July 15, 2020

Department of Justice, Department of Homeland Security
Regulatory Coordination Division, Office of Policy and Strategy,
Via electronic submission

Re: Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review
EOIR Docket No.18-0002; A.G Order No.4714-2020

The City of New York ("the City") submits this comment to oppose the Department of Homeland Security ("DHS") and Department of Justice's ("DOJ") Proposed Rule entitled "Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review," which was published in the Federal Register on June 15, 2020 ("Proposed Rule").[1] The Mayor's Office of Immigrant Affairs ("MOIA"), the Mayor's Office to End Domestic and Gender-Based Violence ("ENDGBV"), the Department of Social Services ("DSS"), and the New York City Commission on Human Rights ("CCHR") contributed to this comment.

The Proposed Rule, if implemented, will alter beyond recognition the U.S. asylum system, which has been in place for four decades. The Proposed Rule is the culmination of this Administration's sustained attacks on the asylum system over the past three years with new policies such as the Migrant Protection Protocol ("MPP"), the Third Country Transit Bar,[2] and several other recent Proposed and Interim Final Rules.[3] Despite the stated purpose of clarifying

[1] Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 FR 36264 (Jun. 15, 2020).
[2] This interim final rule was recently vacated in its entirety for the federal administration's failure to follow the notice-and-comment requirements of the APA. *See Capitol Area Immigrants' Rights Coalition, et al v. Trump*, No. 19-cv-02117-TJK, (D.D.C. Jun. 30, 2020).
[3] *See, e.g.*, comment in opposition to Procedures for Asylum and Bars to Asylum Eligibility, 84 FR 69640 (Dec 19, 2019) at https://www1.nyc.gov/assets/immigrants/downloads/pdf/comments/NYC-Comment-Procedures-for-Asylum-and-Bars-to-Asylum-Eligibility.pdf; comment in opposition to Asylum Application, Interview, and Employment Authorization for Applicants, 84 Fed. Reg. 62374 (Nov. 14, 2019) at https://www1.nyc.gov/assets/immigrants/downloads/pdf/comments/DHS-Docket-No-USCIS-2019-0011-NYC-Comment.pdf; comment in opposition to U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements, 84 FR 67243 (Dec. 9, 2019) at https://www1.nyc.gov/assets/immigrants/downloads/pdf/comments/us-citizenship-and-immigration-services-fee-schedule-comment-20191230.pdf; comment in opposition to Removal of 30-Day Processing Provision for Asylum Applicant-Related Form I-765, 84 FR 47248 (Sep. 9, 2019) at https://www1.nyc.gov/assets/immigrants/downloads/pdf/comments/Comment-re-EAD-Asylees-11-8-19-CSB-Signed.pdf; comment in opposition to Asylum Eligibility and Procedural Modifications, 84 FR 33829 (Jul. 16, 2019) at https://www1.nyc.gov/assets/immigrants/downloads/pdf/comments/IFR-asylum-ban-comment-NYC-2019-08-15.pdf; comment in opposition to Aliens Subject to a Bar on Entry under Certain Presidential Proclamations; Procedures for Protection Claims, 83 Fed. Reg. 55934 (Nov. 9, 2018) at

adjudicative factors and streamlining the asylum process, the litany of changes contained in this rule are designed to achieve one goal—the drastic reduction of individuals who can find shelter from persecution and violence in this country. The Proposed Rule touches on almost all aspects of asylum law, both substantive and procedural. It seeks to redefine key elements of asylum eligibility including but not limited to the notion of persecution itself and the protected grounds for demonstrating persecution (political opinion as well as "particular social group"), with the end result of shutting out survivors of particular forms of persecution such as gender and LGBTQ+ based violence.[4] These changes seek to restrict access to this critical humanitarian relief. Further, it robs asylum seekers of due process by giving executive officers unilateral power to deny hearings, creating a slew of discretionary factors designed to deny the vast majority of applications, and broadening the definition of frivolous applications to take away the applicants' ability to apply for other forms of relief.

The provisions of the Proposed Rule will serve to deny asylum to most applicants, sending them back into harm's way. New York City's comments focus on the ways in which the changes in regulation will negatively impact the City's communities as well as our core values. The Proposed Rule would harm immigrant New Yorkers who are seeking asylum as well as their families—including U.S. citizens—and their local communities. In turn, the Proposed Rule would harm the societal well-being of New York City, including significantly reducing the efficacy of investments made in immigration legal services. Further, these regulatory changes fly in the face of values long-championed by New York City, and historically the United States.

Additionally, the City objects to the woefully inadequate response deadline, which hinders the ability of stakeholders to meaningfully engage in the comment process. New York City strongly opposes the Proposed Rule and calls upon DHS and DOJ to withdraw it in its entirety. Nothing in these comments constitutes a waiver of any arguments that the City may assert in any other forum.

