Comments by The Advocates for Human Rights

in Opposition to the Proposed Rule on Removal; and EOIR No. 18-0002

Credible Fear and Reasonable Fear Review

(OMB Control No. 1615-0067)

BACKGROUND AND EXPERTISE OF THE ADVOCATES FOR HUMAN RIGHTS

The Advocates for Human Rights (“AHR”) welcomes the opportunity to present comments on the Department of Justice’s (“DOJ”) and the Department of Homeland Security’s (“DHS”) (collectively, the “Departments”) Proposed Rule. The proposed rule is a solution in search of a problem that will unnecessarily—and by the Departments’ own account—put more asylum applicants in harms’ way. We accordingly urge the Departments to withdraw this misguided and ill-considered proposal.

We first note that the comment period, occurring during an unprecedented restriction on movement and access due to the Coronavirus pandemic, provides an insufficient time to comment on these Proposed Rules. We joined numerous others in a request to extend the deadline for comments and are disappointed that The Administration has not granted such a request given the length, breadth, and timing of these proposed changes. Nonetheless, we submit the below comment with the hope that the Departments consider the concerns raised. Given the truncated period of time to provide comments to the Proposed Rule, AHR has limited its comments to addressing (1) the unlawful, improper, and unsupported proposed changes to the definitions of political opinion and persecution; and (2) the Departments’ proposal with respect to discretionary review of asylum applications, which is in many ways contrary to congressional intent and also arbitrary and capricious.
The Advocates for Human Rights is a nonprofit, nongovernmental organization headquartered in Minneapolis, Minnesota. Founded in 1983, The Advocates for Human Rights' mission is to implement international human rights standards to promote civil society and reinforce the rule of law. Holding Special Consultative Status at the United Nations, AHR regularly engages UN human rights mechanisms. AHR has provided free legal representation to asylum seekers for nearly four decades, working with more than 10,000 cases to assess, advise, and represent in asylum proceedings. In addition to legal representation, AHR also works with women’s and LGBTI human rights defenders worldwide to document persecution, repression, and death at the hands of state and non-state actors on account of their identities, and to train and support those activists as they advocate for accountability and safety. AHR is a global expert in women's human rights, particularly in the area of domestic violence, and partners with women’s human rights defenders to document threats to life and freedom faced by women due to government failure to protect people from human rights abuses. We have worked in Central and Eastern Europe, the former Soviet Union, the Caucasus, Central Asia, Mongolia, Morocco, Nepal, Mexico, Haiti, and the United States. At the request of government officials, embassies, and NGOs, we help draft laws that promote the safety of women. We have provided commentary on new and proposed domestic violence laws in nearly 30 countries. We have worked with host country partners to document violations of women's human rights, including domestic violence. We train police, prosecutors, lawyers, and judges to implement both new and existing laws on domestic violence. In addition, our Stop Violence Against Women website serves as a forum for information, advocacy, and change, and, working with the UN, we developed the Legislation and Justice sections of the UN Women's Virtual Knowledge Center to End Violence Against Women.
LEGAL ANALYSIS

I. The Proposed Rule Violates International Law to Which the U.S. Is Bound

The international community first established protections for refugees in the aftermath of the Holocaust and World War II. Since that time, the world has witnessed genocide in Rwanda, the Balkans, Cambodia and beyond; tribal conflict in numerous regions; targeting of linguistic or indigenous minorities across Africa and Latin America; persecution and torture of political opponents across the world; targeting of LGBTQ+ individuals; as well as harms stemming from traditional and cultural practices. It is clear from human history that “There being no limits to the perverse side of human imagination, little purpose is served by attempting to list all known measures of persecution.”¹ In recognition of that fact, therefore, the international community wrote the Convention and its Protocol to ensure it was dynamic enough to respond.


As a party to the UN Refugee Convention, the US is obliged to uphold the letter and spirit of the protections contained therein. Moreover, asylum and the principles of nonrefoulment are considered jus cogens, non-derogable norms that must be upheld. The Convention covered categories of refugees that had arisen from events before January 1, 1951.² The 1967 Protocol intentionally expanded the definition of refugee under the Convention by getting rid of the

² Id.
geographical and temporal limitations so that the protection was universal and more flexible. The protocol and its explanatory notes indicate an intention that asylum protections be expansive and flexible to respond to ever-changing landscapes, challenges, and manifestations of human evil. Indeed, the UNHCR’s mandate was “universal and general, unconstrained by geographical or temporal limitations.” Nonetheless, the proposed rules represent an unacceptable narrowing of the asylum definitions in direct contradiction of international law and the broad, unconstrained intent of the UNHCR and Refugee Convention and Protocol.

II. The Proposed Rule Violates Congressional Intent

The proposed regulations also run afoul of Congressional intent in passing the 1980 Refugee Act (“the Act”) and U.S. immigration laws. Looking at the legislative history, the 1980 Refugee Act had two overarching purposes: to unify the piecemeal asylum law that existed in the United States prior to the Refugee Act and to protect human rights and respond to humanitarian concerns. The opening purpose of the Act celebrates the “historic policy of the United States” to provide humanitarian assistance and asylum to persons in need. The Act’s sponsors reaffirmed this underlying purpose. In 1979, the bill’s original sponsor in the Senate, Senator Edward Kennedy, argued on the Senate floor when introducing his bill, “[The Act] will also give statutory meaning to our national commitment to human rights and humanitarian concerns, which are not now reflected in our immigration laws.” Senator Kennedy also stressed the importance of conforming U.S. law “to the United Nations Convention and Protocol relating to

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4 Id.
6 Id.
the status of refugees,”8 which the United States signed in 1968.9 Moreover, the House Committee on the Judiciary wanted to ensure fair asylum policy that was consistent with the traditions of welcoming the oppressed.10 Overall, this evidence of Congressional intent shows that the central purpose of 1980 Refugee Act was to ensure that the United States fulfills its international human rights law and treaty obligations and to help refugees by making the system more fair and logical.

The proposed regulations run afoul of this intent by significantly narrowing the definitions for asylum, increasing evidentiary burdens, making it easier to deny cases, and restricting asylum in violation of our international obligations. Congress was clear in the 1980 Refugee Act and subsequent immigration reforms—which the Departments are charged with implementing and must uphold—that our duties to asylum seekers and refugees are not to be viewed as a burden; rather, asylum is to be viewed as positive tradition of the United States as a welcoming country to those escaping harm.

When Congress passed the Refugee Act of 1980, it unambiguously stated that its intent was to reform United States law to ensure that it conformed to the nation’s obligations under the United Nations Protocol Relating to the Status of Refugees.11 This treaty, to which the United States acceded in 1968, incorporated the United Nations Convention Relating to the Status of Refugees into United States law and reaffirmed the nation’s commitment to addressing the “grave

8 Id.
humanitarian concerns” of those uprooted by persecution. In order to accomplish these goals, Congress directly incorporated the Convention definition of “refugee” into the Act and noted its intention that interpretation of this term was to be guided by the United Nations and the rights-protective purpose of the Convention.

In cases where Congress’ intent is unambiguous, there is no room for reinterpretation by administrative agencies such as the Department of Justice and Department of Homeland Security (collectively, the “Departments”). Here, Congress made its intent clear in incorporating the Convention definition of “refugee” into the Act: to ensure that US law construed this language consistently with its nondiscrimination, non-penalization, and non-refoulement obligations under the treaty. Congress did not delegate discretion to the Departments to interpret the definition of refugee. To the extent the term is ambiguous or unclear, Congress made clear that it is the Convention—not the Departments—which provides interpretive guidance. Nevertheless, the proposed changes seek to narrow the grounds for asylum in so many ways that they effectively eliminate asylum protections—contrary to Congressional intent and the United States’ international obligations.

III. The Proposed Rule Violates Administrative Law

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12 Id. at 11.
14 Id. at 63 (citing S. REP. NO. 96-590, at 20 (1980)) (“The Conference substitute adopted the House provision with the understanding that it is based directly upon the language of the Protocol and it is intended that the language be construed consistent with the Protocol”).
16 Anker, supra note 11, at 63.
17 Id.
AHR’s comments focus, as noted, on several of the new definitions that the Departments proposed to assign to terms found in the Immigration and Naturalization Act of 1965 (“INA”), Pub. L. No. 89-236 (codified as amended at 8 U.S.C. ch. 12); the Refugee Act of 1980 (“Refugee Act”), Pub. L. No. 96-212, 94 Stat. 102; and the United Nations Protocol Relating to the Status of Refugees (“Refugee Protocol”), Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 268. Accordingly, in evaluating the lawfulness of each of the Departments’ proposed definitions that are the focus of these comments, AHR has employed the same basic analytical framework.

As the Departments correctly note at the outset of their Proposed Rule, their authority to adopt these new definitions is limited—where the statutory definition at issue is settled by prior court decisions the statute will therefore “leave no room for agency discretion” to adopt a contrary interpretation. Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Review, 85 Fed. Reg. 36264, 36265 n.1 (proposed June 15, 2020) (to be codified at 8 C.F.R. §§ 208, 235, 1003, 1208, 1235) [hereinafter 85 Fed. Reg.] (quoting Nat’l Cable & Telecommns. Ass’n v. Brand X Internet Servs. (Brand X), 545 U.S. 967, 982 (2005)). And even where the statute admits of some ambiguity the agency is only permitted that “degree of discretion the ambiguity allows.” Id. As to the latter case, an agency’s statutory interpretation is impermissible not only when it falls outside the range of ambiguity, but also where it is otherwise arbitrary and capricious. The Proposed Rule fails these tests, the specifics of which AHR describes in more detail below.

Whether a court should defer to an agency’s interpretation of a statute is guided by the two-step framework articulated in Chevron. See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842 (1984). But before even reaching that first step, the agency must actually have been delegated the responsibility to implement the statute’s policies. Absent an express delegation,
the authority to make major policy decisions remains with Congress. See BATF v. FLRA, 464 U.S. 89, 97 (1983) (“[W]hile reviewing courts should uphold reasonable and defensible constructions of an agency’s enabling Act, they must not rubber-stamp administrative decision that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.”) (citations and quotations omitted)). Judicial deference to an agency’s decision does not apply to decisions that Congress did not entrust to an agency. See Nat’l Fed’n. of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159–60 (2000).

