far from clear to a layperson.[98] At the very least, the Agencies are required to analyze the effect the Rule changes will have in deterring meritorious applicants and/or *increasing wrongful denials* of asylum or other protection from removal.[99] This they did not do.

124. Moreover, the Agencies' analysis misses the important point that the frivolousness bar is not meant to reach the merits of the claim. Indeed, the INS recognized that a finding of frivolousness should be avoided if even a single factor suggests a meritorious asylum claim.[100]

2. The Rule Permits IJs To Deny Asylum Without a Hearing

125. Provision 2.2 of the Rule permits immigration judges to deny applications for asylum, statutory withholding of removal, and protection under the CAT regulations without any hearing if the applicant does not establish a *prima facie* case for relief or protection under applicable laws and regulations.[101]

126. This provision is a violation of the plain language of the INA. Section 1229a provides that, "[a]n immigration judge *shall* conduct proceedings for deciding the inadmissibility or deportability of an alien."[102] And it requires that, "[t]he immigration judge *shall* administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any

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[98] Asylum Decisions Vary Widely Across Judges and Courts - Latest Results, TRAC Immigration (Jan. 13, 2020), https://trac.syr.edu/immigration/reports/590/; Record Number of Asylum Cases in FY2019, TRAC Immigration (Jan. 8, 2020), https://trac.syr.edu/immigration/reports/588/.

[99] *See, e.g., E. Bay*, 964 F.3d at 851 (failure "to consider an important aspect of the problem" is arbitrary and capricious).

[100] *See Grijalva v. Ilchert*, 815 F. Supp. 328, 331 (N.D. Cal. 1993) (drawing a distinction between frivolousness and the merits of the claim and barring a frivolous finding if the claim presented at least one fact related to a statutory ground for asylum) (citing an INS memo)); S. Rep. No. 104-249, at 2 (1996).

[101] 85 Fed. Reg. at 80,397.

[102] 8 U.S.C. § 1229a(a)(1) (emphasis added).

witnesses."[103]

127. The Supreme Court has recognized that "shall" is "mandatory" and "normally creates an obligation impervious to judicial discretion."[104] Congress did not intend for these proceedings to exist only on paper, and Section 1229a reinforces the right to a hearing repeatedly.[105]

128. Current regulations, which the Rule would supplant, reflect these statutory requirements. Under these regulations, "the immigration judge shall . . . [a]dvise the respondent that he or she will have a reasonable opportunity to examine and object to the evidence against him or her, to present evidence in his or her own behalf and to cross-examine witnesses presented by the government."[106] And "[d]uring the removal hearing, the alien shall be examined under oath on his or her application and may present evidence and witnesses in his or her own behalf."[107]

129. Multiple commenters raised the related issue that immigration judges have a heightened duty to develop the record when applicants are *pro se*.[108] The Agencies failed to

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[103] *Id.* (emphasis added). The Rule also violates 8 U.S.C. § 1181, which explicitly lists the categories of noncitizens who will be denied admission to the United States without a hearing. The list does not include noncitizens seeking asylum and other forms of relief.

[104] *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998); *see also Murphy v. Smith*, 138 S. Ct. 784, 787 (2018) ("[T]he word 'shall' usually creates a mandate, not a liberty."); *Lopez v. Davis*, 531 U.S. 230, 241 (2001) (noting Congress' "use of a mandatory 'shall' . . . to impose discretionless obligations").

[105] *See, e.g.*, 8 U.S.C. §1229a(b)(4) (guaranteeing that "the [asylum seeker] shall have a reasonable opportunity to examine the evidence against the [asylum seeker], to present evidence on the [asylum seeker]'s own behalf, and to cross examine witnesses presented by the Government" and requires that "a complete record shall be kept of all testimony and evidence produced at the proceeding").

[106] 8 C.F.R. § 1240.10.

[107] *Id.* § 1240.11.

[108] *See, e.g.*, Catholic Legal Immigration Network, Inc., Comment Letter on Proposed Rule, 15 (July 15, 2020), https://beta.regulations.gov/comment/EOIR-2020-0003-4754; CAIR

acknowledge or address the commenters' concerns in the final Rule.

130. In its Proposed Rule, the Agencies claimed that "current regulations expressly note that no further hearing is necessary once an immigration judge determines that an asylum application is subject to *certain grounds* for mandatory denial."[109] But the fact that an application can be denied without a hearing for "certain grounds" enumerated in the INA itself does not give the Agencies authority to create new grounds for mandatory denial that the INA does not enumerate.

131. The Rule's reliance upon *Zhu v. Gonzales*, 218 F. App'x 21 (2d Cir. 2007) is similarly unconvincing. In *Zhu*, the Court granted the applicant a 30-day continuance to address the deficiencies identified in the application and only denied the application after the applicant failed to submit a brief or request an extension for almost 60 days.[110] The Rule, in contrast, provides for only ***ten days'*** notice.[111]

132. Moreover, in the NPRM, the Agencies stated that "the Departments do not believe that requiring a sufficient level of detail to determine whether or not an alien has a prima facie case . . . would necessarily require a voluminous application."[112] But in *Matter of Fefe*, the Board of Immigration Appeals found "the full examination of an applicant to be an essential aspect of the asylum adjudication process for reasons related to fairness to the parties and to the integrity of

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Coalition, Comment Letter on Proposed Rule, 37 (July 15, 2020), https://beta.regulations.gov/comment/EOIR-2020-0003-6001.

[109] 85 Fed. Reg. at 36,277.

[110] *Zhu*, 218 F. App'x at 23.

[111] 85 Fed. Reg. at 80,397.

[112] NPRM, 85 Fed. Reg. 36,277 n.26.

the asylum process itself."[113] "At a minimum, we find that the regulations require that an applicant for asylum and withholding take the stand, be placed under oath, and be questioned as to whether the information in the written application is complete and correct."[114] The Rule attempts to cast aside this decision on the basis that the regulations at issue there are no longer in effect.[115] The Board of Immigration Appeals examined this very issue in *Matter of E-F-H-L-*, and concluded that the language of the current regulations "does not differ in any material respect from that in the prior regulations. We therefore see no reason to disturb our conclusion in *Fefe*."[116] The Agencies' attempt to run away from these opinions is unpersuasive.

133. The opportunity to be heard is essential in the asylum context, as in so many others, and Provision 2.2 impermissibly seeks to stifle it.

134. In addition, the Rule's "pretermission" procedure violates Article 25 of the Refugee Convention, which requires states to provide administrative assistance to allow individuals claiming refugee status to demonstrate the validity of their claims.

3. The Rule Defines "Particular Social Group" Too Narrowly

135. Provision 2.3 constricts the definition of "particular social group."

136. The Refugee Act defines a refugee, in part, as someone "who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country

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[113] 20 I. & N. Dec. 116, 118 (BIA 1989).

[114] 20 I. & N. Dec. 116, 118 (BIA 1989).

[115] 85 Fed. Reg. at 80,304.

[116] 26 I. & N. Dec. 319, 323 (BIA 2014). Consistent with this Administration's pattern of hostility to immigrants, Attorney General Sessions vacated the favorable *Matter of E-F-H-L-* after the applicant withdrew his application. 27 I&N Dec. 226 (A.G. 2018). The Agencies' attempt to support denying asylum without a hearing by citing to another arbitrary action by this Administration is unavailing. [117] 8 U.S.C. § 1101(a)(42)(A); *see id.* § 1158(a)(1).

because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."[117]

137. The Rule changes every portion of this definition, constricting each to such an extent that it would be nearly impossible for any individual to meet all the new criteria.

138. The BIA first defined the term "particular social group" as requiring an immutable characteristic.[118] That definition is consistent with United Nations High Commissioner for Refugees ("UNHCR") guidance on the definition of that term.

139. In the decisions issued years after *Matter of Acosta*, the Board of Immigration Appeals and the Attorney General have attempted to add additional requirements to the definition, including "social distinction" and "particularity."[119] The Rule codifies the requirements of social distinction and particularity. The Agencies do not provide any basis for this change in the interpretation of particular social group, nor could they, as the interpretation is an unreasonable interpretation of the INA.

140. The Rule also provides that claims based on membership in a particular social group "consisting of or defined by" a "nonexhaustive" list of nine "circumstances" will not be favorably adjudicated.[120]

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[117] 8 U.S.C. § 1101(a)(42)(A); *see id.* § 1158(a)(1).

[118] *Matter of Acosta*, 19 I. & N. Dec. 211, 212 (BIA 1985).

[119] *Matter of C-A-*, 23 I. & N. Dec. 951, 956–57 (BIA 2006), *Matter of S-E-G-*, 24 I. & N. Dec. 579, 586 (BIA 2008); and *Matter of E-A-G-*, 24 I. & N. Dec. 591, 594–95 (BIA 2008).

[120] 85 Fed. Reg. 80,385; 80,394. Those "circumstances" are: 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) the targeting of the applicant for criminal activity for financial gain 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 alien returning from the United States. *Id.*

141. The Rule's new categories of non-cognizable particular social groups encapsulate the most common types of asylum claims. By proposing to bar relief for asylum seekers with claims based on the nine enumerated grounds, the Administration seeks to eliminate relief for a plurality of asylum seekers.

142. This exclusion of otherwise valid claims is contrary to international law, under which there is no authority to deem a group defined by an immutable characteristic as not constituting a "particular social group."

143. But even looking beyond the ill-intent, the logic of the proposed changes to the definition of cognizable particular social groups is faulty. For example, contrary to what the Rule suggests, an individual may suffer particular persecution even when a type of crime or violence is high in the country.[121] The other exclusions are similarly overbroad.

144. The Agencies do not explain why they have changed prior agency definitions of the term particular social group, or whether they could have explored remedies to address the purported need that remained with the ambit of the prior interpretation. For example, DHS has previously interpreted the term particular social group to include women who are the victims of domestic violence in countries in which the government cannot, or will not, come to their aid.[122] The Agencies do not provide any basis for scuttling that interpretation altogether and making it

[121] *See, e.g., Juan-Pedro v. Sessions*, 740 F. App'x 467, 472 (6th Cir. 2018) (recognizing membership in a particular social group and nexus requirement as satisfied even though asylum seeker fled from country with widespread violence).

[122] DHS's Supplemental Brief, *Matter of A-R-C-G-*, 26 I. & N. Dec. 388 (BIA 2014) (stipulating that the applicant was a member of the particular social group of married women in Guatemala who are unable to leave their relationship); DHS's Supplemental Brief, *Matter of R-A-*, 23 I. & N. Dec. 694, 2005 BIA LEXIS 1 (BIA Jan. 19, 2005) (arguing that victims of domestic violence can qualify for asylum as members of a particular social group); *see also Matter of R-A-*, 24 I. & N. Dec. 629 (A.G. 2008); *Matter of L-R-*, 27 I. & N. Dec. 405 (A.G. 2018). Notably, even the Attorney General's recent decision in *Matter of A-B-* left the door open for a case-by-case particular social group analysis. 27 I. & N. Dec. 316 (A.G. 2018).

virtually impossible for women to obtain any form of asylum relief at all on the basis of their membership in a particular social group.

145. The Agencies do not offer any data, explanations, or alternatives to gutting asylum relief on the basis of particular social groups, or any demonstration that they have considered the weighty consequences of the change.

146. Although the Rule includes hedging language such as "generally" and "in general," the explanation provided by the Agencies eliminates any doubt as to the Rule's sweeping nature. They explain that the change is meant to "establish[] clear guidelines for adjudicators and parties regarding the parameters of particular-social-group claims."[123] In other words, the Agencies offer this list to ensure that these claims are consistently denied, resulting in "a more uniform approach toward adjudicating such claims."[124]

147. The Agencies respond to the myriad comments expressing concern that the listed factors will make it virtually impossible to secure asylum based on membership in particular social group by emphasizing that "the Departments do not entirely foreclose the possibility of establishing an asylum claim on those bases."[125] But the contention that this provision is merely "general" guidance that will aid case-by-case analysis is impossible to square with the Agencies' assertion that the factors will "ameliorate stressors" on the system by helping the Agencies "better allocate limited resources in order to more expeditiously adjudicate" claims.[126]

[123] 85 Fed. Reg. at 80,312.

[124] *Id.*

[125] *Id.* at 80,314.

[126] *Id.*

4. The Rule Defines "Political Opinion" Too Narrowly

148. Provision 2.4 of the Rule interprets the broad term "political opinion" within the definition of refugee to mean only an opinion supporting "a discrete cause related to political control of a state or a unit thereof."[127] This narrow definition includes only those opinions related to regime-change. Other political opinions—taking a position on how the government should tax it citizens, expressing opinion through participation in a labor union, supporting the equal rights of persecuted political groups, exposing corruption, and on and on—are excluded, even though courts have already ruled that each of these examples constitutes covered "political opinion" under that term's plain and ordinary meaning.[128]

149. The Refugee Act provides that persecution on account of "political opinion" is a basis for asylum.[129] While the statute does not define political opinion, its plain and ordinary meaning is straightforward. According to the dictionary the Agencies' rely on, "political" is defined as, "[o]f or relating to government, a government, or the conduct of government" as well as "of, relating to, involving, or involved in politics and especially party politics" and "involving or charged or concerned with acts against a government or a political system."[130] And "Opinion"

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[127] *Id*. at 80,385; 80,386; 80,394; 80,395.