I. The Proposed Rule Would Create Unprecedented Barriers to Safety and Stability for the City's Most Vulnerable Residents.

New York City is the quintessential city of immigrants, with immigrants making up almost 40% of its population, or around 3.1 million people. This immigrant population is deeply tied to the City as a whole, with nearly 60% of New Yorkers living in households that have at

https://www1.nyc.gov/assets/immigrants/downloads/pdf/comments/nyc_mayors_office_immigrant_affairs_comment_on_asylum_ban_2019_01_08.pdf.

[4] While gender-based violence is not explicitly mentioned in the 1951 Refugee Convention, survivors have historically been considered refugees that are members of a "particular social group" by Congress, immigration courts, humanitarian guidance, and prior administrations. See: Tahirih Justice Center, *Tahirih Explains: Gender-Based Asylum, available at:* https://www.tahirih.org/wp-content/uploads/2020/06/Tahirih-Explains-Gender-Based-Asylum.pdf; United Nations High Commissioner For Refugees, *Sexual and Gender-Based Violence against Refugees, Returnees and Internally Displaced Persons: Guidelines for Prevention and Response*, *available at* https://www.unhcr.org/en-us/3f696bcc4.html.

least one immigrant.[5] Asylum seekers are a particularly vulnerable population in the City, having often made the perilous journey to the United States to flee persecution in their home countries. The Proposed Rule creates unprecedented barriers to asylum eligibility, preventing applicants from achieving more stable lives in the U.S., and harming cities like New York that are home to many asylum seekers and their families. [6]

The City has long recognized that policies that welcome and integrate immigrants lead to a stronger and more prosperous community for all of our residents. That is why the City has taken great strides to support those fleeing persecution as they establish safe, stable homes in the City.[7] The process of applying for asylum is already incredibly complex and difficult to navigate, especially for applicants who do not have adequate counsel. Far from providing clarity on asylum law, the Proposed Rule compounds the difficulties of the process by drastically changing the existing definitions and legal standards for determining asylum eligibility—definitions and standards that form the bedrock of the U.S.'s international obligations under the Refugee Convention and on which applicants and legal service providers have relied for decades.[8] The Proposed Rule would make the standards for what constitutes a meritorious claim of asylum much harder to achieve by narrowly defining the elements of asylum, eliminating entire categories of claims that have been deemed meritorious for years.[9] This would leave individuals fearing horrible persecution with no options, despite their having a credible fear of being persecuted or even killed in their home country. It would also join the significant limitations that

[5] New York City Mayor's Office of Immigrant Affairs, *State of Our Immigrant City: MOIA Annual Report for Calendar Year 2019*, 12, *available at* https://www1.nyc.gov/assets/immigrants/downloads/pdf/MOIA-Annual-Report-for-2019.pdf.

[6] A significant proportion of those individuals granted asylum in any given year reside in the City and New York State ("the State"). In FY17, 1,510 individuals granted affirmative asylum reside in the State. Nadwa Mossad, *Refugees and Asylees: 2017*, DHS Off. of Immig. Statistics (Mar. 2019), *available at* https://www.dhs.gov/sites/default/files/publications/Refugees_Asylees_2017.pdf. In addition, the State and City are major destinations for children asylum seekers. In FY18, 2,837 unaccompanied immigrant children were released from federal custody to adult sponsors in the State, more than the vast majority of other states. Off. of Refugee Resettlement, *Unaccompanied Alien Children Released to Sponsors by State* (last updated Nov. 29, 2018), *available at* https://tinyurl.com/UAC-state.

[7] *See*, *e.g.*, NBC New York, *Mayor De Blasio Says NYC Will Welcome Refugees*, Nov. 17, 2015, *available at* https://www.nbcnewyork.com/news/local/syria-refugee-new-york-mayor-bill-de-blasio-immigrant/1274304/; Bill de Blasio, Anne Hidalgo & Sadiq Khan, The New York Times, *Our Immigrants, Our Strength*, Sep. 20, 2016, *available at* https://www.nytimes.com/2016/09/20/opinion/our-immigrants-our-strength.html.

[8] Although there are many examples of provisions in the Proposed Rule that are contrary to the U.S.'s international obligations as well as domestic statutes adopting those obligations, we highlight only a few in this comment for the sake of brevity and due to the inadequate comment period. One of these examples is the firm resettlement bar. For two decades, an applicant was considered to have firmly resettled in another country prior to arrival in the U.S. if she was offered "permanent resident status, citizenship, or some other type of permanent resettlement." 8 C.F.R. § 208.15, 65 FR 76135, Dec. 5, 2000; *see also Abdille v. Ashcroft*, 242 F.3d 477, 484 (3d Cir. 2001). Now, through the Proposed Rule, the agencies would change this longstanding rule to create three completely new definitions of firm resettlement to bar asylum eligibility, including if an applicant resided for one year in another country, regardless of whether she was ever offered or given permanent or even nonpermanent status. And, there is no exception based on the asylum seeker's inability to leave the other country due to financial distress or being trafficked, or based on fear of remaining in the other country.