Assuming the agency had been delegated the requisite enforcement responsibility, the first step is to ask “whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” 467 U.S. at 842–43. In determining whether a statute is ambiguous one first looks to the “ordinary tools of statutory construction.” Id. at 842. The ambiguity may also have been eliminated by prior judicial determinations. A prior court decision finding the statute to be clear “leaves no room for agency discretion.” Brand X, 545 U.S. at 982. This principle applies equally whether the courts rule the statutory language is “clear” or “plain” or state there is “little room for doubt,” or use similar expressions to describe statutory text. In other words, a court need not describe the text as “unambiguous” to foreclose an agency from later asserting the same language is ambiguous. New York v. EPA, 443 F.3d 880, 886 (D.C. Cir. 2006). This conclusion follows from the basic tenant that, “[w]hen Congress uses a term with a settled meaning, its intent is clear for purposes of Chevron step one.” Grace v. Whitaker, 344 F. Supp. 3d 96, 128 (D.D.C. 2018) (citing B & H Med., LLC v. United States, 116 Fed. Cl. 671, 685 (2014)).
Only where there is a statutory ambiguity does the agency even qualify for potential deference under “Chevron step two.” Vill. of Barrington v. Surface Transp. Bd., 636 F.3d 650, 660 (D.C. Cir. 2011). The second step is to determine whether the agency’s action is “based on a permissible construction of the statute” or whether such action is arbitrary and capricious. Chevron, 467 U.S. at 843; see City of Arlington v. FCC, 569 U.S. 290, 307 (2013) (“[W]here Congress has established an ambiguous line, the agency can go no further than the ambiguity will fairly allow.”). An agency interpretation of an ambiguous statute fails at Chevron step two if that interpretation falls outside the range of ambiguity, see Vill. of Barrington, 636 F.3d at 660, or if that interpretation is arbitrary and capricious. Northpoint Tech., Ltd. V. FCC, 412 F.3d 145, 156 (D.C. Cir. 2005).  

An agency’s action is arbitrary and capricious, inter alia, when an agency changing its course fails to apply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, or when an agency glosses over or swerves from prior precedent without discussion. Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1971); Northpoint Tech., 412 F.3d at 156; Comcast Corp. v. FCC, 600 F.3d 642, 659 (D.C. Cir. 2010). In other words, an agency cannot “undermine democratic transparency and upset the settled expectations of regulated parties” without providing a “reasoned explanation for the change.” Exelon Generation Co., LLC v. Local 15, Int’l Bhd. of Elec. Workers, AFL-CIO, 676 F.3d 566, 578 (7th Cir. 2012) (citing FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009)); see also DHS v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1913 (2020) (holding that

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18 The Chevron step two analysis overlaps with arbitrary and capricious review under the APA because at step two a court also asks “whether an agency interpretation is ‘arbitrary and capricious in substance.’” Grace, 344 F. Supp. 3d at 121–22 (citing Judulang v. Holder, 565 U.S. 42, 52 n.7 (2011)). This means that an agency interpretation fails if it is arbitrary and capricious, whether one describes the agency’s interpretation shortcomings as “impermissible” under Chevron step two or arbitrary and capricious under the Administrative Procedure Act.
DHS’s failure to consider “serious reliance interests” was arbitrary and capricious). And a “reasonable regulation ordinarily requires paying attention to the advantages and the disadvantages of agency decisions.” *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015).

Finally, the *Chevron* step two analysis overlaps with arbitrary and capricious review under the Administrative Procedures Act (“APA”), Pub. L. 79-404, 60 Stat. 237 (codified as amended at 5 U.S.C. ch. 5), because at step two a court also asks “whether an agency interpretation is ‘arbitrary and capricious in substance.’” *Grace*, 344 F. Supp. 3d at 121–22 (quoting *Judulang v. Holder*, 565 U.S. 42, 52 n.7 (2011)).

As discussed, *infra*, the Proposed Rule violates these established procedures throughout and must either be withdrawn or risk being struck down as unlawful.

**IV. The Proposed Rule Should Be Withdrawn Due to Fatal Flaws Throughout**

In addition to the significant flaws outlined above, The Advocates opposes the proposed rule because it is rife with other flaws and overreach not seen across our more than 30 years in this field. The rule is particularly concerning for its inclusion of several administrative decisions and Presidential Proclamations, the legality of which are currently in dispute in Federal courts. The inclusion thereof not only underscores the haste of this proposal, but also its underpinnings in a general animus toward migrants and, in particular, toward asylees. This is clearly an end-run around legislative and judicial processes to further an improper purpose.

We also note that this proposed rule is deeply flawed throughout as it attempts to define numerous categories by what they are *not*, rather than by what they *are*. Such framing runs contrary to the general rules of legislative construction that prioritize strictures of definitions that are interpreted on a case-by-case basis, rather than backing-in to a definition by defining what it
cannot be. If the aim of the regulation, as alleged, is to provide clearer guidance to encourage “better” decisions on asylum and reduce administrative waste, what is expected to happen to cases that do not fit neatly within the guidelines of discouraged cases? Moreover, such wording clearly indicates an improper motive on the part of the agencies as it is framed to target and foreclose disfavored cases rather than providing clearer guidance for adjudicators in general.

In addition, the Departments’ reliance on generalities, opinions, and dicta rather than data and analysis to justify their Proposed Rule leads to the conclusion that, at best, the Departments have no actual basis for changes and, at worst, that the Departments seek these changes because of animus toward the very asylum process they are charged by Congress to implement and administer. In particular, the Departments fail to support their claims that the proposed changes are needed to improve efficiency and to prevent fraud. This lack of data and evidence in favor of reliance on general statements of opinion is a fatal flaw throughout the proposed regulations.

Moreover, the Departments argue throughout that their proposed changes are necessary for efficiency. The Departments’ commitment to an efficient asylum adjudications process rings singularly hollow alongside underinvestment in the Asylum Corps and Immigration Court systems, both of which receive an infinitesimal fraction of overall federal spending on immigration enforcement, and efforts to complicate and prolong cases. The Departments’ disingenuously imply that asylum seekers benefit from an inefficient asylum process while failing to acknowledge either how delays in the system harm people or how the government itself leverages these harmful delays, especially for detained asylum seekers, to coerce people into giving up. The Advocates for Human Rights has seen the catastrophic toll exacted upon our clients who have experienced years of separation from their families and uncertainty as to their
legal status while proceedings wait for interviews and hearings, and throughout needless
government appeals.

The Departments’ definition of an efficient process is one that maximizes denials of
asylum and deters people from seeking safety from persecution, rather than a process that makes
good on Congress’s intent in enacting the 1980 Refugee Act of creating a fair and reliable
process for adjudication of asylum claims. Creating additional bars and hurdles to asylum, as
proposed throughout this Rule, does not increase efficiency; rather, they deliberately burden an
under-resourced immigration court system. The Departments offer no details about the
inefficiencies the rules will address or how the changes will make things more efficient—other
than to deny more cases. For example, the Departments stress the inefficiencies of the Credible
Fear Interview (“CFI”) procedures to justify creating new authority for asylum officers to deny
cases at this preliminary stage while ignoring a recommendation made fifteen years ago to allow
asylum officers to grant clearly approvable cases. It is unclear how allowing denials, which can
and will likely require court review in many cases, will promote efficiency more effectively than
would allowing asylum approvals at the CFI stage. Because the Departments offer no analysis to
support the proposed change or their choice to expand only authority to deny cases at the CFI
stage, we must conclude that efficiency is a pretext for the true intent of the proposal: to deter
and deny asylum seekers from seeking protection from persecution.

V. The Proposed Rule Impermissibly Narrows the Definition of Persecution

19 U.S. COMM’N ON INT’L RELIGIOUS FREEDOM, REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL, VOL. 1:
FINDINGS AND RECOMMENDATIONS 8 (2005) (recommending that “[t]he burden on the detention system, the
immigration courts, and bona fide asylum seekers in expedited removal themselves should be eased by allowing
asylum officers to grant asylum in approvable cases at the time of the credible fear interview, just as they are already
trained and authorized to do for other asylum seekers. Aliens who establish credible fear but, for whatever reason,
have not yet established an approvable asylum claim, should continue to be referred to an immigration judge.).
To be eligible for asylum, an asylum applicant must demonstrate either past “persecution or a well-founded fear of persecution.” 8 U.S.C. § 1101(a)(42)(A). The Departments acknowledge that “persecution” is a defined term with the following meaning: “a threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive.” 85 Fed. Reg. at 36280. They further acknowledge that this definition encompasses two aspects: (1) “harm or suffering had to be inflicted upon an individual in order to punish him for possessing a belief or characteristic a persecutor sought to overcome”; and (2) “harm or suffering had to be inflicted either by the government of a country or by persons or an organization that the government was unable or willing to control.” Id. The Proposed Rule, however, sets forth a new, heightened standard for persecution that requires the applicant to demonstrate that the persecutor had “an intent to target a belief” and that the persecution would result in “a severe level of harm,” see id., thereby severely winnowing down the types of persecution that would qualify someone for asylum. As discussed below, this new definition is unlawful because it goes beyond the plain meaning of persecution found in the INA and, in any event, is arbitrary and capricious because the Departments have neither provided a reasoned explanation for the definitional change nor have they assessed the relative harms and benefits of their revised definition.

A. Chevron Step One: The Term “Persecution” Is Not Ambiguous.

In reviewing an agency’s interpretation of a statute it is charged with administering, a court must apply the framework of Chevron, 467 U.S. at 842–43; see Halverson v. Slater, 129 F.3d 180, 184 (D.C. Cir. 1997). Since the Departments are charged with administering the INA, the Chevron framework applies. See 8 U.S.C. § 1103(a)(1) & (4) (charging DHS with administering the INA.
and immigration laws and authorizing DHS to delegate such powers, privileges, or duties to DOJ).

The Proposed Rule’s new definition of “persecution” fails under *Chevron*.

Under the first step, courts “must give effect to the unambiguously expressed intent of Congress,” if Congress has directly spoken about the question at issue. *Chevron*, 467 U.S. at 842–43. The interpretive question at issue is the meaning of the term “persecution.” Because the courts have found this term unambiguous, *see generally Grace*, 344 F. Supp. 3d 96, the court’s interpretation overrides the contrary interpretation contained in the Proposed Rule. *Brand X*, 545 U.S. at 982.

Under settled law, persecution may involve “suffering inflicted by the government or by persons the government was unable or unwilling to control.” *Grace*, 344 F. Supp. 3d at 109 (emphasis added). Among other issues in *Grace* was the Attorney General’s determination that to show persecution by non-state actors the asylum applicant “may not solely rely on the government’s difficulty in controlling the violent behavior,” but “must show ‘the government condoned the private actions or at least demonstrated a complete helplessness to protect the victims.’” *Id.* (quoting *Matter of A-B*, 27 I. & N. Dec. 316, 337 (B.I.A. 2018)).