[128] *Hu v. Holder*, 652 F.3d 1011, 1018 (9th Cir. 2011) (holding that participation in a labor union can be political activity); *Fedunyak v. Gonzales*, 477 F.3d 1126, 1129 (9th Cir. 2007) (exposing corruption of high-level official to local police is political activity); *Garcia-Ramos v. Immigration & Naturalization Serv.*, 775 F.2d 1370, 1374 (9th Cir. 1985) (holding that evidence of membership and activities in persecuted political groups demonstrated political activity).

[129] 8 U.S.C. § 1101(a)(42).

[130] *Political* Definition, Merriam-Webster, https://www.merriamwebster.com/dictionary/political.

is defined as "a view, judgment, or appraisal formed in the mind about a particular matter."[131]

150. The requirement that political opinion be against "the state or a legal entity thereof" also ignores the reality that often those in control of a town or region (or even the country) may well not constitute "the state" but nonetheless supplant the state for purposes of expressing political opinion.[132]

151. The Rule further limits the broad term "political opinion" by expressly excluding specific types of political opinions, including those based on gender and persecution by gangs.[133] These exclusions are not interpretations of "political opinion," but rather a fundamental rewriting of that provision of the Refugee Act. For example, under the Rule, an individual tortured on account of her political opinion that women should be allowed the right to vote would not fit the definition. Yet, there is no definition of the term "political opinion" that can be said to exclude that view as political, given that it is "of or related to government, a government, or the conduct of government" and "involving, or involved in politics."[134]

152. The Agencies claim that "all but one of those definitions [of the word political found in Meriam-Webster] relates specifically, and often solely, to governments."[135] But the unremarkable fact that one dictionary has some definitions of the terms political that include the

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[131] *Opinion* Definition, Merriam-Webster, https://www.merriam-webster.com/dictionary/opinion.

[132] Ericka Welsh, *The Path of Most Resistance: Resisting Gang Recruitment as a Political Opinion in Central America's Join-or-Die Gang Culture*, 44 Pepp. L. Rev. 1083, 1097 (2017) (describing how third generation gangs in Central America control ungoverned territory and usurp the role of the state, becoming "the true arbiters of internal order" (citation omitted)).

[133] 85 Fed. Reg. at 80,385–86; 80,395.

[134] *Political* Definition, Merriam-Webster, https://www.merriamwebster.com/dictionary/political.

[135] 85 Fed. Reg. at 80,326.

word government is no reason to upend decades of broader interpretation of the term political opinion. That also ignores the reality that the definition of political from the dictionary they themselves rely on encompasses activity far greater than those related to regime change.

153. Many comments highlighted that the narrow term of political opinion is at odds with decades of case law interpreting the term more broadly.[136] While the Agencies are at pains to deny animus towards refugees, a dubious proposition at best, they do not address or rebut commenters' concern that in purporting to "provide clarity," the Agencies conveniently chose to ignore all favorable precedent supporting a broader definition.[137]

154. Moreover, the narrow definition of political opinion is squarely at odds with international law. Consistent with the term's meaning, international law defines "political

[136] *See* Ayuda Legal, *Comment Letter on Proposed Rule*, 24 (July 15, 2020), https://beta.regulations.gov/comment/EOIR-2020-0003-6076 ("The envisioned rule defines what is 'political' much more narrowly than existing case law or the UN Convention.… The leader of a conservation group who is advocating for stronger environmental protections would not be recognized [under the rule], nor would women seeking enfranchisement or rights or LGBTQ individuals advocating for equal rights."); *see also* American Gateways, *Comment Letter on Proposed Rule*, 36-37 (July 15, 2020), https://beta.regulations.gov/comment/EOIR-2020-0003-5991; Asylum Seeker Advocacy Project, *Comment Letter on Proposed Rule*, 30 (July 15, 2020), https://beta.regulations.gov/comment/EOIR-2020-0003-6043; Catholic Charities Community Services, *Comment Letter on Proposed Rule*, 47-48 (July 14, 2020), https://beta.regulations.gov/comment/EOIR-2020-0003-5021; Catholic Legal Immigration Network, Inc., *Comment Letter on Proposed Rule*, 26-27 (July 15, 2020), https://beta.regulations.gov/comment/EOIR-2020-0003-4754; Human Rights First, *Comment Letter on Proposed Rule*, 6-8 (July 15, 2020), https://beta.regulations.gov/comment/EOIR-2020-0003-6013; National Citizen and Immigration Services Council 119, *Comment Letter on Proposed Rule*, 13 (July 15, 2020), https://beta.regulations.gov/comment/EOIR-2020-0003-6096; Roundtable of Former Immigration Judges, *Comment Letter on Proposed Rule*, 16 (July 13, 2020), https://beta.regulations.gov/comment/EOIR-2020-0003-4734; Immigrant Refugee Assistance Project, *Comment Letter on Proposed Rule*, 22-24 (July 15, 2020), https://beta.regulations.gov/comment/EOIR-2020-0003-5998; Tahirih Justice Center, *Comment Letter on Proposed Rule*, 35-37 (July 15, 2020), https://beta.regulations.gov/comment/EOIR-2020-0003-4756; UNHCR, *Comment Letter on Proposed Rule*, 35 (July 15, 2020), https://beta.regulations.gov/comment/EOIR-2020-0003-5471.

[137] *See* 85 Fed. Reg. at 80,325.

opinion" as an opinion about the nature, policies, or practices of a state or of an entity that exercises authority in a state. One refugee scholar succinctly defined the term as "any opinion on any matter in which the machinery of state, government, and policy may be engaged."[138] Thus, international law plainly contemplates that even broadly framed views can be political, and that opinions related to how power is distributed in society—even if not directly related to control of the state—fall within the ambit of the term.

155. In addition to glossing over contradictory federal court decisions and international law, the Agencies also ignored their own guidance. Lesson plans for asylum officers prepared by the USCIS directorate known as Refugee, Asylum and International Operations ("RAIO") are publicly available. Inexplicably, the Rule's definition of political opinion is contrary to the RAIO lesson plan, and the Rule gives no explanation, much less a justification, for this contradiction. The RAIO lesson plan provides that "expression of a political opinion should not be viewed only in the narrow sense of participation in a political party or the political process. The meaning of political opinion in the refugee definition "'should be understood in the broad sense, to incorporate . . . any opinion on any matter in which the machinery of state, government and police may be engaged.'"[139]

156. The RAIO lesson plan recognizes that an individual can establish a nexus on account of political opinion regarding a non-state actor.[140]

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[138] Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* 87 (2007).

[139] U.S. Citizenship & Immigration Servs., RAIO Directorate – Officer Training: RAIO Combined Training Program 28 (2019)(quoting Guy Goodwin-Gill, *The Refugee in International Law* 30 (1983)), https://www.uscis.gov/sites/default/files/document/foia/Nexus_minus_PSG_RAIO_Lesson_Plan.pdf.

[140] *See, e.g., id.* at 29.

157. The Agencies claim that their definition of political opinion adheres to the definition espoused by UNHCR.[141] Hardly. UNHCR shot back at this assertion decisively in its comments to the NPRM:

> As a preliminary matter, UNHCR observes that the Proposed Rule's background section cites to the UNHCR Handbook to support an overly-restrictive reading of 'political opinion'. The Proposed Rule asserts that political opinion should be analyzed in terms of "holding an opinion different from the Government or not tolerated by the relevant government authorities." UNHCR agrees, as does the United States Supreme Court, that its Handbook is a valuable resource in understanding international refugee law obligations. UNHCR notes, however, that this single quote, without context, fails to present our full position. A more complete reading of the Handbook and its Guidelines on International Protection, which complement the Handbook, reveals UNHCR's view that political opinion is an expansive concept encompassing a wide range of beliefs and convictions. In subsequent Guidelines on International Protection, UNHCR has clarified that this ground has much broader scope: "[p]olitical opinion should be understood in the broad sense, to incorporate any opinion on any matter in which the machinery of State, government, society, policy may be engaged." The UNHCR Handbook further clarifies that "[i]n determining whether a political offender can be considering a refugee, regard should also be had to the following elements: personality of the applicant, his political opinion, the motive behind the act, the nature of the act committed, the nature of the prosecution and its motives; final, also, the nature of the law on which the persecution is based." The Proposed Rule's limiting of the definition of political opinion precludes adjudicators from taking the sum of these factors into account in weighing the validity of an asylum applicant's political opinion claim.[142]

158. Rather than engaging meaningfully with international standards for humanitarian relief, the Agencies did the opposite. At one point in the final Rule, the Agencies "decline[d] to respond to commenters' general assertions that the rule violates U.S. international treaty

[141] In the final Rule, without acknowledging their mistake, the Agencies change course, arguing instead that "[w]hile UNHCR guidelines are informative, they are not prescriptive." 85 Fed. Reg. at 80,326.

[142] Comments of UNHCR on the Proposed Rules, EOIR 2020-0003-5471 (July 15, 2020), https://beta.regulations.gov/document/EOIR-2020-0003-5471 (footnotes omitted).

obligations."[143]

5. The Rule Defines "Persecution" Too Narrowly

159. Provision 2.5 of the Rule, by contrast, restricts the concept of persecution to include only "the infliction of a severe level of harm" by "actions so severe that they constitute an exigent threat."[144] This language heightens the standard in contravention of both the word's plain meaning and established judicial interpretations of the term.[145]

160. The Refugee Act applies to noncitizens who have been subject to, or have a well-founded fear of, "persecution." While the statute does not define persecution, its plain and ordinary meaning is straightforward: "To oppress or harass with ill-treatment, especially because of race, religion, gender, sexual orientation, or beliefs."[146]

161. The Rule's definition is analogous to the meaning of the term "torture," in the implementing regulations for CAT.[147] To be sure, torture is *one form* of persecution, but it is not the only, or even the primary, form of persecution typically employed.

162. The Rule's cramped definition of persecution is inconsistent with that word's plain

[143] 85 Fed. Reg. at 80,326.

[144] *Id*. at 80,386; 80,395.

[145] *Stserba v. Holder*, 646 F.3d 964, 972 (6th Cir. 2011) (persecution includes non-physical threats); *Pathmakanthan v. Holder*, 612 F.3d 618, 622 (7th Cir. 2010) (finding that it is not necessary for harm or abuse to be life-threatening to find persecution exists); *Beskovic v. Gonzalez*, 467 F.3d 223, 226 (2d Cir. 2006) (finding a "minor beating" "may rise to the level of persecution if it occurred in the context of an arrest or detention on the basis of a protected ground" (citation omitted)); *Chaib v. Ashcroft*, 397 F.3d 1273, 1277 (10th Cir. 2005) (affirming that persecution includes suffering or harm that is "offensive" conduct (citation omitted)).

[146] *Persecute*, *The American Heritage Dictionary of the English Language* (5th ed. 2020), https://www.ahdictionary.com/word/search.html?q=persecute.

[147] 8 C.F.R. § 208.18(a) (defining torture, in part, as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person).

meaning. "Persecution" is not limited to actions that create an imminent threat of death or serious bodily harm or an exigent threat. For example, it has long been recognized that acts that, when considered in the aggregate, deprive a person of the ability to work or earn a livelihood can constitute persecution.[148] Further, courts have held that "a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution."[149]

163. The Rule's narrow definition does not include, for example, instances of material harm that can arise out of civil, criminal, or military strife in a country; treatment that the United States regards as unlawful or unconstitutional; intermittent harassment, including detentions; economic harm and property damage; deprivation of liberty, food, housing, employment or other essentials of life; government laws or policies that are infrequently enforced unless there is credible evidence that those laws or policies have been or would be applied to an applicant personally, or, except in limited circumstances, repeated threats that the persecutor has the means of carrying out absent actions to carry out such threats.[150]

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[148] UNHCR, The Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees (Geneva 1979), HCR/1P/Eng./Rev.2, ¶¶ 51–52 ("[I]t may be inferred that a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution. Other serious violations of human rights—for the same reasons—would also constitute persecution . . . .Whether other prejudicial actions or threats would amount to persecution will depend on the circumstances of each case"), https://www.unhcr.org/4d93528a9.pdf. *See also, e.g.*, *Stserba*, 646 F.3d at 972; *Shi Chen v. Holder*, 604 F.3d 324, 334 (7th Cir. 2010); *Zhen Hua Li v. Att'y Gen. of the U.S.*, 400 F.3d 157, 168–69 (3d Cir. 2005).

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

[150] *See* 85 Fed. Reg. at 80,386, 80,395 (providing that "particularized threats of a severe harm of immediate and menacing nature made by an identified entity" *may* constitute persecution); *id.* at 80,281 ("The Departments expect that [cases where threats alone constitute persecution] will be rare.").

164. In particular, the Rule's requirement that the asylum seeker in most circumstances demonstrate actions to carry out the threats is nonsensical.[151] Asylum seekers are not required to endure physical harm or death in order to prove their persecution. Not surprisingly, the exclusion of repeated threats from the definition of persecution is fundamentally at odds with the definition of the phrase that has been developed by U.S. courts throughout the years,[152] in consultation with pronouncements of international human rights bodies, such as UNHCR.[153]

165. In addition, the Rule's exclusion of harm arising from civil, criminal, or military strife in a country from the definition of persecution is fundamentally inconsistent with the Refugee Convention and Protocol. International law requires that claims for asylum be assessed by reference to Article 1 of the Convention, which does not exclude claims arising from war or strife. The Agencies' interpretation of "persecution" is therefore contrary to international law.

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[151] *See* 85 Fed. Reg. at 80,281 ("P]ersecution does not include . . . threats with no actions taken to carry out the threats.").