[9] For examples, *see infra* Section III, which identifies the many redefinitions of the elements of asylum that will work together to deny the majority of gender-based and LGBTQ+ related cases.

have already been enacted by this federal administration, that threaten to rend apart our communities.[10]

In addition to redefining the substantive requirements of asylum, the Proposed Rule also seeks to curtail applications by penalizing asylum seekers in a variety of new ways. First, the rule makes it much easier for asylum officers and immigration judges to deem applications "frivolous," a finding which carries the enormous penalty of barring any other future immigration relief. The vast majority of asylum seekers are fleeing violent persecution in their home countries and arrive in the U.S. with little to no assets let alone a sophisticated knowledge of the U.S. asylum laws. Yet, the Proposed Rule would find that an asylum seeker has made a "frivolous application" if such application is "filed without regard to the merits of the claim" or prohibited by "applicable law."[11] Asylum law and regulations change often—as recent changes driven by this administration demonstrate. How can a recent arrival, who may not even speak fluent English, be expected to determine the merits of her legal claim, especially without competent counsel? Further, existing regulation, 8 C.F.R. § 1003.102(j)(1), specifically states that an application is not frivolous if the applicant has "a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law." Determination of whether an application was "filed without regard to the merits of the claim" would therefore seem to be nearly impossible to prove and even harder to refute. Under the Proposed Rule, an asylum seeker who intends to challenge wrongly decided BIA or AG-certified precedent in federal court must risk a finding that would forever bar any future immigration relief if that appeal is unsuccessful. If this Proposed Rule were adopted, individuals fleeing persecution who would otherwise have valid claims would be relegated to far less stable living conditions either because of inappropriate denials or due to a fear of applying for asylum.

The Proposed Rule would severely hamstring asylum seekers' ability to effectively present their cases in fair proceedings, which in turn would dramatically lower the percentage of the City's most vulnerable population that will be able to win relief for which they are eligible. In New York City, we have seen that the stability of a person's immigration status positively correlates to better socio-economic outcomes across many indices.[12] Because the Proposed Rule places so many new limits on asylum eligibility, a higher percentage of those fleeing persecution will be left only with the ability to pursue related fear-based reliefs with higher standards than asylum—withholding of removal or deferral of removal under the Convention Against Torture ("CAT").[13] These forms of relief are harder to obtain, and even if granted, these forms of relief

[10] Asylum grant rates in immigration court for 1st quarter FY 2020 has fallen by almost 37% since FY 2016 (40% lower than average in Obama & Bush administrations). *See* Eleanor Acer & Kennji Kizuka, Human Rights First, *Fact Sheet: Grant Rates Plummet as Trump Administration Dismantles U.S. Asylum System, Blocks and Deports Refugees*, Jun. 11, 2020, *available at* https://www.humanrightsfirst.org/resource/grant-rates-plummet-trump-administration-dismantles-us-asylum-system-blocks-and-deports.

[11] 85 Fed. Reg. at 36295.

[12] Data shows that stable immigration status, especially lawful permanent resident or naturalized citizen status, is indicative of lower rates of poverty, higher health insurance coverage, and educational attainment, among others. *See supra* note 5 at 22-23, 30.

[13] However, even the possibility of being able to pursue these fear-based reliefs with higher standards of proof is now uncertain. Just three weeks after the publication of this Proposed Rule, the Agencies unveiled a new proposed rule seeking to further limit eligibility for asylum as well as withholding of removal and to make it permissible to send individuals who meet the threshold to apply for deferral under CAT to a third country instead of allowing them

leave people in a far less stable position, with no pathway to lawful permanent residence and citizenship. This results in poorer socio-economic outcomes for applicants and their families. The federal administration's continuous attacks on asylum seekers and the asylum system, of which this Proposed Rule is the culmination, will deny the City's most vulnerable residents the safety and stability they desperately need.

II. The Proposed Rule Severely Undermines the City's Investments in Ensuring Due Process for Immigrants and Public Safety.

In 1968, the United States acceded to the 1967 Protocol Relating to the Status of Refugees ("Protocol"), which largely incorporated the 1951 Convention Relating to the Status of Refugees ("Refugee Convention").[14] Article 33(1) of the Refugee Convention enshrines the principle of nonrefoulement: "[n]o Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."[15] In acceding to the Protocol, the United States sent a message to the world that brave leadership included providing refugees with a safe and welcoming home. This led to the codification of the United States asylum system through the Refugee Act in 1980, which sought to ensure that the United States legal code would comply with the 1967 Protocol Relating to the Status of Refugees,[16] which binds parties to the United Nations Convention Relating to the Status of Refugees.[17] New York City is proud to be embrace that position, and the City remains committed to upholding those values today.