Rejecting the government’s position, the court concluded that the term “persecution” is not ambiguous, and Congress has already directly spoken to the question at issue by incorporating a term with a settled meaning, leaving no ambiguity for the agency to fill. *Id.* at 127–30. Likewise, the Departments’ interpretation of “persecution,” which requires an intent to target a belief and a severe level of harm and narrows down the types of persecution is inconsistent with congressional intent and the settled meaning of “persecution.”

Both the *Grace* court and the Departments looked to the same BIA decision, *Matter of Acosta*, 19 I & N Dec. 211 (1985), for the settled definition of “persecution.” In that decision, the
BIA noted that when Congress first included the term “persecution” in the INA in 1980, Congress carried forward the term from pre-1980 statutes, in which the term had a well-settled judicial and administrative meaning with two aspects: harm or suffering that is inflicted (1) upon an individual in order to punish him for possessing a belief or characteristic a persecutor seeks to overcome; and (2) either by the government of a country or by persons or an organization that the government was unable or unwilling to control. *Id.* at 222. Applying the basic rule of statutory construction that Congress carries forward established meanings of terms, and also noting that two years before enacting the Refugee Act, Congress intentionally chose not to define “persecution” when using it in other provisions of the Refugee Act because its meaning was understood to be well established by administrative and court precedent, the BIA adopted the same definition from court decisions applying the pre-1980 statutes. *Id.* at 222–23.

Following the same approach, the *Grace* court concluded that Congress’s use of the term “persecution” with such settled meaning shows that the congressional intent is clear for purposes of *Chevron* step one. *Grace*, 344 F. Supp. 3d at 128; see *Financial Planning Ass’n v. S.E.C.*, 482 F.3d 481, 490 (D.C. Cir. 2007) (longstanding agency understanding of statutory language supports conclusion that statutory meaning is “unambiguous”); *cf. B & H Med.*, 116 Fed. Cl. at 685 (a term with a “judicially settled meaning” is “not ambiguous” for purposes of deference).

The Proposed Rule provides a heightened standard for “persecution” by adding two elements to the definition of persecution and categorically excluding others. It adds (1) intent to harm or punish and (2) severe level of harm. At the same time, the Proposed Rule automatically excludes the following actions from the definition of persecution: generalized harm that arises out of civil, criminal, or military strife in a country, intermittent harassment, including brief detentions,
threats with no actual effort to carry out the threats, and non-severe economic harm or property damage. 85 Fed. Reg. at 36291–92, 36300.

The two new elements come from Matter of A-B-, 27 I. & N. Dec. 316, which the Grace court abrogated partially on the basis that the DHS’s interpretation of “persecution” was inconsistent with the settled definition of “persecution” and the INA. Grace, 344 F. Supp. 3d at 103, 128. Although these two elements were relevant factors in determining persecution in some cases, requiring them as threshold elements to prove persecution in every case is not consistent with the broad definition of “persecution” that Congress intended. Also, automatically excluding certain types of actions from the definition of persecution without any consideration of circumstances of each case precludes the meaningful fact-specific, case-by-case basis analysis that Congress intended. This is plain, as the court in Grace discussed, from the history and purpose of the Refugee Act and its incorporation of United Nations Protocol Relating to the Status of Refugees (the “Protocol”), Jan. 31, 1967, [1968] 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 268.

Since Congress intended to conform the INA to the Protocol, courts have appropriately considered various international interpretations of the Protocol in construing the INA. Matter of Acosta, 19 I. & N. Dec. at 211, 219; Grace, 344 F. Supp. 3d at 124. Among the various international interpretations of the Protocol, the Handbook on Procedures and Criteria for Determining Refugee Status, as the Supreme Court has noted, provides “significant guidance in construing the Protocol, to which Congress sought to conform . . . [and] has been widely considered useful in giving content to the obligations that the protocol establishes.” Cardoza-Fonseca, 480 U.S. at 439 n.22.
Relevant here, the Handbook has provided that “due to variations in the psychological make-up of individuals and in the circumstances of each case, interpretations of what amounts to persecution are bound to vary,” and that “various measures not in themselves amounting to persecution . . . may, if taken together, produce an effect on the mind of the applicant that can reasonably justify a claim to well-founded fear of persecution.” The Handbook on Procedures and Criteria for Determining Refugee Status ¶¶ 52–53, revised by U.N. Doc. HCR/IP/4/Eng/REV.4 (2019) [hereinafter Handbook]. Such language supports broad interpretation of persecution under the Protocol so that the term can be expanded and adapted to the circumstances of each case. It is clear that, at the time Congress added the term “persecution” to the INA, Congress did not intend the term to be interpreted more narrowly than the pre-existing definition that Congress adopted. Therefore, the proposed definition of persecution in the Proposed Rule fails at Chevron step one.

B. Chevron Step Two: Requiring Intent of Persecutor and Excluding Certain Actions from Definition of Persecution without Explanation Is Impermissible.

Even if the congressional intent were ambiguous as to the meaning of “persecution,” the Departments’ interpretation of “persecution” is nonetheless impermissible and therefore also fails at Chevron step two. The second step is to determine if the agency’s action is “based on a permissible construction of the statute.” Chevron, 467 U.S. at 843; see City of Arlington, 569 U.S. at 307 (“[W]here Congress has established an ambiguous line, the agency can go no further than the ambiguity will fairly allow.”). To begin with, “statutory ambiguities in immigration laws are resolved in favor of the alien.” Grace, 344 F. Supp. 3d at 117 (citing Cardoza-Fonseca, 480 U.S. at 449). On its face, the Departments’ new interpretation is not “favorable to the immigrant.”

But even ignoring that the Proposed Rule fails this standard, the Departments’ interpretation is otherwise impermissible under Chevron step two because it is arbitrary and capricious. The Chevron step two analysis overlaps with arbitrary and capricious review under
the APA because at step two a court also asks “whether an agency interpretation is ‘arbitrary and capricious in substance.’” Grace, 344 F. Supp. 3d at 121–22 (citing Judulang, 565 U.S. at 52 n.7). AHR discusses next why the Proposed Rule’s revised interpretation of persecution is arbitrary and capricious and hence impermissible.

1. The Departments’ Unexplained Departure from the Settled Meaning of Persecution is Arbitrary and Capricious Because It Departs Without Reasoned Explanation from Their Existing Policy.

An agency interpretation is arbitrary and capricious when an agency changing its course fails to apply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, or when an agency glosses over or swerves from prior precedence without discussion. Greater Boston Television Corp., 444 F.2d at 852; Northpoint Tech., 412 F.3d at 156; Comcast Corp, 600 F.3d at 659. The Proposed Rule provides a new, heightened standard for persecution, but the Departments fail to sufficiently explain their departure from the settled meaning of persecution. The only explanation found in the Proposed Rule is that given the wide range of cases interpreting “persecution,” the Departments have proposed adding a new paragraph to the regulations to define persecution and to “better clarify” what does and does not constitute persecution. 85 Fed. Reg. at 36280. This “explanation,” however, only announces the addition of a new paragraph more narrowly defining persecution and fails to address the reason for using a new definition as opposed to the well-settled definition that Congress intended for this purpose.

2. The Intent Requirement in the Proposed Definition of Persecution is Impermissible and Arbitrary Because It Conflates the Intent of the Persecutor with the Perception of the Victim.

In determining whether the agency’s action is permissible, courts again employ the traditional tools of statutory interpretation, including reviewing the text, structures, and purpose of the statute. Grace, 344 F. Supp. 3d at 121 (citing Troy Corp. v. Browder, 120 F.3d 277, 285 (D.C.
Cir. 1997)); see, e.g., District of Columbia v. Dep’t of Labor, 819 F.3d 444, 454 (D.C. Cir. 2016) (agency’s interpretation was “unreasonable in light of the statute’s text, structure, and purpose” because it significantly expanded the reach of the statute and had other practical results inconsistent with the statute as “long understood”).

The interpretation of persecution in the Proposed Rule that requires proof of the intent of the alleged persecutor is unreasonable in light of the statute’s text, structure, and purpose. In determining persecution, “it is the characteristic of the victim . . ., not that of the persecutor, which is the relevant factor. Pitcherskaia v. I.N.S., 118 F.3d 641 (9th Cir. 1997) (“Motive of the persecutor is a relevant and proper consideration only insofar as the alien must establish that the persecution is inflicted on him or her ‘on account of’ a characteristic or perceived characteristic of the alien.”). As mentioned above, since Congress intended the definition of “refugee” to conform to the Protocol, courts and BIA have referred to the Handbook in interpreting the INA. The definition of “persecution” in the Handbook does not include a subjective intent of the persecutor to punish or harm his victim, but rather acknowledges that “[o]ften the applicant himself may not be aware of the reasons for the persecution feared.” Id. at 648 (citing Handbook ¶ 66).

3. The Exclusion of Certain Actions from the Definition of Persecution is Impermissible Because the Exclusion Arbitrarily Precludes Consideration of Individual Circumstances.

As noted above, the Proposed Rule further attempts to narrow the well-settled meaning of “persecution” by providing a non-exhaustive list of actions that do not constitute “persecution” such as generalized harm that arises out of civil, criminal, or military strife in a country, intermittent harassment, including brief detentions, threats with no actual effort to carry out the threats, and non-severe economic harm or property damage. 85 Fed. Reg. at 36291–92, 36300. Such a narrow interpretation of “persecution” is also unreasonable because it is inconsistent with the broad meaning of “persecution” that Congress and UNHCR intended. See Handbook ¶ 53
“[I]t is not possible to lay down a general rule as to what cumulative reasons can give rise to a valid claim to refugee status. This will necessarily depend on all the circumstances, including the particular geographical, historical and ethnological context.”). Consistent with such a broad meaning of persecution, courts have approached asylum cases on a case-by-case basis, and have engaged in a fact-specific analysis, as opposed to a checklist, to determine whether an asylum applicant’s cumulative experience amounts to persecution. See *Herrera-Reyes v. Attorney Gen. of United States*, 952 F.3d 101, 110 (3d Cir. 2020); *Diallo v. U.S. Attorney Gen.*, 596 F.3d 1329 (11th Cir. 2010).