[152] *See, e.g.*, *Cedillos-Cedillos v. Barr*, 962 F.3d 817, 821 (4th Cir. 2020) ("[T]he IJ recognized this circuit's determination . . .that credible death threats can amount to persecution."); *Scarlett v. Barr*, 957 F.3d 316, 328 (2d Cir. 2020) (To rise to the level of persecution, a threat must be "so imminent or concrete . . . or so menacing as itself to cause actual suffering or harm." (citation and internal quotation marks omitted)); *Juan Antonio v. Barr*, 959 F.3d 778, 793 (6th Cir. 2020) ("[T]hreats alone are only sufficient [to establish persecution] when they are of a most immediate and menacing nature." (internal quotation marks omitted)); *N.L.A. v. Holder*, 744 F.3d 425, 431 (7th Cir. 2014) ("This court has declared, however, that credible threats of imminent death or grave physical harm can indeed be sufficient to amount to past persecution, provided they are credible, imminent and severe."); *Javed v. Holder*, 715 F.3d 391, 395–96 (1st Cir. 2013) ("[C]redible, specific threats can amount to persecution if they are severe enough."); *Chavarria v. Gonzalez*, 446 F.3d 508, 518 (3d Cir. 2006) ("We have further defined acceptable threats [constituting persecution] to include only those that are highly imminent and menacing in nature."); *Corado v. Ashcroft*, 384 F.3d 945, 947 (8th Cir. 2004) (per curiam) ("We have never held that a specific, credible, and immediate threat of death . . . is outside the definition of 'persecution,' just because it occurs during a single incident.").

[153] UNHCR Handbook, ¶ 51; *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.").

166. The Rule's new definition of persecution is also at odds, without justification or explanation, with how the Agencies have trained asylum officers on the definition of the term. The RAIO Lesson Plan on Persecution teaches that psychological harm alone can rise to the level of persecution. It instructs asylum officers that, "you should always consider evidence, including the applicant's testimony, that the events he or she experienced caused psychological harm. Psychological harm alone may rise to the level of persecution. . . . Evidence of the applicant's psychological and emotional characteristics, such as the applicant's age or trauma suffered as a result of past harm, are relevant to determining whether psychological harm amounts to persecution."[154] Again, without any explanation, much less justification, the Rule upends this understanding of the term.

6. The Rule Defines "Nexus" Too Narrowly

167. Provision 2.6 of the Rule adds a list of non-exhaustive situations in which the Agencies will most likely not find the nexus requirement within the INA satisfied unless there is additional evidence.[155] The Rule again targets the most common asylum claims, including claims

[154] U.S. Citizenship & Immigration Servs., RAIO Directorate – Officer Training: Definition of Persecution and Elgibility Based on Past Persecution 23–24 (2019), https://www.uscis.gov/sites/default/ files/document/ foia/Persecution_LP_RAIO.pdf; *see Mashiri v. Ashcroft*, 383 F.3d 1112, 1120 (9th Cir.2004) ("Persecution may be emotional or psychological, as well as physical.").

[155] These include: "1) interpersonal animus or retribution; 2) 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; 3) generalized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerrilla, 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; 4) resistance to recruitment or coercion by guerrilla, criminal, gang, terrorist, or other non-state organizations; 5) the targeting of the applicant for criminal activity for financial gain based on wealth or affluence or perceptions of wealth or affluence; 6) criminal activity; 7) perceived, past or present, gang affiliation; and 8) gender." 85 Fed. Reg. at 80,386; 80,395.

relating to persecution on account of gender and gender-identity as well as specific claims frequently brought by individuals from Central America—a favorite target of the Trump Administration.

168. The INA provides that an individual is eligible for asylum if he or she can demonstrate that at least one central reason for his or her persecution or well-founded fear of persecution was on account of a protected ground.[156] The protected ground must be "at least one central reason" for the harm.[157]

169. Nexus is a causal issue, but the Rule confuses nexus with various characteristics that relate to defining a particular social group. As the Rule correctly recites, in asylum law, "nexus" refers to the requirement that an asylum applicant suffer past persecution or fear future persecution "on account of" one or more of five protected grounds.[158] It concerns whether a person is persecuted "on account of" their group[159]—not the definition of the group itself. The confusion undermines the Administration's stated goal of "provid[ing] clarity" to adjudicators.[160]

170. The individual nexus categories identified by the Rule are not a reasonable interpretation of the statutory language, even putting aside the Rule's confusion of the term.

171. Moreover, the Rule's interpretation of the nexus requirement is inconsistent with

[156] 8 U.S.C. § 1101(a)(42).

[157] *Id.* § 1158(1)(B)(i).

[158] 85 Fed. Reg. at 80,281.

[159] *See, e.g.*, *Carvalho-Frois v. Holder*, 667 F.3d 69, 72 (1st Cir. 2012) (nexus involves showing "a causal connection to one of the statutorily protected grounds"); *S.E.R.L. v. Att'y Gen. U.S. of Am.*, 894 F.3d 535, 544 (3d Cir. 2018) ("nexus, or causal link, between the persecution and membership in the particular social group" is element of asylum); *Madrigal v. Holder*, 716 F.3d 499, 508 (9th Cir. 2013) (same).

[160] 85 Fed. Reg. at 80,329.

the United States' obligations under the Refugee Protocol. Under international law, a person who faces persecution on account of a protected ground is entitled to protection as a refugee. By excluding certain categories of claims that may meet that requirement, the United States will impermissibly deny such protection for reasons unrelated to asylum eligibility.

172. The Agencies also say, but do not explain, their conclusion that "[w]hile the Departments did consider expediency and fairness, the Departments disagree that expediency is prioritized over and above due process."[161] Their statement rings especially hollow in tandem with the previous sentence, where the Agencies note that the regulations will "reduce the time that adjudicators must spend evaluating claims."[162] These changes seem designed with speed and speed alone in mind, and applicants' right to individualized consideration of their claims will likely be trampled in the process.

7. The Rule Limits the Evidence Asylum Seekers Can Present

173. In addition to Provision 2.6's enumerated list of nexus exclusions, discussed *supra*, Provision 2.7 renders a grant of relief unattainable by contradicting years of established case law allowing refugees to present evidence related to their country's culture.[163] This evidence is often the only effective way to prove a claim, especially in circumstances where direct evidence of a persecutor's intent is impossible or impractical to obtain. Indeed, the U.S. Department of State country conditions reports, one of the specifically enumerated sources in 8 U.S.C. § 1158, often describe cultural attitudes when outlining human rights conditions.[164]

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[161] *Id.*

[162] *Id.*

[163] *See* 85 Fed. Reg. at 80,386; 80,395.

[164] *See, e.g.*, U.S. Dep't of State, Bureau of Democracy, H.R. & Lab., 2019 Country Reports on Human Rights Practices: Senegal, 20 (2020) ("The government and cultural attitudes remained heavily biased against LGBTI individuals.").

174. Evidence about cultural stereotypes and the relationship of those stereotypes to violence against particular people or groups of people is directly relevant to whether a legitimate fear of persecution exists. Indeed, it is often difficult to contextualize persecution without the background of cultural stereotypes that motivates that persecution. For example, excluding introduction of societal antisemitism in an asylum case in which the applicant fears persecution based on her Jewish religion would be nonsensical. Yet that is precisely what the Rule requires.[165]

175. Moreover, there is no justification in international law to allow the exclusion of country of origin evidence that may inform the assessment of a well-founded fear of persecution.

176. In support of the notion that cultural evidence should be excluded when evaluating nexus, the Agencies cite the following language from *Matter of A-B-*: "conclusory assertions of countrywide negative cultural stereotypes, such as *A-R-C-G-*'s broad charge that Guatemala has a 'culture of machismo and family violence' based on an unsourced partial quotation from a news article eight years earlier, neither contribute to an analysis of the particularity requirement nor constitute appropriate evidence to support such asylum determinations."[166]

177. Again, the Agencies misconstrue the case law. According to *Matter of A-B-*, the main deficiency in the reasoning of *A-R-C-G-* was the fact that the evidence of cultural stereotypes was unacceptably scarce, *i.e.*, one partial quotation from an old news article.[167] The Attorney

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[165] The final Rule attempts, unconvincingly, to address some other compelling examples offered by commenters by distinguishing them, saying that those examples would not be considered stereotype evidence, so there is no need for concern. *See* 85 Fed. Reg. at 80,337. But the phrase "cultural stereotypes" is ambiguous and will therefore lead to inconsistency in application that the Agencies claim to want to avoid. All the while, more individuals will be refouled without the ability to support their case with this often essential evidence.

[166] 85 Fed. Reg. at 36,282 (quoting *Matter of A-B-*, 27 I & N Dec. at 336 n.9) (repeated in part in final Rule at 85 Fed. Reg. at 80,336).

[167] *See Matter of A-B-*, 27 I. & N. Dec. at 336, n.9.

General in *Matter of A-B-* acknowledged what is required in assessing asylum claims: making a case-by-case determination of the adequacy of evidence in support of the claim. The Rule's reliance on *Matter of A-C-A-A-*, 28 I. & N. Dec. 84 (A.G. 2020), is similarly flawed. The Board in *A-C-A-A-* rejected "*conclusory* assertions" of this evidence, not *any* use of this evidence forever and always.[168] Nothing in these decisions supports the Agencies' view that no cultural evidence should be admitted.

178. Nor do the Agencies offer another palatable explanation. In fact, the Agencies admit that "adjudicators are certainly seasoned in" weighing various types of evidence, but "[n]evertheless," the "harms associated with the use of evidence rooted in stereotypes" outweigh "probative value."[169] They then offer the sweeping statement that "such evidence should not be necessary to an asylum application."[170] They provide no support for these propositions. They do not identify the purported harm with any specificity or assess how it outweighs the probative value of the evidence. Indeed, it is hard to see how evidence with probative value in an asylum hearing could be outweighed. While the Agencies may believe that such evidence should not be necessary, the fact remains that it is often necessary and routinely used by immigration attorneys to support their clients' claims.

8. The Rule Makes It Harder to Establish that Internal Relocation Is Not Feasible

179. Provision 2.8 changes multiple components of the internal relocation analysis in asylum and withholding proceedings. The concept of internal relocation does not exist anywhere

[168] 85 Fed. Reg. at 80,336 (quoting *A-C-A-A*, 28 I. & N. Dec. at 91, n.4) (emphasis added).

[169] *Id.*

[170] *See id.*

in the INA. Rather, it was introduced in 2000 through amended regulations, which provide that an applicant who "could avoid persecution by relocating to another part of [his or her] country of nationality" does not have a well-founded fear of persecution, if "under all the circumstances it would be reasonable to expect the applicant to do so."[171] The Agencies acknowledge the same.[172]

180. The Agencies aim to give internal relocation greater force in asylum adjudications without reasoned justification for the change from prior regulations.

181. Provision 2.8 of the Rule shifts the burden to the applicant to prove that internal relocation is not possible if the source of persecution is not a governmental actor.[173] Currently, there is a presumption that internal relocation would not be a reasonable option for individuals who have established past persecution,[174] which reflects the realities of sophisticated non-state actor networks.

182. The Agencies' stated justification for introducing this distinction in the internal relocation context does not survive the barest scrutiny. According to the Agencies, the ability of individuals facing persecution by non-governmental actors to relocate internally should be presumed because "a private individual or organization would not ordinarily have such reach."[175] This assumption is contradicted by scores of evidence, including the statements of numerous asylum seekers.[176] Indeed, as one commenter observed, the Agencies themselves "routinely claim

[171] 65 Fed. Reg. 76,121, 76,134 (Dec. 6, 2000).

[172] 85 Fed. Reg. at 80,339.

[173] 85 Fed. Reg. at 80,387; 80,388–89; 80,396; 80,398.

[174] 8 C.F.R. § 208.13(b)(3)(ii).

[175] 85 Fed. Reg. at 80,340.

[176] *See, e.g.*, Nina Lakhani, *Central America's rampant violence fuels an invisible refugee crisis*, The Guardian (Oct. 13. 2016), https://www.theguardian.com/world/2016/oct/13/central-america-violence-refugee-crisis-gangs-murder/.

that private organizations have influence that crosses borders and, in fact, extends into this country."[177]

183. Additionally, the Rule creates an enumerated list of factors that adjudicators should consider to replace the totality of the circumstances approach currently in place, moving away from the established individual, case-by-case analysis.[178]

184. Some of the factors that the Agencies interpose are arbitrary on their face. One is the "demonstrated ability to relocate to the United States."[179] This is nonsensical. Every person applying for asylum *in the United States* has demonstrated an ability to relocate *to the United States.* This adverse factor does nothing more than provide a basis for an adjudicator to reject every asylum application. Had Congress wanted any factor to weigh against *every* asylum applicant, it would have legislated such a result. It did not, for obvious reasons.

185. A second new factor for consideration in assessing the reasonableness of internal relocation is the "size of the country."[180] By definition, in an asylum case, the persecutor is either the state or an actor that the state is unable or unwilling to control. The size of the country does not necessarily have any bearing on the power of the persecutor, and the relationship may run the

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[177] Tahirih Just. Ctr., Comments in Response to the U.S. Dep't of Homeland Sec. (DHS) U.S. Citizenship & Immigration Servs. (USCIS) & Dep't of Just. (DOJ) Off. for Immigration Review (EOIR) (the Depts.) Joint Notice of Exec. Proposed Rulemaking (NPRM or the Rule): Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review; RIN 1615-AC42/ 1125-AA94/ EOIR Docket No. 18-0002 / A.G. Order No. 4714-2020, EOIR-2020-0003-4756, at 41 (July 15, 2020), https://www.regulations.gov/document?D=EOIR-2020-0003-4756 (citing ICE, *Combating Gangs*, https://www.ice.gov/features/gangs; DOJ, *Department of Justice Fact Sheet on MS-13* (Apr. 18, 2017), https://www.justice.gov/opa/speech/file/958481/download).