Due process protections, which ensure that asylum seekers have a meaningful opportunity to present their cases, are critical, as the stakes are often life and death.[18] As it is, the

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to pursue their claims in the U.S. *See* Security Bars and Processing, 85 FR 41201 (Jul. 9, 2020). In this new proposed rule, the Agencies "acknowledge" that the procedures for processing individuals seeking humanitarian relief in these two rule conflict with one another but merely state that they will "reconcile" this conflict at the final rule stage. *Id*. at 41211.

[14] *See* Convention Relating to the Statute of Refugees art. 33(1), July 28, 1951, 140 U.N.T.S. 1954 (hereinafter "Refugee Convention"); Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223 (1968) (hereinafter "Protocol"); *see also INS v. Stevic*, 467 U.S. 407, 416 (1984) ("The Protocol bound parties to comply with the substantive provisions of Articles 2 through 34 of the United Nations Convention Relating to the Status of Refugees . . . with respect to "refugees" as defined in Article 1.2 of the Protocol."). The Convention and Protocol have been ratified by 145 and 146 countries, respectively. *See* U.N. Treaty Collection, Convention relating to the Status of Refugees (last updated Mar. 19, 2018); U.N. Treaty Collection, Protocol relating to the Status of Refugees (last updated Mar. 19, 2018), *available at* https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=V5&chapter=5&clang=_ en.

[15] Refugee Convention, *supra* note 14, art. 33(1).

[16] Protocol, *supra* note 14.

[17] Refugee Convention, *supra* note 14.

[18] *See* Elizabeth G. Kennedy & Alison Parker, *Deported to Danger United States Deportation Policies Expose Salvadorans to Death and Abuse*, Human Rights Watch (Feb. 5, 2020), *available at* https://www.hrw.org/report/2020/02/05/deported-danger/united-states-deportation-policies-expose-salvadorans-death-and (finding that at least 138 Salvadorans were killed and over 70 were severely abused after being deported from the U.S. from 2013 to 2019).

process of seeking asylum is challenging because the evidentiary burden rests on the asylum seeker who is navigating a complex, unfamiliar system. In addition, applicants for asylum, like all immigrants in removal proceedings or pursuing affirmative applications for relief, have no right to counsel. Moreover, the U.S. asylum system already applies bars to asylum in a manner that is overly broad in the context of our obligations under the Refugee Convention.[19] The Proposed Rule would further rob individuals of due process protections by depriving them of a full day in court as well as creating a slew of new discretionary bars to asylum never contemplated under our existing U.S. and international law.

Recognizing that New York is a city that thrives because of our immigrant communities, this mayoral administration has increased and enhanced access to legal assistance for immigrants—especially for those most vulnerable like asylum seekers—by investing over $30 million dollars in a continuum of free legal service programs for immigrant New Yorkers for fiscal year 2020.[20] Together with the New York City Council, the City of New York has invested over $50 million in immigration legal services.[21] These investments are diminished by the federal administration's dismantling of the asylum system. The Proposed Rule would require legal service providers to expend extensive time and resources to retrain attorneys on the arbitrary changes to the asylum law[22] and to upend their case management systems.

The Proposed Rule would remove the existing procedural safeguards afforded to asylum seekers in service of "efficiency." It would relegate asylum seekers to a "streamlined" process in which individuals found to have credible fear of persecution will have their claims adjudicated by an Immigration Judge in a truncated asylum-only proceeding rather than in a regular immigration court proceeding.[23] Thus, even if an individual were eligible for a different form of immigration relief, she would not be able to apply for it, forcing a difficult choice between paths to relief. This arbitrarily denies applicants the opportunity to present a full case. In a further erosion of due process, the Proposed Rule would give immigration judges the power to summarily deny applications without so much as a hearing, if the judges decide, without the applicant's testimony, that the application form does not sufficiently make out a claim.[24]

The opportunity to a full and fair hearing remains a fundamental American value of justice. Yet, this rule seeks to take this most basic of guarantees away from those fleeing

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[19] *See* Philip L. Torrey, Clarissa Lehne, Collin Poirot, Manuel D. Vargas, Jared Friedberg, *United States Failure to Comply with the Refugee Convention: Misapplication of the Particularly Serious Crime Bar to Deny Refugees Protection from Removal to Countries Where Their Life or Freedom is Threatened*, (2018) available at https://www.immigrantdefenseproject.org/wpcontent/uploads/IDP_Harvard_Report_FINAL.pdf.

[20] New York City Office of Civil Justice, *2019 Annual Report*, *available at* https://www1.nyc.gov/assets/hra/downloads/pdf/services/civiljustice/OCJ_Annual_Report_2019.pdf.

[21] *Id*.