The Proposed Rule prevents Departments from engaging a meaningful fact-specific analysis in cases that involve the excluded actions and therefore is unreasonable. Several commentators have recognized that “behavior that might not qualify as persecution when targeted at adults may rise to . . . persecution when applied to children.” *Mansour v. Ashcroft*, 390 F.3d 667, 679 (9th Cir. 2004) (citing Jacqueline Bhabha & Wendy A. Young, *Through a Child’s Eyes: Protecting the Most Vulnerable Asylum Seekers*, 75 INTERPRETER RELEASES 757, 761 (June 1, 1998)). Thus, for example, mere harassment or interference when directed at adults could amount to persecution if directed at children. *Id.* at 679–80. By excluding “intermittent harassment” from the definition of persecution, the Proposed Rule could prevent children refugees, who would otherwise be eligible for asylum under the current established definition of persecution, from demonstrating persecution and qualifying for asylum status. In failing even to acknowledge this concern, the Departments also act arbitrarily.

4. The Proposed Definition of Persecution Is Arbitrary and Impermissible Because It Fails to Take Reliance Interests into Account.

In excluding certain actions from the definition of persecution, the Departments also failed to “assess whether there were reliance interests, determine whether they were significant, and
weigh any such interests against competing policy concerns.” *Regents of the Univ. of Cal.*, 140 S. Ct. at 1915. Once implemented, this narrow definition of persecution could negatively impact the “866,858 individuals, including children, who have already applied for asylum and are awaiting a hearing or interview to present their cases.” Nickole Miller, *Trump’s New Rules Against Asylum Seekers are Dire. They Must be Challenged*, WASH. POST (June 19, 2020), https://www.washingtonpost.com/opinions/2020/06/19/we-cannot-let-trump-administration-turn-this-countrys-back-asylum-seekers/. Like the DACA recipients in *Regents of the University of California* who “enrolled in degree programs, embarked on careers, started businesses, purchased homes, and even married and had children, all in reliance” on the DACA program, *Regents of the Univ. of Cal.*, 140 S. Ct. at 1914, asylum applicants have important reliance interests. Once they apply for asylum, asylum applicants become legally authorized to remain in the United States and to work if they obtain work authorization. 8 C.F.R. § 208.7; U.S. CITIZENSHIP & IMMIGRATION SERV., USCIS ASYLUM PROGRAM INFORMATION GUIDE FOR PROSPECTIVE ASYLUM APPLICANTS.

The proposed definition of persecution will change the lives of those asylum applicants who have relied on the existing definition of persecution, fled to the United States, and legally remained here in the hopes of obtaining asylum status. Based on the experience of AHR, the Proposed Rule would deny asylum in cases such as (1) gang recruitment cases and political opinion cases in which an applicant is threatened with harm but unable to prove the persecutor’s efforts to carry out that threat; (2) cases where an applicant has suffered a detention deemed to be “brief,” and (3) cases in which there is a persecutory law or policy. Therefore, asylum applicants with these types of cases who have already applied for asylum, having relied on the existing definition of persecution, would be denied asylum status. The Departments’ failure to take into account any of these reliance interests renders the proposed definition of persecution arbitrary and impermissible.
5. The Proposed Definition of Persecution is Unreasonable and Impermissible Because It Fails to Assess the Relative Harms and Benefits.

“Reasonable regulation ordinarily requires paying attention to the advantages and the disadvantages of agency decisions,” Michigan, 135 S. Ct. at 2707, but the Proposed Rule does not sufficiently address the advantages and the disadvantages of the changes to the definition of persecution. It simply states that including the proposed definition of persecution in the regulations would “better clarify what does and does not constitute persecution.” 85 Fed. Reg. at 36280. Such statement is unfounded as there already exists a well-established definition of persecution. Including a new definition that conflicts with this well-established definition and the congressional intent to broadly interpret persecution and employ case-by-case basis analysis does not “clarify” existing law, but rather contradicts it.

Nor have the Departments assessed or weighed any harms against this alleged benefit of clarification. As discussed above, the narrow definition of persecution that the Departments have proposed would prevent immigration officials from considering important facts and circumstances of each case or otherwise engaging in a meaningful fact-specific, case-by-case analysis. The failure to conduct such a meaningful analysis could result in more frequent denial of deserving asylum claims. Even if those asylum applicants contest their removal, their chance of success would be dire, because they would have to demonstrate under the same heightened standard for persecution a 50% chance that they will be “persecuted” or tortured. The stated benefits of clarifying what does and does not constitute persecution are clearly outweighed by the serious consequences of more frequent denial of deserving asylum claims to those asylum seekers who will face torture, persecution, or death on their return. Therefore, the Proposed Rule is unreasonable and impermissible because it proposes changing the definition of persecution without
even answering the crucial question of “whether these changes will do more good than harm.”


**VI. The Departments’ Proposal to Limit the Definition of “Political Opinion” to Only Those Related to Political Control of a State is Unlawful**

The Proposed Rule would drastically constrict the definition of “political opinion” as compared to the definition of “refugee” under 8 U.S.C. § 1101(a)(42)(A). This unlawful constriction would restrict “political opinion” to only those opinions regarding a “discrete cause related to political control of a state or a unit thereof.” 85 Fed. Reg. at 36280. Under this narrowed definition, opinions addressing any other subject will be considered “political” for asylum purposes only if: (1) they are related to efforts by the state to control non-state entities or when such opinion opposes the ruling legal entity of a state; and (2) as to opinions related to non-state actors, an applicant has engaged in one of a limited set of “expressive behaviors.” *Id.*

The Proposed Rule proffers three justifications for these severe restrictions on the statutory definition of “political opinion,” none of which are valid. First, the Departments claim that case law is unclear on the meaning of political opinion. *Id.* at 36279. Second, the Departments rely on a quotation from a single BIA case that purportedly shows the BIA holds that political opinions must relate to a state actor. *Id.* Third, the Departments allege that a statement by the United Nations High Commissioner for Refugees (“UNHCR”) supports the view that political opinions must be opinions opposed to a government. *Id.* at 35279–80.

Contrary to the Proposed Rule’s claim, review of the relevant statute and case law shows that the meaning of “political opinion” under 8 U.S.C. § 1101(a)(42)(A), far from being ambiguous, has been repeatedly and consistently held plainly to extend well beyond opinions addressing the political control of a state or a unit thereof. As a result, this supposed justification
for imposing this limit on the meaning of political opinion evaporates in the face of contrary case law interpreting the clear statutory language.

The case law also makes it clear that the statutory language reflects congressional intent to protect refugees being persecuted on account of their “political” opinions concerning not only state actors, but also those concerning non-state actors. Nothing in the law or legislative history of the INA suggests Congress intended such protection should be limited to opinions about non-state actors only if those opinions concern the state’s relationship to non-state actors or if they were expressed in a certain way. As a result, the case law offers no support for the restrictive conditions under which the Proposed Rule would identify opinions regarding a non-state actor to be “political” for refugee status purposes.

Finally, the proposed requirement that an opinion regarding a non-state actor must be exhibited in only a limited set of expressive behaviors to be considered “political” appears to be fabricated from whole cloth without any legislative or judicial support. While recognizing imputed political opinions regarding state actors, the Departments illogically ignore long-established precedent recognizing imputed opinions as applied to non-state actors. Courts have ruled that an applicant for asylum may not know the reasons for his persecution, but it may be imputed based on the applicant’s “political opinions” addressing either state or non-state actors. See, e.g., Pitcherskaia v. I.N.S., 118 F.3d 641 (9th Cir. 1997). Administratively created limitations that run contrary to long-settled precedent interpreting the INA are barred under Brand X. By adding a substantive requirement that opinions related to non-state actors must be accompanied by “expressive behavior” to be considered “political,” the Proposed Rule falls under this bar and should be struck down.

A. The Chevron Framework.
As discussed above, whether a court should defer to an agency’s interpretation of a statute is guided by the *Chevron* framework. *Chevron*, 467 U.S. at 842. Under *Chevron* step one, the court “must give effect to the unambiguously expressed intent of Congress.” *Id.* at 843. If the statute is silent or ambiguous, then under *Chevron* step two, a court “must respect the agency’s construction of the statute so long as it is permissible.” *Brown & Williamson Tobacco Corp.*, 529 U.S. at 132.

Courts independently evaluate whether the statutory language is ambiguous and defer only after deciding the statute in question is ambiguous on the question at issue. It follows that if a court has previously found statutory language to be clear, an agency may not later decide the same language is ambiguous and set regulations to clarify the supposed ambiguity. “A court’s prior judicial construction of a statute trumps an agency construction . . . if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.” *Brand X*, 545 U.S. at 982. Once a court establishes a statute’s “clear meaning,” there is no longer any ambiguity for an agency to resolve. *Maislin Indus. US, Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990). This principle applies equally when courts rule the statutory language is “clear” or “plain”; state there is “little room for doubt”; or use similar expressions to describe statutory text. In other words, a court need not describe the text as “unambiguous” to foreclose an agency from later asserting the same language is ambiguous. *New York*, 443 F.3d at 886. This principle follows from the basic tenet that, “[w]hen Congress uses a term with a settled meaning, its intent is clear for purposes of *Chevron* step one.” *Grace*, 344 F. Supp. 3d at 128 (citing *B & H Med.*, 116 Fed. Cl. at 685).

Likewise, an agency is entitled to no judicial deference when its supposed statutory interpretation is really nothing more than reliance on an existing court ruling.
The Court need not defer to the government’s interpretation to the extent it is based on an interpretation of court precedent. Indeed, in “case after case, courts have affirmed this fairly intuitive principle, that courts need not, and should not, defer to agency interpretations of opinions written by courts.” *Citizens for Responsibility & Ethics in Washington v. Fed. Election Comm’n*, 209 F. Supp. 3d 77, 87 (D.D.C. 2016) (listing cases). “There is therefore no reason for courts—the supposed experts in analyzing judicial decisions—to defer to agency interpretations of the Court’s opinions.” *Univ. of Great Falls. NLRB*, 278 F.3d 1335, 1341 (D.C. Cir. 2002); *see also Judulang*, 565 U.S. at 52 n.7, 132 S. Ct. 476 (declining to apply Chevron framework because the challenged agency policy was not “an interpretation of any statutory language”).

Grace, 344 F. Supp. 3d at 130.

Nor does an agency have free rein where a statute has some ambiguity. “Where Congress has established an ambiguous line, the agency can go no further than the ambiguity will fairly allow.” *City of Arlington*, 569 U.S. at 307; *see also Casa De Maryland v. Trump*, 414 F. Supp. 3d 760, 784 (D. Md. 2019) (agency’s interpretation “outside the bounds of any ambiguity”). Even if the agency goes only where the ambiguity will fairly allow, it must provide reasons where it is making a change to existing policy. “But an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute.” *Greater Boston Television Corp.*, 444 F.2d at 852

1. “Political Opinion” Unambiguously Encompasses Opinions Broader Than Those Related to Political Control of a State. Courts Have Rejected the Proposition that “Political Opinion” Must Relate to Political Control of a State.