[178] *See, e.g.*, *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985).

[179] 85 Fed. Reg. at 80,387; 80,388; 80,396; 80,398.

[180] *Id.*

other way. For example, a state actor from a large country could very well be a more powerful and forceful persecutor.

186. The Rule also bars consideration of additional factors relevant to the applicant (as opposed to the persecutor). But internal relocation must be *reasonable*,[181] not merely possible,[182] and disallowing consideration of a broader range of circumstances undermines the ability of adjudicators to conduct a comprehensive analysis and come to a reasoned conclusion. This narrowing is likely to have outsized impact on certain vulnerable groups, including unaccompanied children.[183]

187. Provision 2.8 is particularly troubling when considered together with Provision 1.5 (moving initial consideration of internal relocation to the credible fear screening process, discussed *supra*). All of the problems with the Agencies' new internal relocation factors and the holes in their reasoning discussed *supra* are exacerbated in the credible fear context.

188. In addition, Provision 2.8's revision of the internal relocation bar is wholly inconsistent with international law and therefore puts the United States further out of step with its international obligations. In particular, the Rule's burden-shifting in the context of non-state actor persecution compounds a fundamental problem with the concept of internal relocation: that it imposes an impermissible duty on applicants to attempt to hide from their persecutors or forfeit

[181] The Agencies attempt to put lipstick on a pig, pointing to the fact that they include the word "reasonable" in the regulation and even the header of these new provisions. But labeling something as "reasonable" does not make it so, particularly when the specific factors they introduce are irrecoverably flawed as discussed in this section.

[182] *See Matter of M-Z-M-R-*, 26 I. & N. Dec. 28, 34 (BIA 2012).

[183] Kids In Need of Defense, Public Comment Opposing Notice of Proposed Rulemaking on "Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review" (Collection of Information OMB Control Number 1615-0067), EOIR-2020-0003-4763 (July 15, 2020), https://beta.regulations.gov/document/EOIR-2020-0003-4763.

protection.

9. The Rule Expands Acts that Can Constitute "Discretionary" Bases for Denial

189. Provision 2.9 of the Rule sets a long list of factors "for adjudicators to consider when determining whether or not an alien merits the relief of asylum as a matter of discretion."[184] First, the Agencies enumerate three "significant adverse" factors that a decision-maker *must* consider, if applicable, with certain limited exceptions: (1) "[a]n alien's unlawful entry or unlawful attempted entry into the United States;" (2) "[t]he failure of an alien to apply for protection from persecution or torture in at least one country . . . through which the alien transited;" and (3) "[a]n alien's use of fraudulent documents to enter the United States."[185]

190. The Rule also lists nine additional factors that, if present, will result in denial except in "extraordinary circumstances."[186]

191. The problems with these factors are myriad. First, the Agencies fail to justify their substance on the merits, though the factors' relevance to the validity of an individual's asylum

[184] 85 Fed. Reg. at 80,282.

[185] 85 Fed. Reg. at 80,387; 80,396.

[186] *Id.* at 80,388; 80,397. These include, with limited exceptions: (1) spending more than 14 days in any one country while in transit to the United States; (2) transiting through more than one country en route to the United States; (3) having been convicted of a crime that would render the individual ineligible but for the reversal, vacatur, expungement, or modification of the conviction or sentence; (4) spending more than a year in the United States prior to filing an asylum application; (5) failing to properly file tax returns; (6) having more than one prior asylum application denied for any reason; (7) having withdrawn with prejudice or abandoned a prior asylum application; (8) failing to attend an asylum interview; and (9) being subject to a final order of removal, deportation, or exclusion without filing a motion to report or seek asylum based on changed country conditions within one year of those changes. *Id* at 80,387–80,388; 80,396–80,397.

claim ranges from dubious to utterly immaterial.[187] Second, the so-called "discretionary" factors—particularly the latter nine, the application of which is explicitly mandatory in the absence of "extraordinary circumstances"—represent an end-run around the requirement in 8 U.S.C § 1158(b)(2)(C) that additional limitations on eligibility for asylum be "consistent with" that section. And third, many of the specific factors are contrary to statutory law, international law, or both.

192. For example, the Rule violates 8 U.S.C § 1158(a)(2)(A), in which Congress authorized officials to turn away asylum seekers only when they can be removed, pursuant to a valid international agreement, to a country where they will not face persecution and where they will have access to a full and fair asylum procedure. This statute applies "irrespective of [the asylum seeker's] status" and to all asylum seekers who arrive in the United States "whether or not at a designated port of arrival."[188]

193. In addition, Article 31 of the 1951 Convention, ratified by the United States in the 1967 Protocol, forbids governments from penalizing refugees for fleeing without official travel documents or for entering a country without authorization. But Provision 2.9 *requires* adjudicators to consider whether an applicant entered the United States unlawfully or with false documents as a significant adverse factor.

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[187] For instance, the Ninth Circuit has expressly concluded that consideration of *the manner* of an asylum seeker's entry into the United States in assessing the validity of their claim to asylum is likely arbitrary and capricious, as "it conditions an alien's eligibility for asylum on a criterion that has nothing to do with asylum itself." *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 772 (9th Cir. 2018). As the court explained, "whether an alien enters the United States over its land border with Mexico rather than through a designated port of entry is uncorrelated with the question of whether she has been persecuted in, say, El Salvador." *Id.*; *see also Mamouzian v. Ashcroft*, 390 F.3d 1129, 1138 (9th Cir. 1999) (observing that "the way in which [an alien] entered this country is worth little if any weight in the balancing of positive and negative factors").

[188] 8 U.S.C § 1158(a).

194. The Rule's factors penalize refugees who must flee life-threatening situations, even if they promptly notify the immigration officials of their presence in the United States and of their request for asylum. They also penalize refugees who are unable to travel directly to the United States—which can be the result of many factors, none of which has any bearing on the legitimacy of an individual's claim for asylum.

195. In addition, none of the nine enumerated discretionary bars maps on to the requirements of the Refugee Convention. As a result, it is internationally unlawful for the United States to rely on these factors to withhold protection.

10. The Rule Defines Firm Resettlement Too Expansively

196. Provision 2.10 of the Rule redefines the term firm resettlement expansively to include even temporary, unauthorized stays in a country before arriving in the United States.

197. An individual is ineligible for asylum if the applicant "was firmly resettled in another country prior to arriving in the United States." 8 U.S.C § 1158(b)(2)(A)(vi).

198. The term "firmly" is unambiguous: according to the dictionary definition that the Agencies rely upon, firm means "not subject to change" and "fixed in place."[189]

199. The Rule attempts to define a person who was "firmly resettled" to include any non-citizen who resided in a country through which she transited prior to arriving in the United States and either "was eligible for any permanent legal immigration status in that country" or "could have applied for and obtained any non-permanent but indefinitely reviewable legal

[189] *Firm*, Merriam Webster, https://www,merriam-webster.com/dictionary/firm (quoted in 85 Fed. Reg. at 80,364). To the extent that the phrase "firm resettlement" is ambiguous, it should not be interpreted in a manner contrary to the U.S. treaty obligations under the Refugee Convention and Refugee Protocol, which, as the Agencies acknowledge, "require the alien to be recognized by the third country as possessing the same rights and obligations as citizens of [the third] country" to be considered firmly resettled. 85 Fed. Reg. at 80,364.

immigration status in that country."[190]

200. Notably, the relevant language from the NPRM clarified that this definition includes a person who "*could* have resided" in a "permanent *or* non-permanent, *potentially* indefinitely renewable legal immigration status" in another country, "regardless of whether the alien applied for or was offered such status."[191] The Agencies thus seek to exclude from seeking asylum anyone who "could have" "potentially" stayed in another country indefinitely. Though the precise language in the final Rule is amended slightly, the Rule specifies that any changes "are stylistic and do not reflect an intent to make a substantive change from the NPRM."[192]

201. This redefinition is Orwellian—the Agencies are, in effect, attempting to reconceive "firmly" to mean its opposite. A person who is not resettled in another country in a fixed and definite way is not "firmly resettled" even if she theoretically might, under some hypothetical set of circumstances, have had the ability to seek renewable legal immigration status that could or could not be indefinite. In fact, the language of the Rule seems to allow for a finding of firm resettlement even for individuals whose legal status has a fixed end date, simply because the person's renewable status could have been indefinite *in theory*. The Rule's redefinition would require adjudicators to engage in rampant speculation, and it is inconsistent with existing U.S. and

[190] 85 Fed. Reg. at 80,283.

[191] NPRM, 85 Fed. Reg. at 36,286.

[192] 85 Fed. Reg. at 80,283 (emphasis added).

international law,[193] as well as the legislative history of the term's use.[194]

202. The Agencies justify this change by arguing that because 43 countries have signed the Refugee Convention, there are more "resettlement opportunities" outside of the United States.[195] But many of the signatories to the Refugee Convention are not the safe havens the Agencies claim. Afghanistan is one of the signatories,[196] as is El Salvador.[197] Thus, the plentiful "opportunities" for resettlement in signatory countries are, in reality, not an option for many asylum seekers. In any event, the existence of resettlement opportunities has no bearing on the relevant question under the INA, which is whether a person has in fact firmly resettled in another country. The Agencies' attempt to redefine firm resettlement as the possibility of theoretical indefinite residency is contrary to law.

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[193] 8 U.S.C. § 1158(b)(2)(a)(vi) (providing that a noncitizen is firmly resettled if, absent an exception, he or she had received an offer of permanent resident status, citizenship, or some other type of permanent resettlement); *Sall v. Gonzales*, 437 F.3d 229 (2d Cir. 2006) (per curiam); *Abdille v. Ashcroft*, 242 F.3d 477 (3d Cir. 2001); *Ramos Lara v. Lynch*, 833 F.3d 556 (5th Cir. 2016); *Camposeco-Montejo v. Ashcroft*, 384 F.3d 814 (9th Cir. 2004); *Elzour v. Ashcroft*, 378 F.3d 1143 (10th Cir. 2004); 1951 Convention, art. 1(E) (defining firmly resettled as "person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country" and who has "has acquired a new nationality, and enjoys the protection of the country of his new nationality.").

[194] Congress first used the term "firmly resettled" in the Displaced Persons Act of 1948, and amendments to that act made it clear that individuals who fled their countries and temporarily resided elsewhere remained entitled to protection on American soil. *See* Pub. L. No. 81-555, § 2(c), 64 Stat. 219 (1950).

[195] 85 Fed. Reg. at 80,282.

[196] According to the State Department, Afghanistan does not currently have any laws governing asylum. *See* U.S. Dep't of State, 2019 Country Reports on Human Rights Practices: Afghanistan, § 2F (Mar. 11, 2020).

[197] Interview with Nayib Bukele, President, El Salvador, 60 Minutes, (Dec. 15, 2019) https://www.cbsnews.com/news/el-salvador-president-nayib-bukele-the-60-minutes-interview-2019-12-15/ (The President of El Salvador recently admitted, "We don't have asylum capacities.").

203. The Agencies' other explanation for the change is that "those genuinely in fear of persecution [have an interest in] attaining safety as soon as possible."[198] But they offer no evidence that from this truism it follows that individuals are likely to—or able to—firmly resettle in a third country through which they transit.[199] Many asylum seekers cannot flee their country via direct flight and face challenges that affect how quickly they are able to reach a safe haven.[200] The Agencies' supposition that those with genuine claims should seek to reside permanently in third countries based on the trajectory of their journeys is illogical and unconscionable.[201]

204. The Agencies also shift the burden from the government to the applicant on the issue of firm resettlement.[202] In effect, this means asylum seekers must now negate a baseline assumption that firm resettlement was possible and therefore occurred whenever they stayed in a third country en route to the United States (or other evidence in the record indicates resettlement

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[198] 85 Fed. Reg. at 80,282; *cf. also id.* at 80,346 (explaining that "the Departments believe that there is a higher likelihood that aliens who fail to apply for protection in a country through which they transit en route to the United States are misusing the asylum system").

[199] Indeed, the Agencies include an exception to the firm resettlement presumption for those residing in Mexico "as a direct result of being returned to Mexico pursuant to section 235(b)(2(C) of the Act or of being subject to metering." 85 Fed. Reg. at 80,388, 80,397. This exception acknowledges the reality that individuals seeking persecution are often not able to control the length of time they spend in transit through other countries for various reasons, yet the Agencies offer no explanation as to why it is only very narrowly applicable.

[200] *See, e.g.*, Roundtable of Former Immigration Judges, Comments in Opposition to Proposed Rulemaking 26 (July 13, 2020), EOIR-2020-0003-4734, https://www.regulations.gov/document?D=EOIR-2020-0003-4734 ("In our collective experience as adjudicators, this definition ignores the realities of what it is to escape persecution. Legitimate refugees don't always have choices about how they leave their countries, where they go, who they rely on, and how they travel. They frequently have severe restraints, economic or otherwise, which require moving along at a pace they would not choose under normal circumstances.").

[201] *Cf. E. Bay Sanctuary Covenant*, 932 F.3d 742 at 772 (finding that an agency action that "conditions an alien's eligibility for asylum on a criterion that has nothing to do with asylum itself," such as where the alien entered the country, was likely arbitrary and capricious).