[22] Among many changes to longstanding regulations and legal precedent, the Proposed Rule seeks to arbitrarily redefine "persecution" as well as the protected grounds of "political opinion" and "particular social group." *See* 85 Fed. Reg. at 36278-80. It would also change the proof required for establishing a nexus between the persecution and protected ground, bar certain types of commonly-used evidence regarding cultural stereotypes to support a claim that a persecutor conformed to that stereotype (i.e., machismo, family violence), and it would shift the burden to the applicant in cases where an applicant has suffered past persecution and argues that internal relocation is not possible. *See id.* at 36281-2.

[23] *See* 85 Fed. Reg. at 36264, 36266-67.

[24] *See id.* at 36277.

persecution. Such drastic changes to the proceedings afforded asylum seekers, far from clarifying and streamlining the process, will result in widespread confusion. First, asylum-only proceedings mean that legal service providers will be unable to pursue every avenue of relief available to their clients. Further, these same providers will be burdened by the myriad appeals and challenges to these truncated proceeding they must pursue to fully vindicate their clients' rights. Second, allowing the immigration judge to pretermit cases without a hearing ignores the practical obstacles many asylum seekers face in completing the lengthy and complex asylum application. Most asylum seekers find it challenging to navigate a complex, foreign court system and face hurdles in finding trusted and free or low-cost counsel. In New York City, we recognize this reality and have accordingly made historic investments in legal services. As these applicants become more settled in their new city, they are often able to find quality legal representation through these services. As a result, applicants often end up filing their initial application *pro se* (on their own), and later work with legal service providers to gather evidence to supplement initial filings. These applications will now run the risk of being pretermitted without any opportunity for the applicant and her attorney to present such additional evidence.

The U.S. already applies bars to asylum that are far broader than was contemplated by international law, and the Proposed Rule, which adds a slew of new discretionary bars,[25] comes on the heels of a prior rule that sought to do the same, to which the City of New York commented on January 21, 2020.[26] As expressed in the City's previously submitted comment, the most egregious proposed bars clearly conflict with existing statutes and regulations, evincing the administration's primary goal of denying as many applications as possible. For one particularly salient example, the Proposed Rule would ban from asylum many individuals who submit their applications more than a year after arriving in the U.S. with no exceptions. This directly contradicts provisions of the Immigration and Nationality Act, passed by Congress.[27]

The numerous and arbitrary revisions contained in the Proposed Rule limiting due process and creating barriers to relief will significantly weaken the impact of New York City's historic investment in legal services and place an undue strain on the City's legal service partners by requiring retraining of legal service providers and upending their case load and management.

III. The Proposed Rule Contravenes the Values and Purpose of Asylum.

The City is proud to offer itself as a home to those who have escaped conflict, persecution, and violence.[28] This Proposed Rule is an egregious attempt to destroy the asylum system in the U.S. and joins an overwhelming number of proposals and policies offered by this administration that seek to deprive immigrants of safe harbor and critical resources.[29] It is impossible to comment on this Proposed Rule and ignore the obvious attacks on immigration as a whole. The Proposed Rule does not provide any justification for how it serves our country's

[25] *See id.* at 36282-85.
[26] *See* comment in opposition to Procedures for Asylum and Bars to Asylum Eligibility, 84 FR 69640 (Dec 19, 2019) at https://www1.nyc.gov/assets/immigrants/downloads/pdf/comments/NYC-Comment-Procedures-for-Asylum-and-Bars-to-Asylum-Eligibility.pdf.
[27] *See* INA § 208(a)(2)(d).
[28] *See supra* note 7.
[29] *See supra* note 3.

economy, national security, or legal system and instead seeks, without justification, to overhaul the four-decades-old asylum system through unilateral executive action.[30] Such action, which attempts to circumvent the will of the legislature as well as precedential rulings in the Courts, is of deep concern to the City of New York.

Asylum was created as a path to safety for people harmed because of immutable characteristics: gender, sexual orientation, and gender identity, like race, religion, nationality, and political opinion, are fundamental aspects of one's personhood as recognized broadly in international human rights law.[31] Yet, the Proposed Rule would directly contradict the United States' treaty obligations by seeking to exclude gender and sexual orientation based violence claims, going so far as to virtually eliminate gender as a ground for asylum, and reading those fleeing gang-related violence entirely out of the refugee definition.

The Proposed Rule would make it practically impossible for asylum claims based on gender-based violence and LGBTQ+ related persecution to succeed by redefining the "particular social group" ("PSG")[32] and "political opinion"[33] grounds of asylum, redefining persecution to undercut these claims,[34] redefining nexus to explicitly exclude gender,[35] and prohibiting the submission of the most common and critical forms of evidence used to support these claims.[36]

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[30] *See e.g.*, *Matter of L-E-A-*, 27 I&N Dec. 581 (A.G. 2019); *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018); https://www.whitehouse.gov/presidential-actions/proclamation-suspending-entry-aliens-present-risk-u-s-labor-market-following-coronavirus-outbreak/.