The Proposed Rule would define political opinion to include only a “discrete cause related to political control of a state or a unit thereof.” 85 Fed. Reg. at 36280. But Congress intended the meaning of political opinion to be more broad. The statutory language and judicial interpretations
of “political opinion” make clear the statutory language is unambiguous and thus cannot be modified by regulation. Moreover, even if the language could be considered ambiguous, the Departments’ proposed limitations on its meaning fall well outside the range of any ambiguity in the term.

The Third Circuit, for example, has succinctly concluded that the definition of political opinion extends beyond opinions related to political control. Now-Justice Alito found the point so clear that he did not feel the need to provide justification that a political opinion need not solely relate to the political control of a state. In Fatin v. INS, he simply stated, “we have little doubt that feminism qualifies as a political opinion within the meaning of the relevant statutes.” Fatin v. INS, 12 F.3d 1233, 1242 (3d Cir. 1993). That feminism is a political opinion rules out the Proposed Rule’s contention that political opinions relate solely to political control of a state, as one can hold feminist opinions regardless of who is in control of the state.

The Second Circuit similarly found no such limitation in the statutory term political opinion in an appeal from denial of petition for asylum based on a ruling that union organization activities were primarily economic and not political in nature. Osorio v. INS, 18 F.3d 1017, 1030 (2d Cir.1994). The court found, instead, that BIA’s restrictive interpretation “contradicts the plain meaning of the Act.” Id. at 1030–31 (emphasis added).

These court rulings override the Departments’ proposed limitations on the meaning of “political opinion.” Brand X, 545 U.S. at 982. Indeed, where, as here, the courts have ruled that a statute’s meaning is clear, the courts’ interpretation is controlling. Maislin, 497 U.S. at 131. Being thus bound, the Departments have exceeded their authority in attempting to narrow the meaning of political opinions to only opinions about political control of a state.

2. Congress clearly intended that political opinions may apply to non-state actors.
That political opinions may apply to non-state actors as well as to a state actor has been part of the statutory plan since the predecessor to 8 U.S.C. § 1101(a)(42)(A) was enacted: Nothing in the ordinary definition of persecution suggests that the term applies only to the acts of formally established governments. In the absence of contrary authority, we see no basis for thinking that Congress intended that the availability of relief under subsection 1253(h) turn on legal niceties concerning who has de jure power if a strong minority has sufficient de facto political power to carry out its purposes without effective hindrance. *Rosa v. I.N.S*, 440 F.2d 100, 102 (1st Cir. 1971). 20

Congress’ intent to provide relief to parties when a group that does not have official status of a government exhibits de facto political power was carried forward to the current statutory plan, as evidenced by a consistently applied judicial test for determining whether an opinion about a non-state actor is political. “When an asylum claim focuses on non-governmental conduct, its fate depends on some showing either that the alleged persecutors are aligned with the government or that the government is unwilling or unable to control them.” *Al Khalili v. Holder*, 557 F.3d 429, 436 (6th Cir. 2010); *see, e.g.*, *Raza v. Gonzales*, 484 F.3d 125, 129 (1st Cir. 2007) (“When an asylum claim focuses on non-governmental conduct, its fate depends on some showing either that the alleged persecutors are aligned with the government or that the government is unwilling or unable to control them.”); *see also, e.g.*, *Sibrian de Alfaro v. Sessions*, 704 F. App’x 265, 266 (4th Cir. 2017) (same).

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20 At the time of the decision in *Rosa*, the statute in question stated, “The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time as he deems to be necessary for such reasons.” *Rosa v. I.N.S*, 440 F.2d 100, 100 n.1 (1st Cir. 1971).
The settled interpretations of the courts on this point overrides the Departments’ proposed contrary interpretation. *Brand X*, 545 U.S. at 982. Nothing in the statute would justify excluding opinions regarding non-state actors who are aligned with the government or that the government is unwilling or unable to control from the meaning of “persecution . . . on account of political opinion,” 8 U.S.C. § 1101(a)(42)(A). As political opinion has a settled meaning, the proposed limitations on that settled meaning do not clarify an ambiguity because there is no ambiguity to resolve. Congress intended to provide relief for persecution for opinions related to non-state actors where they have taken on a role of authority in lieu of the state. Therefore, any proposed regulation must incorporate, not deviate from, the clearly stated statutory language and intent.

3. The Departments’ “Expressive Behavior” Exception to its Unlawful Non-State Actor Limitation Is Itself an Improper Departure from Settled Law on Imputed Political Opinions.

As noted above, the Proposed Rule will only treat opinions related to non-state actors as “political opinions” if they are accompanied by “expressive behavior.” In so doing, the Departments flout settled law that opinions related to non-state actors may also encompass *imputed* political opinions.

To be sure, an imputed political opinion claim requires a different showing from an overt political opinion claim. Nonetheless, imputed opinion claims (if proven) are well recognized as a valid ground for refugee relief: Claims of persecution on account of imputed political opinion differ in an important way from those involving actual political opinion. When, as here, an applicant claims that she has been or will be persecuted on account of an imputed political belief, then the relevant inquiry is not the political views sincerely held or expressed by the victim, but rather the persecutor’s subjective perception of the victim’s views. *Lagos v. Barr*, 927 F.3d 236, 254 (4th Cir. 2019). In those cases, the perspective shifts from what was done or believed by the asylee to what the persecutor believed to be the asylee’s motivation or opinion. “It is well
established that when deciding whether an applicant has a well-founded fear of persecution on account of political opinion, one must look at the applicant from the perspective of the persecutor.”


Because the settled interpretation of “political opinion” includes opinions perceived by the persecutor and imputed to the asylum applicant, restricting or eliminating this option by requiring proof of “expressive behavior” of opinions related to non-state (though not state) actors is foreclosed under *Brand X*. *Cf. Grace*, 344 F. Supp. 3d at 128. The proposed regulations go further by seeking to limit expressive behavior to only those activities associated with political activism. 85 Fed. Reg. at 32680 n.30. Nothing in the statute suggests these restrictions should be adopted. Quite the opposite, the statute includes coercive family planning, which involves non-state actors and no expressive behavior on the part of the persecuted person, as an example of persecution on account of political opinion, demonstrating that expressive behavior is not an essential element for granting asylum. 8 U.S.C. § 1101(a)(42)(A).

Thus, the Proposed Rule would all but eliminate imputed opinion related to non-state actors as an option for obtaining asylum relief contrary to the statutory language and intent as well as established judicial interpretation of how the statutory language should be read. Aside from this fatal flaw, such a radical departure from existing law must be accompanied by substantial justification for the change. Instead, no explanation is proffered for the proposed changes, which is yet another fatal flaw of the Proposed Rule.

4. The Cases and Sources the Departments Invoke to Support Their Revised Definition of “Political Opinion” Do Not Stand for the Propositions the Departments Claim.

Lacking any other justification for their proposed changes to the definition of “political opinion,” the Departments maintain that their newfound interpretations are supported by a
purported split among courts about whether “political opinion” is limited solely to a cause related to political control of a state. They claim to find support for the Proposed Rule in a Fourth Circuit decision, *Saldarriaga v. Gonzales*, 402 F.3d 461 (4th Cir. 2005). See 85 Fed. Reg. at 36279. But the cited case stands for a much more modest proposition; *viz.*, “whatever behavior an applicant seeks to advance as political, it must be motivated by an ideal or conviction of sorts before it will constitute grounds for asylum.” *Saldarriaga*, 402 F.3d at 466. The failure in that case turned not on whether the opinion related to political control of the state, but, rather, that it related to the applicant’s “self-regarding ends,” unrelated to any “cause.” *Id.* at 467. The Proposed Rule would expand the court’s unremarkable observation that an applicant’s disapproval of a drug cartel, standing alone and based on the applicant’s self-regarding ends, would not qualify as “political opinion” into a sweeping rewrite of the law under which “political control of the state” becomes the *only* “ideal,” “conviction,” or “cause” that can be deemed a “political opinion.”

The implausibility of expanding this single ruling into a sweeping rewrite of the law is highlighted by both the DOJ and the Fourth Circuit. In opposing the petition for a writ of certiorari, the DOJ itself argued that *Saldarriaga* was consistent with cases from other circuits that construed “political opinion” broadly, in accordance with its plain language. See Brief for the Respondent in Opposition, *Saldarriaga v. Gonzales*, 402 F.3d 461 (4th Cir. 2005) (No. 05-266), 2005 WL 3561030, at *9–10 (comparing *Saldarriaga* to *In De Brenner v. Ashcroft*, 388 F.3d 629 (8th Cir. 2004), and *Agbuya v. INS*, 241 F.3d 1224 (9th Cir. 2001) and stating: “The decisions on which petitioners rely do not reflect any divergence in the legal standards applied by the courts of appeals to review asylum determinations. They simply reflect that application of the same legal test to different facts and circumstances can yield different outcomes.”). These representations by counsel comprise admissions chargeable to the DOJ. See, e.g., *Best Canvas Products & Supplies,*
Inc. v. Ploof Truck Lines, Inc., 713 F. 2d 618, 621 (11th Cir. 1983) (“a party is bound by an admission in his pleadings”); United States v. Benston, 947 F.2d 1353, 1356 (9th Cir. 1991) (client bound by concession of counsel).

Similarly, the Fourth Circuit recently rejected the “political control of state” restriction to the statutory political opinion definition, holding, instead, that the political opinion definition requirement can be satisfied by evidence that a gang effectively controlling the applicant’s neighborhood believed that the applicant held “an anti-gang political opinion.” Lagos, 927 F.3d at 251. In sum, the premise that the Departments’ radical revision of the definition of “political opinion” is justified by a circuit split, or even a split within the Fourth Circuit, is demonstrably false. Neither the Fourth Circuit nor any other court has suggested the severe limitation on political opinion that is proposed here. In any event, the supposed ambiguity is based on the Proposed Rule’s (incorrect) interpretation of case law, not an ambiguity found in the statute itself. Accordingly, no deference can be given to the proposed restrictions because (1) they incorrectly interpret a court ruling, and (2) the supposed ambiguity rests in a court decision, not the controlling statutory language.

A second listed justification for the radically restricted meaning of political opinion—the claim that the UNHCR requires that a political opinion be an opinion related to the government, see 85 Fed. Reg. at 36280—is equally meritless. To be sure, the UNHCR Handbook does include opinion related to government as one form of political opinion, but it also supports drastically more open definitions of political opinion, including opinions related to sex-based and gender-based
identities. \textsuperscript{21} And, the overall purpose of the Convention—to provide broad and dynamic protection—would caution against any such reading.