[202] *See* 85 Fed. Reg. at 80,388, 80,397.

was theoretically possible) without requiring the government to meet its prima facie burden. The Rule lacks any reasonable explanation for this shift and fails to provide guidance on what kind of "evidence" would lead to this presumptive bar.

205. The Rule's definition of firm resettlement is also at odds with international law. Under Article 1(E) of the Convention, a person who has the same rights and obligations in her country of residence as that country's nationals is not eligible for protection. But the category of individuals excluded under the Rule's definition is, without justification, far broader. Thus, the Rule will deny protection to those entitled to such protection under international law.

11. The Rule Denies Protection to Individuals Tortured by "Rogue Officials"

206. Provision 2.11 of the Rule changes the language from "rogue" official (in the NPRM) to an official "not acting under color of law,"[203] but the intent is the same: to cabin relief under CAT.[204] The Agencies also introduced a new, heightened standard for what constitutes "acquiescence," requiring that a public official have prior awareness of the activity constituting torture "and thereafter breach his or her legal responsibility to intervene to prevent such activity."[205]

207. Pursuant to Art. 3 of the Convention Against Torture, no State Party shall expel, return ("*refouler*"), or extradite a person to another State where there are substantial grounds for

[203] *Id.* at 80,398.

[204] Otherwise, given that the "under color of law" was already adopted by AGs in 2002, *In Matter of Y-L-*, 23 I. & N. Dec. 270, 285 (A.G. 2002), and 2020, discussed *infra*, it is hard to tell what exactly needed to be "clarified."

[205] *See* 85 Fed. Reg. at 80,398.

believing that he would be in danger of being subjected to torture.[206] The United States has promulgated various regulations to comply with this treaty obligation, and these regulations adopt the Convention's definition of torture:

> Torture is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.[207]

208. The Proposed Rule suggested that individuals would need to prove that their persecutor was not a "rogue official."[208] This "rogue official" exception to CAT would swallow the rule. For example, the Rule would allow asylum officers and immigration judges to avoid granting relief because a police officer who raped, beat, or extorted an individual was acting "rogue" in that context.

209. As various federal courts have held, officials do not inflict torture under the color of law for personal benefit.[209] The relevant case law establishes that "under color of law" means "clothed with the authority of state law."[210] The key question, then, is whether the perpetrators of

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[206] *See* UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465; *see also* Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, div. G, § 2242, 112 Stat. 2681-761, 2681-822 (codified at 8 U.S.C. § 1231 note (1999)).

[207] 8 CFR § 208.18(a)(1); 8 CFR § 1208.18(a)(1).

[208] 85 Fed. Reg. at 80,285 (noting "rogue official" language in NPRM).

[209] *See Khouzam v. Ashcroft*, 361 F.3d 161, 170 (2d Cir. 2004); *Zheng v. Ashcroft*, 332 F.3d 1186, 1188–89 (9th Cir. 2003).

[210] *See Iruegas-Valdez v. Yates*, 846 F.3d 806, 812–13 (5th Cir. 2017) (citation omitted); *Ramirez-Peyro v. Holder*, 574 F.3d 893, 900–01 (8th Cir. 2009); *Madrigal v. Holder*, 716 F.3d 499, 506–07 (9th Cir. 2013).

an act of torture are government officials, as they can leverage the authority of their positions whether or not they are acting with the official sanction of the law. The Supreme Court also has found that the phrase "under color of law" encompasses "under pretense of law," including when officers overstep their authority.[211]

210. Moreover, as many commenters rightly noted, the Rule's new standard to demonstrate acquiescence is unreasonable because applicants would be required to demonstrate the legal duties of a government official who failed to act and also demonstrate whether the official was charged with preventing those actions but failed to act[212]—complicated factual questions in which the relevant evidence will be in the exclusive possession of the home country's government.

211. The Agencies offer no real explanation for this shift. Historically, relief under CAT has been remarkably difficult to obtain, so it is unclear why the Agencies feel it necessary to make it even harder to obtain.[213] Moreover, the Proposed Rule, signed by Attorney General William Barr on behalf of DOJ, contradicted A.G. Barr's own *Matter of O-F-A-S-* opinion. In that case, the A.G. found that the "rogue official" standard "risks confusion" because it "suggests a standard different from 'under color of law'" and "has been interpreted to have multiple meanings."[214] Although the final rule removed the term "rogue official",[215] it simply replaced it with another term meaning the same thing. In other words, in the name of seeking "clarity," the Agencies

[211] *Cf. Screws v. United States*, 325 U.S. 91, 111 (1945).

[212] 85 Fed. Reg. at 80,367 (summarizing comments).

[213] *See, e.g.*, Dep't of Justice, Executive Office for Immigration Review, Statistics Yearbook FY 2018 at 30, https://www.justice.gov/eoir/file/1198896/download (showing fewer than two percent of cases were granted relief under CAT).

[214] 28 I. & N. Dec. 35, 38–39 (A.G. 2020)

[215] *See, e.g.*, 85 Fed. Reg. at 80,283.

created a provision that the Attorney General who authorized the Rule previously admitted would lead to confusion.[216]

VI. THE AGENCIES DID NOT ENGAGE IN ANY MEANINGFUL ANALYSIS OF THE RULE'S IMPACT

A. The Agencies Ignored the Rule's Impact to the U.S. Economy and Fisc

212. Implementation of the Rule would have a substantial and negative impact on the U.S. economy and fisc—an inevitable consequence that the Agencies entirely fail to address. This deliberate oversight reflects the overarching mission of the Agencies to reduce access to asylum to the greatest extent possible—an arbitrary goal that entirely fails to grapple with the associated costs.

213. The Rule simply states, without explaining the underlying reasoning, that the "Office of Information and Regulatory Affairs has determined that" the Rule "will not result in an annual effect on the economy of $100 million or more . . . or significant adverse effects on competition, employment, investment, productivity, [or] innovation." 85 Fed. Reg. at 80,383.

214. The Rule also states that the Agencies submitted the Rule to the Office of Management and Budget for review, along with "the required analysis of the rule's costs and benefits."[217] But nowhere in the Rule do the Agencies provide such an analysis or attempt to quantify the probable economic impact. Instead, the Rule contends that "the fact-specific nature of asylum application and the lack of granular data on the facts of every asylum application prevent the Departments from quantifying particular costs."[218]

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[216] *Id.* at 80,371.

[217] *Id.* at 80,377.

[218] *Id.* at 80,378. The Rule dismisses commenters' concerns that the Agencies failed to consider the lost "talent, diversity, and innovation" from asylees on the dubious ground that such costs are "the nonquantifiable opinions of the commenters." *Id.*

215. In fact, the United States' efforts to welcome refugees fulfill an important humanitarian mission while also providing significant economic benefits to the Nation, and the Rule's inevitable result of lowering the number of individuals who will apply for and be granted asylum will have predictably negative economic and fiscal impacts that are fully capable of estimation.

216. Refugees contribute billions of dollars annually to the economy through consumer spending and the creation of businesses, resulting in a net positive financial impact. They also pay taxes and have a net positive impact on the U.S. fisc.

217. Refugees have a net positive fiscal impact on the American economy. A July 2017 draft Department of Health and Human Services report (the "DHHS Report") estimated that, "the *net fiscal impact of refugees was positive* over the ten year period [2005 to 2014], at $63.0 billion, meaning they contributed more in revenue than they cost in expenditures. . . . [R]efugees net fiscal benefit to the federal government was estimated at *$40.9 billion*, and the net fiscal benefit to state and local governments was estimated at *$22.0 billion*."[219]

218. The DHHS Report was drafted at the request of President Trump, who, in a March 6, 2017 memorandum, asked the Secretary of State, Attorney General, and Secretary of Homeland Security to "submit . . . a report detailing the estimated long-term costs of the United States Refugee Admissions Programs."[220] On information and belief, upon reviewing the Report's

[219] U.S. Dep't of Health & Human Servs., *The Fiscal Costs of the U.S. Refugee Admissions Program at the Federal, State, and Local Levels, from 2005-2014* at 31 (July 29, 2017) (emphases added), https://www.nytimes.com/interactive/2017/09/19/us/politics/document-Refugee-Report.html.

[220] *Id.* at 6; Memorandum for the Secretary of State, the Attorney General, the Secretary of Homeland Security (Mar. 6, 2017), https://www.whitehouse.gov/presidential-actions/memorandum-secretary-state-attorney-general-secretary-homeland-security/.

conclusions that refugees have a net *positive* impact on the United States to the tune of $80 billion dollars over a 10-year period, Stephen Miller, a senior Administration official, intervened. Ultimately, the Administration refused to release the full report publicly. Instead, the final report by the Administration provides only the costs of refugees, without any mention of their net positive economic impact.[221]

219. Expert analysis confirms that DHHS employed a sound methodology and that its conclusion of positive impact of refugees on the economy and fisc is correct. However, because of inherent study limitations, the study *underestimated* the positive net impact of refugees on the economy and fisc.

220. The Rule's material and negative impact on the number of individuals permitted to seek refuge in the United States would deprive the economy of potentially billions of dollars in lost tax revenue and lost spending power.

221. Specifically, an economic analysis of the likely impact of such reduction estimates conservatively that a mere 10 percent reduction in affirmative and defensive asylum seekers in the United States relative to 2019 levels would have a net *negative* effect to the U.S. fisc amounting to $1.5 billion over a five-year period. The number increases dramatically if larger percentages of

Percent reduction	Base inflow, annual	Absolute decline, annual	Annual net fiscal loss $per migrant	Annual net fiscal loss, $billion (flow change)	Cumulative loss, 5 yrs, $billion (stock change)
10%	307,704	30,770	3,215	0.10	1.48
25%	307,704	76,926	3,215	0.25	3.71
50%	307,704	153,852	3,215	0.49	7.42
75%	307,704	230,778	3,215	0.74	11.13

[221] Julie Hirschfeld Davis & Somini Sengupta, Trump Administration Rejects Study Showing Positive Impact of Refugees, N.Y. TIMES (Sept. 18, 2017), https://www.nytimes.com/2017/09/18/us/politics/refugees-revenue-cost-report-trump.html.

reductions are assumed.

A similar reduction would lead to a loss to the U.S. economy of at least $8.9 billion dollars over a 5-year period. Again, the loss rises if larger percentages of reductions are assumed.[222]

222. These estimates are conservative in every sense. Though it is impossible to predict with precision, the Rule is likely to result in an even larger reduction in U.S. asylum seekers—and a correspondingly larger hit to the U.S. economy and public fisc.

Percent reduction	Base inflow, annual	Absolute decline, annual	Annual GDP effect $ per migrant	Annual GDP effect, $billion (flow change)	Cumulative cost, 5 yrs, $billion (stock change)	Cumulative direct cost *to others*, 5yr $billion
10%	307,704	30,770	19,194	0.59	8.86	2.96
25%	307,704	76,926	19,194	1.48	22.15	7.40
50%	307,704	153,852	19,194	2.95	44.30	14.79
75%	307,704	230,778	19,194	4.43	66.44	22.19

223. The Agencies turn a blind eye to the economic realities of the Rule. They disclaim that the Rule is a "major rule" as defined by the Congressional Review Act, 5 U.S.C. § 804, by making a blanket assertion that the Rule would not have an economic impact equal to or larger than $100 million. But that conclusion is unsupported and illogical.

224. As one comment pointed out,[223] previous immigration-related Notices of Proposed Rulemaking have acknowledged that they meet the major rule threshold on the sole basis of costs to the DOJ and have provided specific estimates.[224]

225. The Agencies have a strategic incentive for downplaying the economic impact:

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[222] *Id*. ¶ 20.

[223] Cath. Charities Cmty. Servs., Public Comment Opposing Proposed Rules on Asylum, EOIR-2020-0003-5021 (July 15, 2020), https://beta.regulations.gov/document/EOIR-2020-0003-5021.

[224] *See* GAO Letter Report to Congress (Mar. 28, 1997), https://www.gao.gov/decisions/majrule/og97032.htm (transmitting the Departments' "Major Rule" Analysis).

Refusing to classify the Rule as a major rule avoids triggering additional procedures and a 60-day effective date period, meaning that the Rule is currently scheduled to go into effect before Inauguration Day instead of after it, *i.e.*, on January 11, 2021, instead of February 9, 2021.

B. The Agencies Ignored Key Problems Raised by the Comments

226. Administrative agencies are required to consider the comments they receive through public notice-and-comment.[225] "Indeed, failure to address issues raised in comments may require a finding that the agencies acted in violation of the APA by 'fail[ing] to consider an important aspect of the problem.'"[226]

227. Despite the limited 30-day window, the agencies received approximately 87,000 comments. Some were short notes from concerned citizens, but the Rule acknowledges that more than 300 were from organizations. Of the more than 300 comments from organizations, the Agencies admit only two supported the Rule changes. The other organizational commenters, many national and international organizations with decades of experience in the field of refugee assistance and law, raised serious concerns—and even alarm bells—about the negative impact the Rule's restrictions would have on refugees and asylum law in the United States.

228. For example, organizations like UNHCR, Amnesty International, and Human Rights First correctly point out that the Proposed Rule would effectively eliminate asylum in the

[225] *Thompson v. Clark*, 741 F.2d 401, 408–09 (D.C. Cir. 1984); *see also N.C. Growers' Ass'n v. United Farm Workers*, 702 F.3d 755, 769 (4th Cir. 2012) ("[D]uring notice and comment proceedings, the agency is obligated to identify and respond to relevant, significant issues raised during those proceedings.").