[31] In 1985, U.S. Board of Immigration Appeals ("BIA") ruled that the PSG ground for asylum protects individuals persecuted on account of a fundamental characteristic, including sex in *Matter of Acosta*, 19 U&N Dec. 211(BIA 1985). In 1996, in *Matter of Kasinga*, the BIA granted asylum to a young woman fleeing female genital mutilation/cutting and forced marriage, recognizing that her persecution was partly motivated by her gender. 21 I&N Dec. 357 (BIA 1996). The precedent set by *Kasinga* paved the way for those fleeing other types of gender-based violence.

[32] Among other restrictions, the Proposed Rule states that a PSG ground cannot be based on "interpersonal disputes" or "private criminal acts." 85 Fed. Reg. at 36279. As explained further in this section, such a change would effectively exclude most claims stemming from intimate partner violence—such as domestic violence or spousal rape—or intra-family violence—such as female genital cutting, honor crimes, or forced marriage.

[33] The Proposed Rule would limit the definition of "political opinion" to those held in "furtherance of a discrete cause related to political control of a state or a unit thereof." 85 Fed. Reg. at 36280. Under this definition, claims based on feminist beliefs that women should not be treated as objects of control and harm by husbands or other male family members or LGBTQ+ advocacy and speech would likely not be considered "political opinion."

[34] The Proposed Rule drastically raises the level of severity of harm to qualify as "persecution," changing the standard from threat to life or freedom to a harm so severe that it constitutes an exigent threat. The rule also lists harms that the Agencies claim do not constitute persecution under this new definition. This list includes harms that are dangerous due to their cumulative nature like repeated threats and harassment, which are often involved in gender-based violence. The rule would also deny asylum claims of LGBTQ+ individuals who fear persecution in a country with laws criminalizing gender identities or sexual orientation unless the individual can prove that they were going to be persecuted using that policy. *See* 85 Fed. Reg. at 36280-81.

[35] The Proposed Rule does not explain why gender is listed under nexus rather than a ground for asylum under PSG—perhaps, because it is clear that gender, like race or nationality, is an immutable and socially distinct characteristic. In any event, the rule would prohibit claims which argue that gender was or will be one of the central reasons why the applicant was persecuted. *See* 85 FR 36264, 64-65.

[36] Without any rationale, the rule seeks to prohibit evidence about "pernicious cultural stereotypes," even though these are often reflective of country conditions. 85 Fed. Reg. at 36282. The vast majority of gender or LGBTQ+ based asylum claims rely on evidence of widely held cultural attitudes toward women and LGBTQ+ individuals,

These changes will lead to almost categorical denial of cases where gender, gender-identity, or sexual orientation is a crucial reason for the persecution, and such outcomes are antithetical to the case-by-case analysis required under asylum law. [37]

Of particular concern in these myriad changes is the Proposed Rule's codification of the requirement that a PSG be defined "independently" of the alleged persecutory act or harm, and its attendant list of bases that "would be insufficient to establish a particular social group," including "interpersonal disputes" and "private criminal acts." 85 Fed. Reg. at 36279. Codifying such a blanket requirement and list of bases without nuance is particularly damaging to gender and LGBTQ+ related claims because so many are rooted in intimate partner or family violence that government actors choose to ignore as private or family matters. For example, in *Matter of A-R-C-G-*, 26 I&N Dec. 338 (BIA 2014), the BIA held that a Guatemalan woman should be granted asylum on the basis that her former spouse had repeatedly abused her "emotionally, physically and sexually," establishing a precedent that has allowed many asylum seekers, especially women from Central America, to win cases.

LGBTQ+ individuals, who have been considered members of a PSG, face even heightened risk of experiencing gender-based violence. In many countries, LGBTQ+ people are subject to "corrective rape."[38] Likewise, in many countries rape and torture is countenanced under the guise of pseudoscientific "therapy."[39] Such gender-based violence, particularly for LGBTQ+ individuals, is often perpetrated by private actors, such as family and community members and is routinely underreported.[40]

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and such evidence has been accepted as probative and reliable by adjudicators for years, especially to establish that these individuals are set apart particularly and distinctly in their culture to establish the PSG ground.

[37] While the rule purports to allow gender-based claims in "rare circumstances," in practice, this exception will have no effect. 85 Fed. Reg. at 36282. As expressed in *supra* section II, the rule allows judges to pretermit any "legally insufficient" claims—e.g., those based on gender—at the outset. Such claims will then be deemed "frivolous" under another provision in the rule, forever barring an applicant from any immigration status or benefits of any kind. Survivors will be deterred or prevented from applying at all, and the parameters of the exception will go untested.

[38] For example, in Jamaica, lesbians are raped under the belief that intercourse with a man will "cure" them of their sexual orientation. *See Human Rights Violations Against Lesbian, Gay, Bisexual, and Transgender (LGBT) People in Jamaica: A Shadow Report*, submitted at 118th Session of Human Rights Committee in Geneva, at 5, Sept. 2016, *available at* https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/JAM/INT_CCPR_CSS_JAM_25269_E.pdf.