Indeed, the UNHCR recommends a far more open concept of a political opinion, and one that is consistent with the statutory language and intent, than proposed by the very restrictive definition here. Given that the Supreme Court has stated that the UNHCR Handbook is intended to provide significant guidance in construing the Protocol to which the INA seeks to conform, \textit{see Cardoza-Fonseca}, 480 U.S. at 439 n.22, it is arbitrary and capricious for the Departments to ignore those portions of the Handbook that do not support their conclusion and focus only on that small portion that the Departments deem to support the proposed radical shift. This is hardly reasoned decision making. \textit{Universal Camera Corp. v. NLRB}, 340 U.S. 474, 488 (1951); \textit{see Int’l Union, United Mine Workers v. Mine Safety & Health Admin.}, 626 F.3d 84, 94 (D.C. Cir. 2010) (“Conclusory explanations for matters involving a central factual dispute where there is considerable evidence in conflict do not suffice to meet the deferential standards of our review.”).

\section*{VII. The Proposed Rule Related to Particular Social Groups (PSGs) Is Impermissibly Narrow}

\textbf{a. The Departments’ unreasonably restrictive definition of “particular social group” exceeds the authority delegated to these agencies by Congress}

When Congress passed the Refugee Act of 1980 (the “Act”), it unambiguously stated that its intent was to reform United States law to ensure that it conformed to the nation’s obligations

\textsuperscript{21} \textit{See UNHCR Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection,} Guidelines on International Protection No. 1. ¶ 32 (“Political opinion should be understood in the broad sense, to incorporate any opinion on any matter in which the machinery of State, government, society, or policy may be engaged. This may include an opinion as to gender roles. It would also include non-conformist behaviour which leads the persecutor to impute a political opinion to him or her. In this sense, there is not as such an inherently political or an inherently non-political activity, but the context of the case should determine its nature. . . . It is not always necessary to have expressed such an opinion, or to have already suffered any form of discrimination or persecution. In such cases the test of well-founded fear would be based on an assessment of the consequences that a claimant having certain dispositions would have to face if he or she returned.”); \textit{see also id.} No. 9. ¶ 50 (same as to sexual orientation and/or gender identity).
under the United Nations Protocol Relating to the Status of Refugees. \(^{22}\) This treaty, which the United States ratified in 1968, incorporated the United Nations Convention Relating to the Status of Refugees into United States law and reaffirmed the nation’s commitment to addressing the “grave humanitarian concerns” of those uprooted by persecution. \(^{23}\) In order to accomplish these goals, Congress directly incorporated the Convention \(^{24}\) definition of “refugee” into the Act, and noted its intention that interpretation of this term was to be guided by the United Nations and the rights-protective purpose of the Convention. \(^{25}\)

In cases where Congress’ intent is unambiguous, there is no room for reinterpretation by administrative agencies such as the Department of Justice and Department of Homeland Security (collectively, the “Departments”). \(^{26}\) Here, Congress made its intent in incorporating the Convention definition of “refugee” into the Act: to ensure that US law construed this language consistently with its nondiscrimination, non-penalization, and non-refoulement obligations under the treaty. \(^{27}\) Congress did not delegate discretion to the Departments to interpret the definition of refugee. To the extent the term is ambiguous or unclear, Congress made clear that it is the Convention—not the Departments—which provides interpretive guidance. \(^{28}\) Nevertheless, the Departments’ proposed regulations purport to “reinterpret” the definition of refugee in a manner


\(^{23}\) Id. at 11.

\(^{24}\) For ease of reference, the United Nations Protocol Relating to the Status of Refugees and the United Nations Convention Relating to the Status of Refugees are collectively referred to as the “Convention.”

\(^{25}\) Id. at 63 (citing S. REP. NO. 96-590, at 20 (1980)) (“The Conference substitute adopted the House provision with the understanding that it is based directly upon the language of the Protocol and it is intended that the language be construed consistent with the Protocol”).


\(^{27}\) Anker, *supra* note 11, at 63.

\(^{28}\) Id.
so restrictive as to effectively eliminate one of the five grounds for relief (membership in a particular social group (“PSG”)). This is inappropriate because it far exceeds the Departments’ authority and attempts to redefine the limits of the agencies’ statutorily defined powers in violation of separation of powers principles.

b. The proposed definition of particular social group is unreasonable because it is manifestly contrary to Congress’ intent to create a flexible standard which would ensure conformance to the United States’ obligations under international law

Moreover, even if the Departments were authorized to reinterpret the definition of refugee adopted by Congress, the proposed regulations’ exceedingly restrictive interpretation is unreasonable because it is manifestly contrary to the intent of Congress and therefore would be rejected under *Chevron.*29 One purpose of the Convention was to create a universal definition of “refugee” which was flexible enough to be applied in unpredictable future circumstances, eliminating the confusion and discrimination associated with the ad hoc refugee protection systems common at the time.30 Therefore, the United Nations High Commission for Refugees (UNHCR) Guidelines provide that “the term membership in a particular social group should be read in an evolutionary manner, open to the diverse and changing nature of groups in various societies and evolving international human rights norms.”31 This allows parties to the treaty to ensure that its fundamental purpose of protecting refugees is realized even where the particular group being persecuted was or could not have been foreseen when the treaty was drafted.

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29 *See Chevron*, 467 U.S. at 845 (noting that an agency’s interpretation is unreasonable and should be ignored where “it appears from the statute or its legislative history” that Congress would not have sanctioned the interpretation).

30 Anker, supra note 11, at 60 (“The objectives of the Act were to provide a permanent and systematic procedure for the admission to this country of refugees and to provide comprehensive and uniform provisions”).

31 UNHCR, GUIDELINES ON INTERNATIONAL PROTECTIONS: “MEMBERSHIP OF A PARTICULAR SOCIAL GROUP” WITHIN THE CONTEXT OF ARTICLE 1A(2) OF THE 1951 CONVENTION AND/OR ITS 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES 2 (May 7, 2002) [hereinafter UNHCR PSG Guidelines].
For example, when the Convention and Protocol were drafted in 1951 and 1967 respectively, little consideration was given to persecution on the basis of sexual identity or orientation. However, since that time, the United Nations and countries around the world have recognized the pervasiveness and gravity of such persecution and have been able to adapt to address these grave humanitarian concerns by recognizing PSGs based on these characteristics.\(^{32}\)

Recognizing the impossibility of creating a comprehensive catalog of potential bases for persecution, Congress intentionally adopted the flexible Convention definition of “refugee”—including membership in a PSG—to ensure that the United States would be able to fulfill its treaty obligations to protect refugees even where the particular basis for those refugees’ persecution was not specifically predicted or recognized at the time the Act was passed.\(^{33}\) The proposed regulations’ extensive restrictions on the groups which can qualify as PSGs and absurdly onerous burdens on refugees seeking relief based on their membership therein are directly at odds with Congress’ intent to create a flexible standard which would eliminate the administrative burden of ad hoc refugee legislation and would serve the Convention’s purpose of providing broad protections for those displaced by persecution. A definition of PSG so manifestly at odds with the purpose of the Act is not “a reasonable accommodation of conflicting policies that were committed to the agency by statute” and “it appears from the statute or its legislative history that the accommodation is not

\(^{32}\) Id. at 3.

\(^{33}\) Anker, supra note 11, at 9 (“This legislative history demonstrates the effort to develop a coherent and flexible refugee admission policy.”).
one that Congress would have sanctioned.”

As such, this unreasonable interpretation would be rejected under *Chevron*.

c. The proposed regulations are arbitrary and capricious because they fail to consider critical concerns and fail to provide sufficient explanations for sweeping policy changes

The proposed regulations are arbitrary and capricious because they entirely fail to consider crucial issues, and the proffered “explanations” for these sweeping, controversial reforms are “so implausible that [they] could not be ascribed to a difference in view or the product of agency expertise.” The proposed regulations codify the disputed “particularity” and “social distinction” elements of the definition of PSG but provide no indication that the Departments considered the concerns which have caused multiple United States Circuit Courts, as well as the UNHCR, to reject these requirements (discussed in further detail below). Likewise, the proposed regulations purport to enumerate numerous categories of claims that will “generally” not qualify for relief, but provide no explanation for this abrupt departure from the well-established principle that asylum claims are highly fact- and situation-specific, and must be decided with due consideration to an applicant’s particular circumstances. Further, because the Departments provide no guidance on how this

34 See *Chevron*, 467 U.S. at 845.

35 *Id.* (“If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency’s care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned”).


“generally” standard will apply, cases will arbitrarily be denied or approved under the proposed new standard.

The only rationale offered for these radical reforms is that they will result in “more uniform application” and “reduce the amount of time the adjudicators must spend evaluating such claims.” Not only is this doubtful—as discussed below, the language of the proposed regulations is hopelessly vague and ambiguous—but it is not an appropriate justification for these unprecedented restrictions. Asylum cases are matters of life or death. No amount of increased administrative efficiency can justify denying relief to individuals who will be tortured or killed if returned to their home countries. Not only does this violate the United States’ non-refoulement obligations under the Convention and undermine Congress’ intent to create broad protection for refugees, but it is antithetical to the ideals upon which this country was founded: that all people are created equal and endowed with unalienable rights to life, liberty, and the pursuit of happiness. Denying refuge to those no one else can or will protect undermines the United States’ position as a global leader.

d. The proposed definition of particular social group is so restrictive as to effectively eliminate the possibility of asylum on this basis

The proposed regulations codify the controversial “particularity” and “social distinction” elements of the definition of a particular social group which were first introduced in Matter of S-E-G-. This restrictive definition of PSG is at odds with both the UNHCR interpretation of the Convention, the opinions of multiple United States Circuit Courts of Appeals, and the Bureau of Immigration Appeals’ (“BIA”) own understanding of how this term should be interpreted. At the same time that the proposed regulations provide heightened requirements for defining PSGs, they preclude applicants from submitting precisely the type of evidence necessary, through the ban on

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evidence that could be considered “promoting stereotypes” to meet these new requirements. As a result, the proposed regulations effectively eliminate the possibility of obtaining asylum on the basis of membership in a PSG.