[226] *Loan Syndications v. S.E.C.*, 223 F. Supp. 3d 37, 63 (D.D.C. 2016) (alteration in original) (citing *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1051 (D.C. Cir. 2002)), *rev'd on other grounds*, 882 F.3d 220 (D.C. Cir. 2018).

United States.[227]

229. Numerous comments also warned that implementing the Proposed Rule would inevitably lead to the *refoulement* of applicants to places where they will be persecuted, killed,

[227] *See* UNHCR, Comment Letter on Proposed Rule, 4 (July 15, 2020), https://beta.regulations.gov/comment/EOIR-2020-0003-5471 ("Taken individually, each of these changes would be divergent from international standards; as a group they serve to create a series of barriers that all but deny outright the right to seek asylum."); *see also* Amnesty International, Comment Letter on Proposed Rule, 3 (July 15, 2020), https://beta.regulations.gov/comment/EOIR-2020-0003-4760 ("Given the numerous new bars to asylum eligibility announced in this rule and others—not to mention their dubious legality—this proposed rule would have the effect of eliminating countless asylum-seekers at a threshold stage, before they ever receive a full and fair consideration of their claim."); *see also* Human Rights First, Comment Letter on Proposed Rule, 6 (July 15, 2020), https://beta.regulations.gov/comment/EOIR-2020-0003-6013 ("This restricted definition would eliminate all valid asylum claims where the applicant was persecuted for a political opinion that is not explicitly tied to a specific cause related to 'political control of a state or a unit thereof,' even in cases where the government itself persecuted the applicant."); National Immigrant Justice Center, Comment Letter on Proposed Rule, 7 (July 15, 2002), https://beta.regulations.gov/comment/EOIR-2020-0003-77333 ("[T]he Proposed Rules eliminate the possibility of applying for many forms of relief for which a person may qualify."); Safe Passage Project, Comment Letter on Proposed Rule, 8 (July 5, 2020), https://beta.regulations.gov/comment/EOIR-2020-0003-6116 ("The proposed rule, however, essentially eliminates the 'discretion' delegated to the finder of fact and turns it into a form of automatic exclusion, which is not contemplated by the statute."); American Immigration Council and American Immigration Lawyers Association, Comment Letter on Proposed Rule, 5 (July 15, 2020), https://beta.regulations.gov/comment/EOIR-2020-0003-6023 ("This change would again exclude entire classes of asylum seekers and run counter to the spirit and purpose of asylum law."); Kids In Need of Defense, Comment Letter on Proposed Rule, 24 (July 15, 2020), https://beta.regulations.gov/comment/EOIR-2020-0003-4763; Oxfam America, Comment Letter on Proposed Rule, 13 (July 15, 2020), https://beta.regulations.gov/comment/EOIR-2020-0003-4758; Harvard Immigration and Refugee Clinical Program, Comment Letter on Proposed Rule, 9 (July 15, 2020), https://beta.regulations.gov/comment/EOIR-2020-0003-74314; Williams Institute at the University of California at Los Angeles School of Law, Comment Letter on Proposed Rule, 6 (July 15, 2020), https://beta.regulations.gov/comment/EOIR-2020-0003-5162; Center for Victims of Torture, Comment Letter on Proposed Rule, 5 (July 15, 2020), https://beta.regulations.gov/comment/EOIR-2020-0003-84145 (representing thirteen national torture treatment programs); Catholic Legal Immigration Network, Inc., Comment Letter on Proposed Rule, 39 (July 15, 2020), https://beta.regulations.gov/comment/EOIR-2020-0003-4754.

tortured, raped, or otherwise seriously harmed.[228]

230. Commenters raised concerns not only with substantive changes, but with new

[228] *See* Human Rights First, Comment Letter on Proposed Rule, 23 (July 15, 2020), https://beta.regulations.gov/comment/EOIR-2020-0003-6013 ("Under the proposed rule, countless victims of torture will be returned to their home countries in violation of U.S. and international law."); *see also* UNHCR, Comment Letter on Proposed Rule, 3 (July 15, 2020), https://beta.regulations.gov/comment/EOIR-2020-0003-5471 ("UNHCR has deep concerns about the Proposed Rule which is incompatible with fundamental tenets of international refugee law and would dramatically diminish the United States' capacity to guarantee protection of refugees from return to situations of serious harm."); Amnesty International, Comment Letter on Proposed Rule, 10,16 (July 15, 2020), https://beta.regulations.gov/comment/EOIR-2020-0003-4760 ("This rule, if implemented, will lead to countless wrongful denials of protection for people whose removals would send them back to a real risk of torture, in violation of the principle of non-refoulement."); Immigration Equality, Comment Letter on Proposed Rule, 15 (July 15, 2020), https://beta.regulations.gov/comment/EOIR-2020-0003-85541 ("Refusing asylum to these refugees would be contrary to long established law and violate the U.S.'s non-refoulment obligations. The result would be devastating for transgender refugees, including Immigration Equality clients, who face severe persecution around the world."); Innovation Law Lab, Comment Letter on Proposed Rule, 7 (July 15, 2020), https://beta.regulations.gov/comment/EOIR-2020-0003-6022 ("These proposed changes contravene our commitment to protecting asylum seekers and refugees under the Refugee Act and the 1951 UN Refugee Convention, as they will lead to the deportation of legitimate asylum-seekers to countries where they will undoubtedly suffer persecution and torture."); American Immigration Council and American Immigration Lawyers Association, Comment Letter on Proposed Rule, 12 (July 15, 2020), https://beta.regulations.gov/comment/EOIR-2020-0003-6023 ("The Proposed Rule also ignores the fact that many asylum seekers are simply not safe from persecution by transnational criminal groups in 'pass-through' nations, even in those countries that are signatories to the 1951 Refugee Convention."); Tahirih Justice Center, Comment Letter on Proposed Rule, 28 (July 15, 2020), https://beta.regulations.gov/comment/EOIR-2020-0003-4756; American Jewish Committee, Comment Letter on Proposed Rule, 7 (July 13, 2020), https://beta.regulations.gov/comment/EOIR-2020-0003-81077; Disability Rights California, Comment Letter on Proposed Rule, 2 (July 15, 2020), https://beta.regulations.gov/comment/EOIR-2020-0003-6047; Immigrant Legal Resource Center, Comment Letter on Proposed Rule, 5 (July 15, 2020), https://beta.regulations.gov/comment/EOIR-2020-0003-4836; Unlocal, Comment Letter on Proposed Rule, 5 (July 15, 2020), https://beta.regulations.gov/comment/EOIR-2020-0003-6059; National Immigrant Justice Center, Comment Letter on Proposed Rule, 63 (July 15, 2020), https://beta.regulations.gov/comment/EOIR-2020-0003-77333; American Bar Association, Comment Letter on Proposed Rule, 23 (July 15, 2020), https://beta.regulations.gov/comment/EOIR-2020-0003-84797; Center for Gender and Refugee Studies, Comment Letter on Proposed Rule, 9 (July 15, 2020), https://beta.regulations.gov/comment/EOIR-2020-0003-6004.

procedures creating additional barriers for asylum applicants.[229]

231. The comments highlight that the Proposed Rule violates United States treaty obligations incorporated into domestic law and contravenes international law.[230]

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[229] *See* American Immigration Council and American Immigration Lawyers Association, Comment Letter on Proposed Rule, 16 (July 15, 2020), https://beta.regulations.gov/comment/EOIR-2020-0003-6023 ("As Senator Ted Kennedy has pointed out, 'expedited exclusion procedures' that do not afford procedural safeguards such as '[a] hearing and 'access to counsel' run the risk that the United States will 'turn away true refugees.' Raising the fear standard from 'significant possibility' to 'reasonable possibility' heightens the risk that the United States will indeed 'turn away true refugees.'"); Ayuda, Comment Letter on Proposed Rule, 6 (July 15, 2020), https://beta.regulations.gov/comment/EOIR-2020-0003-6076 ("It is precisely because the credible fear process affords far fewer procedural protections that such preclusive procedures and bars should not be closely examined and considered at the initial credible fear stage, which is by design cursory. . . . The proposals would turn this 'gatekeeping' stage on its head, raising the threshold while reducing legal rights—all in the name of efficiency and denying asylum seekers their day in court."); American Bar Association, Comment Letter on Proposed Rule, 35 (July 15, 2020), https://beta.regulations.gov/comment/EOIR-2020-0003-84797 ("The procedures set forth in the Proposed Rules would create an untenable situation with potentially dire consequences for the asylum applicant. As a result, it is antithetical to the principles of fairness and due process."); Disability Rights California, Comment Letter on Proposed Rule, 6 (July 15, 2020), https://beta.regulations.gov/comment/EOIR-2020-0003-6047 ("The proposed regulation is antithetical to principles of due process, and it would unnecessarily modify established procedures to the detriment and injury of asylum seekers. . . . Importantly, this change is discordant with the UNHCR principle that requires 'fair and efficient' procedures to secure a full and inclusive application of the Refugee Convention."); Center on Gender and Refugee Studies, Comment Letter on Proposed Rule, 12 (July 15, 2020), https://beta.regulations.gov/comment/EOIR-2020-0003-6004; Tahirih Justice Center, Comment Letter on Proposed Rule, 59 (July 15, 2020), https://beta.regulations.gov/comment/EOIR-2020-0003-4756; Safe Passage Project, Comment Letter on Proposed Rule, 4 (July 15, 2020), https://beta.regulations.gov/comment/EOIR-2020-0003-6116; American Gateways, Comment Letter on Proposed Rule, 4, 28-29 (July 15, 2020), https://beta.regulations.gov/comment/EOIR-2020-0003-5991; American Jewish Committee, Comment Letter on Proposed Rule, 9 (July 13, 2020), https://beta.regulations.gov/comment/EOIR-2020-0003-81077; Kids In Need of Defense, Comment Letter on Proposed Rule, 6 (July 15, 2020), https://beta.regulations.gov/comment/EOIR-2020-0003-4763; University of Texas School of Law Immigration Clinic, Comment Letter on Proposed Rule, 4 (July 15, 2020), https://beta.regulations.gov/comment/EOIR-2020-0003-85085.

[230] *See* UNHCR, Comment Letter on Proposed Rule, 3, 4 (July 15, 2020), https://beta.regulations.gov/comment/EOIR-2020-0003-5471 ("UNHCR is concerned that the extensive changes made in the Proposed Rule move away from the humanitarian, non-discriminatory spirit of the 1980 Refugee Act, which implemented the U.S.'s commitments made

through ratifying the 1967 Protocol. . . . UNHCR notes that compliance with the 1951 Convention and 1967 Protocol is not brought about merely by complying with one article therein (that is, non-refoulement obligations under Article 33). Instead, the U.S. should provide for a determination of eligibility for refugee status pursuant to the criteria in Article 1 (inclusion as well as exclusion)."); National Citizen and Immigration Services Council 119, Comment Letter on Proposed Rule, 14, 23, 26 (July 15, 2020), https://beta.regulations.gov/comment/EOIR-2020-0003-6096 ("Such practices are clearly prohibited under the 1951 Refugee Convention and thus outside the lawful authority of the Secretary of Homeland Security or the Attorney General to implement."); Human Rights First, Comment Letter on Proposed Rule, 22 (July 15, 2020), https://beta.regulations.gov/comment/EOIR-2020-0003-6013 ("We have represented clients who were tortured by government officials in plain clothes, and country conditions evidence reflects that this is all too common. We are concerned that an ill-informed analysis of whether the government official committing an act of torture was officially on duty, in uniform, or acting in an official capacity will block protection for persons who were tortured directly by their country's government. Such an interpretation violates the Convention against Torture and its implementing statute."); Center for Constitutional Rights, Comment Letter on Proposed Rule, 15, 16 (July 15, 2020), https://beta.regulations.gov/comment/EOIR-2020-0003-5994 ("The Proposed Rule also violates U.S. treaty mandates and international law by subjecting asylum seekers to deportation contrary to the principle of "non-refoulement. . . . By stripping away protections against deportation for countless individuals fleeing persecution in their home countries, the Proposed Rule flagrantly violates the U.S.'s treaty obligations and international law norms."); Amnesty International, Comment Letter on Proposed Rule, 11 (July 15, 2020), https://beta.regulations.gov/comment/EOIR-2020-0003-4760 ("The concept of internal flight or relocation alternative should therefore not be invoked in a manner that would undermine important human rights tenets underlying the international protection regime, namely the right to leave one's country, the right to seek asylum and protection against refoulement. Yet, by presuming that safe internal relocation alternatives exist, this proposed rule would do just that."); Catholic Charities Community Services, Comment Letter on Proposed Rule, 7 (July 13, 2020), https://beta.regulations.gov/comment/EOIR-2020-0003-39866 ("The proposed definition of persecution marks a significant departure from longstanding case law and the intent of Congress in enacting the Refugee Act of 1980. The proposal also violates the United States' obligations under international law. The proposed changes are not adequately explained or justified in the proposed rule, and thus, will not be granted deference upon judicial review."); *see also* Kids in Need of Defense, Comment Letter on Proposed Rule, 24 (July 15, 2020), https://beta.regulations.gov/comment/EOIR-2020-0003-4763 ("The Proposed Rule turns the concept of discretion on its head, mandating denials contrary to administrative law, the Refugee Act of 1980, and U.S. international treaty obligations."); Innovation Law Lab, Comment Letter on Proposed Rule, 7, 14-15 (July 15, 2020), https://beta.regulations.gov/comment/EOIR-2020-0003-6022 ("These proposed changes contravene our commitment to protecting asylum seekers and refugees under the Refugee Act and the 1951 UN Refugee Convention, as they will lead to the deportation of legitimate asylum-seekers to countries where they will undoubtedly suffer persecution and torture."); Urban Justice Center, Comment Letter on Proposed Rule, 12 (July 13, 2020), https://beta.regulations.gov/comment/EOIR-2020-0003-5974 ("The Departments' proposed change is contrary to international and domestic law and undermines the main policy of

232. Further, organizations stressed that applicants at the border would face extreme hardship under the Proposed Rule's unreasonable expectations that applicants, typically without legal representation or English fluency, understand and demonstrate mastery of the new Rule to avoid denial of their applications.[231]

U.S. asylum law—to protect vulnerable refugees from persecution."); Ayuda Legal, Comment Letter on Proposed Rule, 47 (July 15, 2020), https://beta.regulations.gov/comment/EOIR-2020-0003-6076; Refugee and Immigrant Center for Education and Legal Services, Comment Letter on Proposed Rule, 6 (July 15, 2020), https://beta.regulations.gov/comment/EOIR-2020-0003-6017; American University Washington College of Law's Center for Human Rights & Humanitarian Law, Comment Letter on Proposed Rule, 9, 11 (July 15, 2020), https://beta.regulations.gov/comment/EOIR-2020-0003-6102; ASISTA, Comment Letter on Proposed Rule, 10 (July 15, 2020), https://beta.regulations.gov/comment/EOIR-2020-0003-5985; Unlocal, Comment Letter on Proposed Rule, 5 (July 15, 2020), https://beta.regulations.gov/comment/EOIR-2020-0003-6059.