[39] In Ecuador, LGBTQ+ individuals are involuntarily admitted to "corrective therapy" clinics by their family members, where they are beaten, locked in solitary confinement, and force-fed psychoactive drugs. *See* Anastasia Moloney, *Gays in Ecuador raped and beaten in rehab clinics to "cure" them*, Reuters, Feb. 8, 2018, *available at* https://www.reuters.com/article/ecuador-lgbt-rights/feature-gays-in-ecuador-raped-and-beaten-in-rehab-clinics-to-cure-them-idUSL8N1P03QO.

[40] As the State Department has noted, "[r]eluctance to report abuse—by women, children, lesbian, gay, bisexual, transgender, or intersex persons (LGBTI), and members of other groups—is, of course, often a factor in the underreporting of abuses." *See* U.S. Department of State, Bureau of Democracy, Human Rights, and Labor, *2019 Country Reports on Human Rights Practices*, Appendix A, Mar. 11, 2020, *available at* https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/.

The Proposed Rule would summarily deny claims based on such atrocities by defining them as "interpersonal disputes" or "private criminal acts."[41] Violence is sometimes outside the reach of the state, and sometimes takes place where weak governments depend on allied armed groups to provide security.[42] However, the very indifference of governmental authorities to the plight of survivors of gender-based violence in fact *proves* that persecution exists. There is no good reason for denying survivors who can show their government's failure to protect them. Social norms can also hide gender-based violence from public view, and governments often allow those norms to go unchecked and unchallenged.

Asylum cases are inherently fact-specific and perhaps no part of an asylum claim is more individualized than the specific way in which one person has been or may be harmed by another. By establishing such per se rules around an individualized determination, the Proposed Rule significantly undercuts the necessary flexibility of the current framework and will ultimately result in the erroneous denial of protection to bona fide asylum seekers. The Proposed Rule provides no rationale for this significant departure from the current manner of interpreting this term.

This approach ignores the reality that discrimination, harassment, and violence toward people based on their gender, gender identity, and sexual orientation remain persistent social problems.[43] Locally, the City remains committed to combatting such discrimination through the protections of the New York City Human Rights Law and by welcoming asylum seekers and refugees who face persecution and are unable to enjoy comparable protections in their home countries.[44] All survivors of persecution based on their gender, gender identity, and sexual orientation deserve a chance to seek protection through the asylum process.

Indeed, the United Nations High Commissioner for Refugees ("UNHCR"), which oversees the Refugee Convention, has confirmed that people fleeing persecution based on gender, gender-identity and sexual orientation do qualify for asylum under the Convention's definition of a refugee. In recent years, the UNHCR has issued several interpretive instruments recognizing the specific protection needs of women and LGBTQ+ individuals.[45] A recent such instrument specifically recognized the need to address escalating levels of gender-based violence faced by women fleeing Central America.[46]

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[41] While the rule alludes to "rare circumstances" in which such cases might be considered, this is ultimately an empty assurance and will serve to deny survivors of gender-based violence any protection.

[42] *See* Human Rights Watch, *Audacity in Adversity: LGBT Activism in the Middle East and North Africa*, Apr. 2018, *available at* https://www.hrw.org/sites/default/files/report_pdf/lgbt_mena0418_web_0.pdf.

[43] *See* N.Y.C. Comm'n on Human Rights, *Fiscal Year 2019 Annual Report*, 44, https://www1.nyc.gov/assets/cchr/downloads/pdf/publications/AnnualReport2019.pdf.

[44] *See generally* N.Y.C. Admin. Code §§ 8-101, *available at* https://www1.nyc.gov/site/cchr/law/chapter-1.page#8-102.

[45] United Nations High Commissioner For Refugees, *UNHCR's Views on Asylum Claims based on Sexual Orientation and/or Gender Identity Using international law to support claims from LGBTI individuals seeking protection in the U.S.*, *available at* https://www.unhcr.org/en-us/5829e36f4.pdf.

[46] United Nations High Commissioner For Refugees, *UNHCR's Views on Gender Based Asylum Claims and Defining "Particular Social Group" to Encompass Gender Using international law to support claims from women seeking protection in the U.S.*, *available at* https://www.unhcr.org/en-us/5822266c4.pdf.

Domestically, for more than two decades, the BIA has held that survivors of gender-based violence, just like those fleeing religious or political persecution, are eligible for asylum if they meet the statutory criteria that establish them as refugees. This legal precedent considers the social, economic, and legal reality that these survivors face by recognizing that this violence is brought about by a public code of conduct that allows them to be victimized simply because of their gender. The proposed rule is a continued attack[47] on refugees and asylum seekers, particularly those experiencing gender-based and LGBTQ+ related violence.