_The proposed regulations misapply and contravene the United Nations’ definition of particular social group_

When it first adopted the particularity and social distinction elements in _Matter of S-E-G-_, the BIA purported to rely on UNHCR Guidelines for interpretation of the phrase “particular social group.” However, as several Circuit Courts have observed, the BIA’s definition of PSG—which the Departments now seek to codify—did not faithfully adopt the Guidelines’ test. While the test in the proposed regulations is conjunctive, requiring immutability and particularity and social distinction, the test in the UNHCR Guidelines is disjunctive, either immutability or particularity and social distinction, but not both. Therefore, the UNHCR defines a PSG as “a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society.” (emphasis added). Only when an asylee alleges a social group based on a characteristic which is not immutable or fundamental should an adjudicator engage in further analysis “to determine whether the group is nonetheless perceived as a cognizable group in that society.” By requiring applicants to demonstrate both immutability and social distinction, the proposed regulations disqualify an enormous group of people who would qualify for protection under the Convention as interpreted by the UNHCR. This is directly contrary to Congress’ intent.

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39 Id. at 586.
40 See, e.g., Gatimi v. Holder, 578 F.3d 611 (7th Cir. 2009).
41 UNHCR PSG Guidelines at 3.
42 Id. at 4.
Denying asylum based on the size of or lack of cohesion in a purported particular social group violates both United Nations and United States precedent.

Similarly, the UNHCR has specifically stated that “the size of the purported social group is not a relevant criterion in determining whether a PSG exists.”\textsuperscript{43} The Guidelines note that the number of persons who might fall into a group has never been used to deny asylum on the basis of any of the other protected characteristics.\textsuperscript{44} Similarly, the Guidelines specify that, just as with the other grounds for relief, there is no requirement that the members of a PSG be “cohesive”—all that matters is that there is a common element which members share.\textsuperscript{45} Likewise, while the BIA has stated that the well-recognized interpretive tool of ejusdem generis should be applied to look to the other grounds for relief to help determine how PSG should be interpreted,\textsuperscript{46} the BIA itself has never required precise boundaries or an evaluation of the strength of the applicant’s membership in the group for any of the other grounds for asylum, nor has it raised concerns that the size of a potential group of asylees precludes granting asylum in the case of any of the other grounds of relief.

For example, if an applicant seeks asylum on the basis of her Christian faith, neither the UN nor the U.S. Government has ever required her to delineate precisely which beliefs are required to qualify as “Christian,” or show that she ascribes to each of the particular beliefs which others in her society attribute to “Christians” (and no others). In fact, the BIA has held the opposite, explicitly stating that the “religion” which can form the basis of a claim for asylum relief can be

\textsuperscript{43} \textit{Id.} at 5.

\textsuperscript{44} \textit{Id.; see also Cece v. Holder}, 733, F.3d 662, 675 (7th Cir. 2013) (“It would be antithetical to asylum law to deny refuge to a group of persecuted individuals who have valid claims merely because too many have valid claims”).

\textsuperscript{45} UNHCR PSG Guidelines at 4.

“entirely personal and idiosyncratic.” Moreover, neither the UN nor the BIA has ever asserted that an applicant must be denied relief purely because there may be many other Christians who might also seek asylum. Of course, such a position seems absurd in this context. Just because there are many Christians does not mean an individual Christian cannot be or was not persecuted on the basis of her faith.

However, the Departments now seek to impose these absurd requirements on asylees whose applications are based on membership in a particular social group, without offering any explanation as to why such a showing is necessary in these cases but not others. And, without justification as to how the potential size of social groups may be used against such claims. For example, the Departments have offered no explanation for why a Togolese woman who has been persecuted for her opposition to female genital mutilation (FGM), and whose eligibility for asylum was previously well established, must now show exactly which actions do and do not qualify as “opposition” to FGM and that there is a group of similarly-situated women who have expressed their opposition in exactly the same manner, but that the group is not so large that the Departments would decide members cannot obtain relief (despite the fact that the proposed regulations offer no insight into what criteria the Department might use to determine that a group is too large to allow relief). As the Guidelines recognize, the fact that any particular applicant is unable to formulate a proposed PSG which meets these poorly-defined criteria, or that there are a large number of members in such a group, does not mean that she has not suffered persecution as a result of her opposition to this horrific practice or that she would not be at risk of harm, including extreme bodily mutilation and even death, if forced to return to her country. History has taught us time and


again that just because a group may have many or diverse members does not mean it cannot be the

target of a calculated campaign of persecution and attempted extermination that requires protection

as envisaged by the international community and the U.S. Government. Nonetheless, the

Departments offer no explanation for why membership in such a group no longer qualifies for

protection.

*Requiring an applicant to demonstrate that other members of a proposed particular social
group have been persecuted contravenes the United Nations’ interpretation of the

Convention*

Likewise, UNHCR Guidelines specifically note that an applicant need not demonstrate that

other members of her PSG have been persecuted or are at risk of persecution.49 This would be a

nonsensical requirement because the fact that a persecutor has not targeted other members of a

group does not mean that his persecution of the applicant was not based on a protected

characteristic. For example, no one would question that a hate group which burns down a Christian

church was motivated by anti-Christian sentiment just because other churches were not burned.
Likewise, just because a persecutor targets one FGM opponent at a time, while other opponents
escape such a fate a little longer, does not mean that the victim was not targeted because of her

opposition to the practice. The proposed regulations provide no reason why a victim of the church

attack qualifies for asylum while a woman who was tortured for her opposition to FGM does not.

*The proposed regulations impose an impossible standard on asylum applicants*

These particularity and social distinction requirements have been controversial, in part,
because they impose an unreasonably high evidentiary burden on those least equipped to meet it.

49 UNHCR PSG Guidelines at 4.
At the same time, the proposed regulations impose new restrictions on the types of evidence which applicants can submit in support of their applications, excluding precisely the type of evidence needed to meet these onerous requirements. By imposing inexplicably heightened requirements while simultaneously making it impossible to submit the only evidence which could possibly be used to meet them, the Departments have effectively eliminated this ground for relief.

According to the BIA, a PSG cannot be defined by language commonly used in society if the language would not define the group with the absolute precision required by the particularity requirement. For example, the BIA has stated that terms such as “wealthy” and “young” do not satisfy the particularity requirement because they do not sufficiently clarify how wealthy or young an individual must be to qualify for membership. 50 However, the proposed regulations simultaneously require the definition to capture a concept which is “distinct” in the eyes of the applicant’s society. Therefore, if an applicant substitutes “persons making over $100,000” for “wealthy” to satisfy the particularity requirement, she will then be required to demonstrate that members of her society make a meaningful distinction between those who make $99,999 and those who make $100,001. It’s hard to imagine any society which makes distinctions with such particularity and precision, and therefore it’s hard to imagine how any particular social group (including those the BIA has consistently recognized for decades) would qualify under this new test. It is not surprising that the BIA only found one PSG to be cognizable in the 12 years since these requirements were first introduced in Matter of S-E-G+: the group of “married women in Guatemala who are unable to leave their relationship” recognized in Matter of A-R-C-G-. 51 Even this group, however, would likely not qualify under the new proposed regulations because of the

proposed regulations’ restriction on cases based on gender-based persecution and persecution by non-state actors, discussed below.

Asylum applicants generally lack the resources required to attempt to meet the Departments’ unreasonably high standards

Even experienced immigration attorneys have struggled to formulate PSGs which meet these circular, confusing requirements. Yet, the vast majority of asylees do not have the benefit of experienced counsel to assist them with this onerous task. One recent study showed that just 7% of individuals in removal proceedings are represented by counsel.52 In addition, most asylees lack the strong English language skills required to conform to the precise technical requirements now required to define the basis of their persecution. However, applicants have no right to a translator to assist them in this endeavor and often rely on family or friends to act as translators.53 In order to ensure that the particularity and social distinction requirements are met, a translator must have a comprehensive understanding of the cultural connotations of the words used, and the nuances of an applicant’s word choice are likely to be lost in translation, especially given that these are not professional translators trained in the specific context of asylum applications. The net result of these factors means that many people who face a genuine risk of severe bodily harm and even death if returned to their country—in other words, those who have a viable claim for asylum under internationally-accepted standards—would now, under the proposed rule, be turned away and condemned to this fate purely because they did not use the precise combination of words the Departments are expecting. Precise language, we note, that the Departments themselves have not


53 8 C.F.R. § 208.9(g) (noting that an applicant unable to proceed in English must provide a translator at no expense to the Government).
been able to clarify to such an extent that adjudicators have received sufficient guidance to analyze. This elevation of form over substance has no place in life-or-death situations like this.

The proposed regulations’ ban on evidence promoting cultural stereotypes precludes the very evidence the particularity and social distinction requires

While the definitional requirements alone effectively eliminate the possibility that any applicant will be able to obtain relief from persecution based on her membership in a PSG, the nail in the coffin for this avenue for relief is the extraordinarily broad ban on any evidence which might be considered to “promot[e] cultural stereotypes of countries or individuals.” It’s impossible to imagine what evidence an applicant might submit in order to demonstrate that her society views her PSG as a distinct group and subjects members to disparate treatment on the basis of their membership which could not be viewed as promoting cultural stereotypes and therefore banned.

For example, the BIA granted asylum to a survivor of FGM based on its findings that “few African countries have officially condemned female genital mutilation and still fewer have enacted legislation against the practice,” and it remains practically true that [African] women have little legal recourse and may face threats to their freedom, threats or acts of physical violence, or social ostracization for refusing to undergo this harmful traditional practice or attempting to protect their female children. Such evidence may be inadmissible under the new proposed regulations, highlighting the fact that these new regulations have effectively eliminated the possibility of relief from persecution on the basis of membership in a PSG. The proposed regulations offer no guidance to Immigration Judges on how to distinguish the sociological evidence now required to demonstrate the existence of a PSG and evidence “promoting cultural stereotypes” which is now

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inadmissible. Such a broad, poorly-defined ban on evidence could be used to exclude nearly any type of evidence imaginable, including, for example, the State Department country reports the BIA and USCIS asylum officers have historically relied heavily upon. For example, State Department reports of widespread fighting between ethnic groups or high rates of domestic violence arguably “promote” stereotypes that members of the country in question are violent, racist, and misogynist, among other things, even if the reports are merely factual recitations of ongoing events. But an applicant who has been persecuted as a result of such ethnic or domestic violence would now be barred from submitting this evidence to demonstrate that her persecutor’s actions were influenced by this cultural context.