[231] *See* American Immigration Council & American Immigration Lawyers Association, Comment Letter on Proposed Rule, 21 (July 15, 2020), https://beta.regulations.gov/comment/EOIR-2020-0003-6023 ("When one considers the complexities of asylum law, it becomes very troubling to realize that applicants (most of whom are non-English speakers and acting pro se) may be in danger of being permanently barred from filing an asylum application that is found to be 'patently without substance.' The formulaic process of (non-judicial) asylum officers marking applications as frivolous will only serve to add a hurdle to applicants presenting their cases to reviewing IJs."); *see also* Roundtable of Former Immigration Judges, Comment Letter on Proposed Rule, 10 (July 13, 2020), https://beta.regulations.gov/comment/EOIR-2020-0003-4734 ("While this rule would streamline the asylum process and allow the Immigration Courts to rapidly reduce the backlog, the rule flies in the face of due process and contrary to the purpose of asylum. It is particularly problematic for pro se and non-English speaking asylum seekers. . . . In practice, this means that many indigent asylum seekers, including those who are detained and speak no English, must navigate the immigration court and asylum system with no assistance. Such individuals, many of whom are legitimate refugees, will never have their day in court under the proposed rule."); UNHCR, Comment Letter on Proposed Rule, 75, 76 (July 15, 2020), https://beta.regulations.gov/comment/EOIR-2020-0003-5471 ("The Proposed Rule puts forward a great number of procedural changes that are punitive toward applicants, as discussed above, and UNHCR is concerned that these will be disproportionately felt by applicants less well-equipped to navigate complex legal systems. This includes applicants appearing pro se in U.S. immigration proceedings, as well as those who have suffered profound trauma, have a low level of literacy, and are not proficient in English. The cumulative effect of the Proposed Rule's provisions on pro se asylum-seekers, and especially those with low levels of English proficiency or literacy, is clear: this highly vulnerable group stands virtually no chance at obtaining protection in the United States."); Asylum Seeker Advocacy Project, Comment Letter on Proposed Rule, 17-18 (July 15,

2020), https://beta.regulations.gov/comment/EOIR-2020-0003-6043 ("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 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.'"); Tahirih Justice Center, Comment Letter on Proposed Rule, 27 (July 15, 2020), https://beta.regulations.gov/comment/EOIR-2020-0003-4756 ("That failure also amounts to an arbitrary failure to consider a significant aspect of the issue. Over the past five years, between 15% and 24% of all asylum seekers have been unrepresented by counsel. People representing themselves lack significant legal training in U.S. asylum law, often speak little or no English, and have no way to fully familiarize themselves with the intricate rules surrounding PSGs. To require people in that situation to define their own PSGs dooms every pro se asylum seeker to failure on a PSG theory (no matter the underlying merits of the claim) and makes a mockery of the immigration courts."); National Immigrant Justice Center, Comment Letter on Proposed Rule, 14, 49 (July 15, 2020), https://beta.regulations.gov/comment/EOIR-2020-0003-77333 ("These additions would entrap unrepresented and vulnerable asylum seekers. Many asylum seekers are not sophisticated litigants, do not speak English, and may have a basic education level. Yet, under the Proposed Rules, they could easily make earnest mistakes or advance claims that will result in a finding of frivolousness. . . . IJs may punish truthful, often unrepresented asylum applicants for their failure to navigate complex laws and regulations"); Innovation Law Lab, Comment Letter on Proposed Rule, 6 (July 15, 2020), https://beta.regulations.gov/comment/EOIR-2020-0003-6022 ("Applicants for asylum do not flee persecution with well-formed legal theories or a knowledge of case law. Asking applicants, many of whom have little to no proficiency in English, to have the sort of robust knowledge of the constantly changing case law precedent to be able to determine when a claim is 'foreclosed by applicable law' is an impossibility. To criminally prosecute those who fail to meet an impossible standard is in effect a criminalization of the act of applying for asylum without an attorney."); American Bar Association, Comment Letter on Proposed Rule, 27 (July 15, 2020), https://beta.regulations.gov/comment/EOIR-2020-0003-84797 ("Because asylum law is complex, expecting an asylum applicant (who is most likely not fluent in English, and may have little formal education, much less legal training) to avoid inadvertently making a claim that is foreclosed by applicable law is unreasonable. Moreover, applicable law is constantly in flux, and it is challenging even for attorneys who regularly practice immigration law to stay current."); Catholic Charities Community Services, Comment Letter on Proposed Rule, 13-14 (July 14, 2020), https://beta.regulations.gov/comment/EOIR-2020-0003-54347; Immigrant Legal Resource Center, Comment Letter on Proposed Rule, 6 (July 15, 2020), https://beta.regulations.gov/comment/EOIR-2020-0003-4836; American Gateways, Comment Letter on Proposed Rule, 27 (July 15, 2020), https://beta.regulations.gov/comment/EOIR-2020-0003-5991; AsylumWorks, Comment Letter on Proposed Rule, 8, 10 (July 15, 2020) https://beta.regulations.gov/comment/EOIR-2020-0003-6132; City Bar Justice Center, Comment Letter on Proposed Rule, 12, 18 (July 15, 2020), https://beta.regulations.gov/comment/EOIR-2020-0003-5997; Kids in Need of Defense, Comment Letter on Proposed Rule, 18 (July 15, 2020), https://beta.regulations.gov/comment/EOIR-2020-0003-4763.

233. Notwithstanding the multitude of serious concerns raised by the comments, the Agencies did not address them in any legitimate way. By the Agencies' own admission, the Rule did not materially change from its proposed form. At an absolute minimum, the Agencies were required to consider whether alternatives existed so as to avoid some of the Rule's negative consequences, not the least of which is the certainty of increased *refoulement*.[232] The Agencies' failure to do so represent a clear violation of the Administrative Procedure Act.

C. The Agencies Did Not Support the Purported Benefits of the Overhaul

234. For several decades, our Nation's laws have provided a standardized and agile system for identifying, vetting, and protecting refugees. That system has endured across multiple administrations, ensuring that the Government does not return refugees to territories where they would be persecuted or tortured. When changes to the asylum system have been necessary, such as to ensure the right to an asylum hearing while streamlining the removal system, Congress has made those changes through legislation.

235. The Supreme Court has repeatedly, and recently, made clear that, particularly when there is so much at stake, "the Government should turn square corners in dealing with the people."[233]

236. Notably, the Agencies fail to provide a compelling reason to overhaul the entire asylum system at all, much less through eleventh-hour regulation. Nor do they address the

[232] *See Grace*, 965 F.3d at 902 (agencies' failure to account for how new policy affected statutory mandate to ensure those eligible for asylum are not summarily removed was arbitrary and capricious); *Casa de Maryland v. Wolf*, 2020 WL 5500185, at *26 (D. Md. Sept. 11, 2020) (agency action arbitrary and capricious in part because "public comments repeatedly draw the agency's attention to the combined adverse effect of the challenged rules. Yet time and again, the agency sidesteps this fundamental concern.").

[233] *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1909 (2020) (quoting *St. Regis Paper Co. v. United States*, 368 U. S. 208, 229 (1961) (Black, J., dissenting)).

reasonable alternatives that are within the ambit of the existing system, as the APA requires.[234]

237. The Agencies do not identify any data that would justify an overhaul of the asylum system, much less data that supports the proposition that these changes will in fact streamline and improve the system. The Agencies do not identify the most salient aspects of the problems they seek to remedy; articulate any facts or conclusions related to the particular policies the Rule seeks to further; explain how the policies align with Congressional intent; or acknowledge any regulatory alternatives, much less opine on the ways the Rule is superior to satisfactory alternatives.

238. Instead, the Agencies claim generically that the changes are designed to provide "clarity" and more "uniform application" of the law. The Agencies provide no explanation, however, as to how their changes provide any clarity or uniformity at all. And rather than increasing efficiency, the Rule will lead to innumerable legal challenges in the BIA and the Circuit Courts, as precedents that have long guided asylum adjudications will have to be reconsidered, something the Agencies themselves acknowledge.[235] Far from leading to clarity and consistency, implementation of the Rule will lead to widespread chaos.

239. The Agencies also falsely claim that the changes will "streamline" the process and "reduce the amount of time adjudicators must spend evaluating [asylum] claims." 85 Fed. Reg. at 80,329.

240. "Streamlining" is not a "get out of the APA free" card that agencies can throw in to justify any kind of regulatory action. Making the criteria so stringent that almost no one can meet them *might* ease administrative burdens, but it would do so at the cost of subverting the will of Congress.

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[234] *Id.* at 1933 (Kavanaugh, J., concurring in part and dissenting in part).

[235] 85 Fed. Reg. at 36,266 n.1; 36,282 n.32

241. And, it bears noting, the Agencies do not in fact offer any kind of evidence that the Rule will make the process more efficient or less costly. Indeed, in many instances the changes will make the process less efficient, for example, by require asylum officers in credible fear interviews to assess and apply mandatory bars to asylum where now they need assess only whether the applicant has a significant possibility of being persecuted. Not to mention that resolving the sheer number of legal challenges and lawsuits that will result from the complete overhaul of the U.S. asylum system will more than swamp any perceived efficiency gains.

242. Finally, the Agencies claim the changes will reduce widespread "fraud" and "meritless claims" by asylum applicants. But the Agencies provide no evidence of the alleged widespread existence of "fraudulent" or "meritless" claims. *See, e.g.*, 85 Fed. Reg. at 80,285. That a claim is denied does not indicate that the claim was without merit, much less that it was fraudulent. Notably, the Agencies do not address the fact that any increase in denied claims likely results not from an increase denials of meritless claims, but from the Administration's all-out attack on *all* asylum claims.

D. The Agencies Did Not Allow Sufficient Time for Comments or Implementation

243. To the extent feasible, agencies should provide a period of "at least 60 days" for comments on proposed rules. 76 C.F.R. § 3821 (2011). Executive Order 12866 requires agencies to "afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days." Executive Order 13563 likewise directs agencies to "afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally be at least 60 days." The Agencies concede that the Rule is a "significant regulatory action. . . because it raises

novel legal or policy issues."[236]

244. Here, although the Rule is designed broadly to transform nearly every aspect of asylum law in the United States, the Administration provided only 30 days for public comment on the proposed Rule. This was plainly an insufficient comment period, given not just the sheer scope of the changes contemplated, but also the highly technical, nuanced legal and policy issues involved.

245. The need for a longer comment period is obvious from the face of the Rule. The Rule includes dense, technical language that would bring about sweeping new restrictions. Any one of the sections of these regulations, standing alone, would merit a 60-day comment period for the public to absorb the proposed changes, perform research on the existing rule and its interpretation, and respond thoughtfully. Thirty days to respond to the entire regulation, which extends to 160 pages, is plainly insufficient, particularly given that the COVID-19 pandemic raging in June and July 2020 made it even more difficult for individuals and organizations to prepare their submissions.[237] Indeed, given the wide-ranging scope of the Rule and its impact, even 60 days would have been insufficient notice for individuals and groups to provide comprehensive comments. In view of all of this, the Agencies were well aware that the Rule required additional time for comment, yet failed to provide it.

246. The Agencies were also aware that the Rule required additional time for comment

[236] 85 Fed. Reg. at 80,383.

[237] Other agencies have recognized the need to grant the public additional time for comment in light of the pandemic. For example, the Bureau of Consumer Financial Protection recently extended a comment period from an initial 60 days to add an additional 90 days, noting that various "stakeholders state that the COVID-19 pandemic continues to make it difficult to respond to the [proposed action] thoroughly. The Bureau agrees that the pandemic makes it difficult to respond to the [proposed action] thoroughly and to determine when stakeholders will be able to do so." 85 Fed. Reg. 30,890 (May 21, 2020).

because the commenters *told* the Agencies as much. Over 500 organizations on June 18, 2020, jointly requested that the Agencies allow a minimum of 60 days for comments.[238] The Chairman of the House Committee on the Judiciary and the Chair of its Subcommittee on Immigration and Citizenship made the same request on June 22, 2020.[239] The Agencies nonetheless refused to extend the comment period beyond the initial 30 days.