In addition to redefining asylum law to shut survivors of gender-based and LGBTQ+ related violence out of asylum, the Proposed Rule would also prohibit asylum-seeking survivors in "expedited removal" procedures from applying for protection under the Violence Against Women Act or Trafficking Victims Protection Act. It would also allow for disclosure of information in an asylum application under new circumstances, which may provide abusive partners to obtain survivor information and inflict further violence and abuse. As a result of the unnecessary abuse stemming from this Proposed Rule, the legal system may see an increase in gender-based violence cases, spreading already sparse resources even thinner.[48]

IV. This Notice of Proposed Rulemaking Warrants a Longer Comment Period.

As discussed above, the Proposed Rule, if implemented, would systematically erode asylum protections and would be the most sweeping changes to asylum since the Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA) of 1996. The Proposed Rule seeks to rewrite statutes passed by Congress forty years ago, without any legislative action.

The Notice of Proposed Rulemaking ("NPRM") is over 160 pages long, and more than 60 of those pages are the proposed regulations themselves. Written in dense, technical language, these sweeping new restrictions have the power to send the most vulnerable back to their countries where they may face persecution, torture, and death.[49] Any one of the sections of the Proposed Rule, standing alone, would merit 60 days for the public to fully contemplate the potential reach of the proposed changes, perform research on the existing rules and interpretations, and respond in a complete, thoughtful manner. Instead, the agencies have allowed a mere 30 days to respond to multiple, unrelated changes that, taken together, work to eviscerate the asylum system of the last forty years.

Under any circumstances, it would be wrong for the government to give such a short time period to comment on changes that are this far-reaching and potentially life-threatening, but the challenges in responding to the NPRM now are magnified by the ongoing COVID-19 pandemic, which has impacted New York City particularly hard.

We urge the administration to grant the public at least 60 days to have adequate time to provide comprehensive comments.

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[47] *Matter* of *A-B-*, 27 I&N Dec. 227 (A.G. 2018).
[48] Contracted immigration legal services providers at the NYC Family Justice Centers explore all options with immigrant survivors and the proposed rule would make it much harder for survivors seeking safety in the U.S. to obtain legal immigration status.
[49] *See supra* note 18.

V. Conclusion

In creating more barriers for asylum seekers, the Proposed Rule continues this federal administration's march towards making the United States a hostile place for immigrants to the detriment of everyone in our communities. It is well documented that hostile climates for immigrants make the City less safe[50] and less prosperous.[51] As the City's Comptroller stated, "when immigrants are threatened, when their ability to live, work, and raise their families is compromised—our entire City pays a costly price."[52] The Proposed Rule, is particularly egregious, even in the context of this Administration's steady attack on the immigration system precisely because it targets the most vulnerable individuals fleeing for safety, those of whom our country has a long, proud history of protecting. The Proposed Rule imposes new hurdles and challenges at every stage of the asylum process, blocking the vast majority of applications, rendering our obligations under U.S. and international law and our basic humanitarian values, mere empty promises. For these reasons, and those articulated above, the Proposed Rule should be withdrawn.

[50] Mike Males, *White Residents of Urban Sanctuary Counties are Safer From Deadly Violence Than White Residents in Non-Sanctuary Counties*, Dec. 2017, *available at* http://www.cjcj.org/uploads/cjcj/documents/white_residents_of_urban_sanctuary_counties.pdf?utm_content=%7BURIENCODE%5bFIRST_NAME%5d%7D&utm_source=VerticalResponse&utm_medium=Email&utm_term=CJCJ%27s%20report&utm_campaign=New%20Report%3A%20Sanctuary%20Counties%20Safer%20for%20White%20Residents; *see* TCR Staff, *You're Safer in a 'Sanctuary City,' says New Study*, Dec. 13, 2017, *available at* https://thecrimereport.org/2017/12/13/youre-safer-in-a-sanctuary-city-says-new-study/; Tom K. Wong, *The Effects of Sanctuary Policies on Crime and the Economy*, Jan. 26, 2017, *available at* https://www.americanprogress.org/issues/immigration/reports/2017/01/26/297366/the-effects-of-sanctuary-policies-on-crime-and-the-economy/.

[51] *See* Dan Kosten, *Immigrants as Economic Contributors: Immigrant Tax Contributions and Spending Power*, Sep. 6, 2018, *available at* https://immigrationforum.org/article/immigrants-as-economic-contributors-immigrant-tax-contributions-and-spending-power/; New American Economy Research Fund, *From Struggle to Resilience: The Economic Impact of Refugees in America*, Jun. 19, 2017, *available at* https://research.newamericaneconomy.org/report/from-struggle-to-resilience-the-economic-impact-of-refugees-in-america/.

[52] Scott Stringer, *Immigrant Population Helps Power NYC Economy*, Jan. 11, 2017, *available at* https://comptroller.nyc.gov/newsroom/press-releases/comptroller-stringer-analysis-immigrant-population-helps-power-nyc-economy/.