247. In the final Rule, the Agencies acknowledge that "[c]ommenters raised concerns with the 30-day comment period" due "to the complex nature of the rule and its length," the impacts of the COVID-19 pandemic, and the lack of urgency in promulgating the Rule.[240] But the Agencies provide no explanation as to why the truncated period was necessary. Instead, they simply assert that, though Executive Orders 12866 and 13563 "recommend a comment period of at least 60 days, a 60-day period is not required" by the APA.

248. This is the most extensive change by regulation to immigration law since Congress passed IIRIRA in 1996. Allowing only 30 days to respond to a Rule of this scope and complexity is unreasonable under any circumstances. Though the APA does not specify the relevant time period in each and every circumstance, it requires that agencies provide the public with a "meaningful opportunity" to comment, as the Agencies acknowledge.[241] Allotting this very short timeframe, which included a federal holiday, in the middle of an unprecedented pandemic is a

[238] Request to Provide a Minimum of 60 Days for Public Comment, signed by the Center for Gender & Refugee Studies and 501 Other Organizations (June 18, 2020), https://www.tahirih.org/wp-content/uploads/2020/06/Request-for-Extension-of-Asylum-Rule-Comment-Period-from-502-organizations.pdf.

[239] Request for 60-Day Comment Period for DHS and DOJ Joint Notice of Proposed Rulemaking, signed by Rep. Jerrold Nadler and Representative Zoe Lofgren (June 22, 2020).

[240] 85 Fed. Reg. at 80,373.

[241] 85 Fed. Reg. at 80,373.

violation of the APA.

249. Similarly, the Final Rule provides only a brief 30 days between its publication and the effective date. 85 Fed. Reg. at 80,274. But the Congressional Review Act provides that a "major rule," as defined by statute, may not take effect until 60 calendar days after the rule has been published in the *Federal Register* and submitted to Congress.[242]

250. The Rule states, without further explanation, that the Office of Information and Regulatory Affairs "has determined that" the final Rule "is not a major rule as defined by . . . the Congressional Review Act," meaning that it "will not result in an annual effect on the economy of $100 million or more."[243]

251. This conclusion is contradicted by expert economic analysis, which determined that even a two percent reduction in the number of asylum seekers would easily cost the U.S. economy and fisc over $100 million, in the first year alone.

252. It blinks reality to suggest that the sweeping changes implemented by the Rule will fail to have their intended effect: reducing asylum grants by a substantial margin. The Agencies' contention than the Rule is not a "major rule" for purposes of the Congressional Review Act does not survive the barest scrutiny, and a 60-day period between publication and implementation is therefore required.[244]

[242] 5 U.S.C. § 801(a)(3).

[243] 85 Fed. Reg. at 80,383 (citing 5 U.S.C. § 804(2)).

[244] *See* 5 U.S.C. § 801(a)(3).

COUNTS

COUNT ONE
VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT: RULEMAKING CONTRARY TO LAW (8 U.S.C. § 1101 *et seq*.)

253. Plaintiff incorporates by reference paragraphs 1 through 252.

254. The Rule will go into effect on January 11, 2021. Defendants have stated that they will begin implementing the Rule on this date in the manner described on the DHS and DOJ websites.

255. Under the APA, a court "shall hold unlawful and set aside agency action, findings, and conclusions found to be . . . not in accordance with law." 5 U.S.C. § 706(2). A reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;" or "(D) without observance of procedure required by law." *Id.* § 706(2).

256. Defendants violated the foregoing requirements of the APA in issuing the Rule, and each of the rule changes contained therein, for several independent reasons, each of which is sufficient to require that the Rule, or each of the rule changes contained therein, be set aside.

257. Defendants' actions constitute a violation of the APA because the Rule is contrary to the plain meaning of the INA.

258. Defendants failed to address conflicts between the Rule and the text and purpose of the INA, including but not limited to the specific scheme Congress mandated through provisions 8 U.S.C. §§ 1101, 1153, 1158, 1225, 1229.

259. The Rule is "not consistent with applicable provisions" of the asylum and expedited

removal provisions and thus is "in violation of law." 8 U.S.C. § 1252(e)(3)(A)(ii). The Rule is therefore contrary to law under the APA.

260. Defendants' actions implementing the Rule are *ultra vires* and in excess of any authority granted by the INA, regulation, or statute, and not otherwise in accordance with law in violation of the APA, 5 U.S.C. § 706(2)(C).

261. Plaintiff Human Rights First has been harmed as a result of Defendants' violations of the INA and the APA. The litany of changes the Rule implements will make it substantially more difficult for individuals fleeing persecution to qualify for asylum, including many of Human Rights First's clients. The rendering of entire categories of Human Rights First clients ineligible for asylum frustrates Human Rights First's core mission and threatens its funding, some of which is directly tied to the number of clients the organization agrees to serve in a given period.

262. In addition, as a result of the higher standards imposed by the Rule, Human Rights First will have to spend substantially more time preparing each impacted client for the various steps of his or her proceedings, which will severely constrain the number of clients the organization will be able to assist. This reduction in client base will, in turn, severely impair not only Human Rights First's ability to fulfill its mission, but also its financial health.

263. Plaintiff does not have an adequate remedy at law to redress the violations alleged herein, and therefore seek declaratory relief setting aside the Rule and injunctive relief restraining Defendants from engaging in the unlawful policies and practices alleged herein.

COUNT TWO
VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT:
RULEMAKING IN EXCESS OF STATUTORY AUTHORITY (8 U.S.C. 1101 *et seq*.)

264. Plaintiff incorporates by reference paragraphs 1 through 252.

265. Defendants' actions constitute a violation of the APA because they acted in excess

of their statutory authority.

266. Defendants' actions exceed the delegation of statutory authority to the Executive for reasons including that Congress did not and could not delegate discretion to the Agencies to rewrite the immigration laws to change the substantive and procedural aspects of the INA and, in particular, Congress did not and could not delegate to the Agencies discretion to make asylum virtually impossible to obtain.

COUNT THREE
VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT:
RULEMAKING CONTRARY TO CONSTITUTIONAL SEPARATION OF POWERS

267. Plaintiff incorporates by reference paragraphs 1 through 252.

268. The doctrine of separation-of-powers is embodied in the United States Constitution. Congress "may not transfer to another branch 'powers which are strictly and exclusively legislative.'" *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42–43 (1825)).

269. "Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. . . . [T]hat the formulation of these policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government." *Galvan v. Press*, 347 U.S. 522, 531 (1954).

270. The Agencies cannot exercise their delegated authority under 8 U.S.C. §§ 1103(a), (g) to override, contravene, or issue regulations that are incompatible with the INA.

271. The Rule is executive lawmaking in a manner that Congress has expressly rejected in the INA.

272. To the extent that any section of the INA can be read to permit the delegation of

discretion reflected in the Rule, that section is an unconstitutional delegation of power in violation of the separation of powers.

273. Defendants' actions implementing the Rule are contrary to constitutional rights, violating the separation of powers enumerated in the U.S. Constitution in violation of the APA, 5 U.S.C. § 706(2)(B).

274. Plaintiff does not have an adequate remedy at law to redress the violations alleged herein, and therefore seeks injunctive relief restraining Defendants from continuing to engage in the unlawful policy and practices alleged herein.

COUNT FOUR
VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT:
RULEMAKING THAT IS ARBITRARY, CAPRICIOUS, AN ABUSE OF DISCRETION AND OTHERWISE CONTRARY TO LAW

275. Plaintiff incorporates by reference paragraphs 1 through 252.

276. The promulgation of the Rule constitutes agency action by the Attorney General and the Acting Secretary of DHS that is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law for a number of reasons:

a. Defendants failed reasonably to justify their departure from settled practice.

b. Defendants' implementation of the Rule is pretextual because Defendants seek to reduce, if not eliminate altogether, the availability of asylum.

c. Defendants did not quantify the adverse impact to refugees and the increase of *refoulement* of the Rule's changes to current practice.

d. Defendants did not quantify the adverse impact to the United States economy as a result of the Rule's changes to current practice.

e. The Rule states requirements that are irrational, vague, and unworkable, rendering impossible the uniform application of the laws or review of decisions for consistency with facts and evidence.

277. Defendants' actions implementing the Rule are based on legal error; fail to consider

all relevant factors; and lack a rational explanation, and are therefore arbitrary and capricious and an abuse of discretion, in violation of the APA, 5 U.S.C. § 706(2)(A).

COUNT FIVE
VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT:
RULEMAKING IN EXCESS OFAUTHORITY, NOT IN ACCORDANCE WITH LAW

278. Plaintiff incorporates by reference paragraphs 1 through 252.

279. Acting DHS Security Secretary Chad Wolf, who reviewed and approved the proposed rule and delegated signature authority to Chad Mizelle, did so without authority because neither he nor his predecessor Kevin McAleenan properly occupied the role of Acting Secretary under the DHS order of succession promulgated pursuant to the HSA. 6 U.S.C. § 113(a)(g)(2).

280. Mr. Wolf's exercise of authority as Acting DHS Secretary also exceeds the limitations of the FVRA. 5 U.S.C. § 3346(a)(1); *id.* § 3345 (b)(1)(B). Accordingly, Mr. Wolf's actions in that role "shall have no force or effect." 5 U.S.C. § 3348(d)(1).

281. Under the APA, a reviewing court "shall . . . hold unlawful and set aside agency actions" that are "not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. § 706(2)(A), (C).

282. Because Mr. Wolf's tenure as Acting Secretary is in violation of the HSA and/or the FVRA, his actions undertaken pursuant to that authority are in excess of authority and otherwise not in accordance with law.

283. On this basis, Plaintiff seeks a declaration setting aside the Rule and injunctive relief barring Defendants from implementing the unlawful Rule.

COUNT SIX
VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT:
RULEMAKING WITHOUT OBSERVANCE OF PROCEDURE REQUIRED BY LAW

284. Plaintiff incorporates by reference paragraphs 1 through 252.

285. The Rule is illegal because the Administration promulgated the Rule without providing sufficient notice and opportunity for public comment.

286. Federal regulation dictate that agencies should provide a period that should "generally be at least 60 days" for comments on proposed rules. 76 C.F.R. § 3821 (2011). Executive Order 12866 requires agencies to "afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days." *Id.* Executive Order 13563 likewise directs agencies to "afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally be at least 60 days." *Id.*

287. Defendants nevertheless provided only thirty days, in direct contravention of relevant regulations and executive orders.

288. The short 30-day timeframe was further exacerbated by the COVID-19 global pandemic and the fact that the 30 days included a federal holiday.

289. Moreover, the Agencies failed to meaningfully consider the comments they did receive during the notice-and-comment period.

290. Because interested parties only had thirty days to submit comments instead of the enumerated sixty days, because thirty days was inadequate for commenters to participate fully in the notice-and-comment process, and because the Agencies failed to meaningfully consider the comments they received, the Rule was promulgated without observance to procedure in violation of 5 U.S.C. § 706(2)(D).

291. Additionally, the Agencies' contention that the Rule is not a "major rule" for purposes of the Congressional Review Act does not survive the barest scrutiny. *See* ¶¶ 250–52, *supra*. A 60-day period between publication and implementation was required under the

Congressional Review Act because the Rule implicates more than $100 million in annually. *See* 5 U.S.C. § 801(a)(3).

292. On these bases, Plaintiff seeks a declaration setting aside the Rule and injunctive relief barring Defendants from implementing the unlawful Rule.

COUNT SEVEN
VIOLATION OF THE IMMIGRATION AND NATIONALITY ACT:
***ULTRA VIRES* RULEMAKING**
(Against All Defendants)

293. Plaintiff incorporates by reference paragraphs 1 through 252.

294. The Rule is illegal and so is *ultra vires* for the reasons provided in Counts One through Six. *See, e.g.*, *Trudeau v. F.T.C.*, 456 F.3d 178 (D.C. Cir. 2006); *Aid Ass'n for Lutherans v. U.S. Postal Serv.*, 321 F.3d 1166, 1172, 1175 (D.C. Cir. 2003).

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that the Court enter judgment in its favor and against Defendants, and to grant the following relief:

a. A declaratory judgment that the Rule violates the Administrative Procedure Act because (1) Defendant Wolf occupies the position of Acting Secretary of the Department of Homeland Security without authority and in contravention of the FVRA, and his promulgation of the Rule is therefore in excess of authority and not in accordance with the law; (2) the Agencies promulgated the rule in excess of their statutory authority under the INA; (3) the Rule is arbitrary, capricious, and contrary to law within the meaning of 5 U.S.C. § 706; and (4) the Rule's 30-day comment period and 30-day period between publication and its effective date were each without observance of procedure required by law.

b. Such preliminary injunctive and ancillary relief as may be necessary to avert the likelihood of irreparable harm to Plaintiff during the pendency of this action, including, but not

limited to, temporary and preliminary injunctions or, in the alternative, a stay of implementation pending judicial review, pursuant to 5 U.S.C. § 705;

c. A permanent injunction forbidding Defendants from implementing or enforcing the Rule;

d. An order awarding Plaintiff's costs of suit, as well as reasonable attorneys' fees and expenses pursuant to any applicable law; and

e. Such additional and other relief as the Court deems just and proper.

Dated: December 21, 2020

Respectfully submitted,

/s/ Ana C. Reyes

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* Practice supervised by D.C. Bar members pursuant to D.C. Court of Appeals Rule 49(c)(8), and certification to practice pursuant to LCvR 83.2(g) to be submitted.