Moreover, this proposed ban on an important category of relevant evidence—introduced casually with little fanfare and even less explanation—violates well-established EOIR precedent which allows applicants to submit any relevant evidence in support of their claim. As the BIA and UNHCR have recognized, asylum claims pose particularly difficult evidentiary burdens because persecutors are hardly likely to make evidence of their actions and motivations available to their victims, and because refugees fleeing for their lives are not in a position to put their escape plans on hold while they gather supporting evidence.55 United States courts have always taken these factors into consideration in evaluating asylum claims and have allowed applicants to support their claims with any relevant evidence.56 The new evidentiary restrictions have no basis in United States or UN precedent, and the proposed regulations themselves do not offer any explanation as to the wisdom or necessity of such constraints. Indeed, it is difficult to understand how the United

55 See, e.g., UNHCR Handbook at ¶ 199.

56 See, e.g., Krasnopivtsev v. Ashcroft, 382 F.3d 832, 837 (8th Cir. 2004) (noting that “the traditional rules of evidence do not apply to immigration proceedings” and “the sole test for admission of evidence is whether it is relevant and whether its admission is fundamentally fair”).
States can comport with the rights-protective purpose of the Convention while imposing additional evidentiary hurdles on claims where the difficulty of obtaining corroborating evidence is well-established. This unsupported proposed evidentiary ban is arbitrary and capricious and owed no deference.\textsuperscript{57}

\textit{The proposed regulations impose a novel “independent existence” element which ignores both international and domestic precedent}

The proposed regulations also provide that a PSG “must have existed independently of the alleged persecutory acts and cannot be defined exclusively by the alleged harm.” The proposed regulations themselves acknowledge that this is a novel requirement: some Circuits have required that a PSG must have an independent existence, and many Circuits have noted that a PSG cannot be defined \textit{exclusively} by the harm suffered by its members, but none have required that both criteria be met.\textsuperscript{58} Likewise, the UNHCR Guidelines require only that a PSG not be defined \textit{solely} by the shared characteristic of facing danger of persecution.\textsuperscript{59} The Departments argue that their unprecedented heightened requirements are due deference under \textit{Brand X} principles. However, that case recognizes that an agency cannot reinterpret a statute inconsistently with its past precedent without offering sufficient explanation for its change in policy, and that “unexplained

\begin{itemize}
\item \textsuperscript{57} It is also arguably a violation of applicants’ due process rights. See \textit{Tun v. Gonzales}, 485 F.3d 1014, 1018–20 (8th Cir. 2007) (finding due process violated where Immigration Judge arbitrarily excluded relevant evidence); \textit{Gathungu v. Holder}, 725 F.3d 900, 910 (8th Cir. 2013) (same).
\item \textsuperscript{58} See, e.g., \textit{Lukwago v. Ashcroft}, 329 F.3d 157 (3d Cir. 2003) (noting that harm feared by PSG of former child soldiers – attacks by vigilantes – differs from the shared harm that helps define the group – forced recruitment).
\item \textsuperscript{59} UNHCR PSG Guidelines at 4 (noting that while a PSG cannot be defined exclusively by the persecution of its members, “persecutory action toward a group” is nonetheless relevant to the analysis).
\end{itemize}
inconsistency is . . . a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.”

The proposed regulations offer little to no explanation for this deviation from the obligations of international and domestic law, including the BIA’s own precedents. The Departments attempt to argue that the proposed rule “clarifies” the independent existence requirement by requiring both Circuit Court tests be met. Of course, just stating that a change in policy provides clarity does not make that true and does not mean that it is not an inconsistency requiring sufficient explanation, even under *Brand X*. Here, the proposed rule does not offer any additional clarity, since, as the proposed regulations recognize, there is confusion as to the extent of the differences between the two Circuit Court tests, and the proposed regulations merely compound this problem by requiring that both tests be met.

The proposed regulations also cite to the abrogated opinion in *Matter of A-B-* in support of this policy change, stating that “if a group is defined by the persecution of its members, the definition of the group moots the need to establish actual persecution.” Of course, an applicant for asylum is not obligated to demonstrate that she has been the victim of actual persecution; a well-founded fear of future persecution is also sufficient to allow protection under the Convention and the Act. Moreover, this proposition is only true where a group is defined *exclusively* by the persecution of its members. As United States courts have recognized, there are many situations in which groups are defined partially by the fact of their persecution, but where group members are nevertheless linked by other shared characteristics. For example, “women in Jordan who have

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60 *National Cable & Telecommunications Ass’n v. Brand X Internet Services*, 545 U.S. 967, 981 (2005).

61 The impropriety of relying on this abrogated precedent without further explanation is discussed below.

62 8 C.F.R. § 208.13(b).
allegedly flouted repressive moral norms and thus who face a high risk of honor killing”—the PSG recognized in Sarhan—are linked not only by the fact that they risk persecution, but also because of the immutable characteristics of gender, nationality, and the inability to alter their past labels of non-conformist.63

As the Seventh Circuit has noted, “it is not fair to conclude that the group is defined by the harm or potential harm inflicted merely by the language used rather than determining what underlying characteristics account for the fear and vulnerability,” and it is inappropriate to “tease out one component of a group’s characteristics to defeat the definition of social group.”64 This is exactly what the Departments are doing by enumerating an extensive— in the Departments’ own words, “nonexhaustive”— list of groups which they have pre-judged to be defined by persecution. Moreover, the Departments ignore UNHCR guidance on interpretation of the Convention, which notes that, while a PSG cannot be defined exclusively by the persecution of its members, “persecutory action toward a group may be a relevant factor in determining the visibility of a group” and “the actions of the persecutors may serve to identify or even cause the creation of a PSG in society.”65 For example, while left-handed men are not a PSG in the abstract, if they were persecuted for being left-handed, they would quickly become recognizable in their society as a particular group. In such a case, it would be the attributes of being male and left-handed which would identify the PSG, not the persecution itself. This not only underlines the potential relevance of the fact of persecution in creating a PSG, but also demonstrates the danger of attempting to articulate groups which will or will not qualify as PSGs in the abstract, without considering the

63 Cece v. Holder, 733 F.3d 662, 672 (7th Cir. 2013) (citing Sarhan v. Holder, 658 F.3d 649 (7th Cir. 2011).
64 Cece, 733 F.3d at 672.
65 UNHCR PSG Guidelines at 4.
particular facts and circumstances involved. The proposed regulations directly undermine Congress’ intent by adopting a restrictive interpretation of PSG which is at odds with the nation’s obligations under the Convention, and the Departments do not even attempt to provide a reasoned analysis which might justify this unprecedented constraint. This is particularly so when viewed in concert with the fact that the proposed regulations also propose to allow denial of applications based solely on the I-589 and initial evidence without providing the applicant an interview to make these clarifications.

e. The proposed regulations impermissibly pre-judge extensive categories of claims as “unfavorable,” ignoring their obligation to assess asylum claims in the context of the applicant’s particular circumstances

While these restrictions effectively eliminate asylum on the basis of membership in a PSG, the proposed regulations purport to go further, specifying broad categories of applicants whose applications would not be “favorably adjudicated” by the Secretary of Homeland Security or Attorney General. The UNHCR makes clear that asylum applications are highly fact and situation specific, and must be determined on a case-by-case basis which allows for appropriate evaluation of an applicant’s particular circumstances.\textsuperscript{66} United States Courts and the BIA have never wavered from this position.\textsuperscript{67} However, the proposed regulations now purport to be able to pre-judge these claims, making sweeping pronouncements about situations that will not qualify for protection, without explaining why the Departments are so sure that their predictions are or will remain accurate indefinitely.

\textsuperscript{66} See, e.g., UNHCR Handbook at 9.

\textsuperscript{67} See, e.g., Gonzalez-Hernandez v. Ashcroft, 336 F.3d 995, 997-98 (9th Cir. 2003) (noting obligation to consider evidence on “individualized basis”); In re J-Y-C-, 24 I.&N. Dec. 260, 263 (BIA 2007) (noting Immigration Judges’ responsibility to “tak[e] into consideration the individual circumstances of the specific witness and/or applicant”).
The proposed regulations are so vague and ambiguous that they are likely to decrease, rather than promote, administrative efficiency.

The proposed regulations make only the most cursory of attempts to justify this complete policy reversal, stating that the new regulations will result in more uniform application, promote clarity, and reduce the amount of time required to adjudicate asylum claims. This seems incredibly unlikely. The proposed regulations are so vague and ambiguous, and represent such a radical departure from the interpretive resources United States courts have historically used for guidance, that confusion, arbitrary disparities in application, and a flood of appeals seem inevitable. For example, the proposed regulations state that “without more,” claims based on membership in the enumerated groups will “generally” not be favored, but that there may be “rare circumstances” where this is not the case. They make no effort to explain what “more” might be required, or what type of “rare circumstances” would allow an exception to be made. This lack of clarity will lead to disparate results across the country as Immigration Judges and Asylum Officers attempt to determine the scope of these restrictions. Unfortunately, it seems the most likely result is that many adjudicators will read these proposed regulations to require them to abandon the individualized inquiry required and will simply deny all claims based on membership in these groups.

The exclusion of claims based on persecution by non-state actors ignores the mandates of international and domestic precedent.

While many of the categories of “unfavorable” groups are vague or otherwise flawed, several examples are sufficient to demonstrate the inappropriate, unprecedented nature of this portion of the proposed regulations. The proposed regulations purport to bar claims based on “interpersonal disputes of which governmental authorities were unaware or uninvolved” and “private criminal acts of which governmental authorities were unaware or uninvolved.” Until now,
both international and U.S. immigration law have recognized that persecution can be perpetrated by non-state actors where an applicant cannot avail herself of the protection of her own government because it is unable or unwilling to intervene.\textsuperscript{68} This interpretation acknowledges that governments have an obligation to prevent human rights abuses, including violations of the right to life and security of the person, and that systemic or deliberate failure to protect people from harm by private actors is a human rights violation. In addition to purporting to ban these claims generally, the change of language from “unable or unwilling to intervene” to “unaware or uninvolved” ignores that governmental authorities often purposefully decline to intervene in such disputes. For example, it is well documented that governmental authorities in many countries refuse to intervene in violent familial disputes as a result of cultural beliefs and/or laws giving the head of household the right to treat his family however he pleases.\textsuperscript{69} As both United States and international courts have recognized, the role of the state in the persecution of the victims of such disputes is not lessened because of its refusal to intervene. Instead, it is the fact that the government has deemed such violence to be permissible that creates the context which both develops the power dynamics which cause such violence to occur and enables such persecution to continue unfettered.\textsuperscript{70} Individuals who are persecuted by non-state actors but cannot turn to their government for help fall squarely within the group the Convention was designed to protect.

Our pro bono lawyers have represented several women from different countries in Africa who sought asylum based on persecution, including female genital mutilation, forced marriage,

\textsuperscript{68} See, e.g., \textit{Burbienie v. Holder}, 568 F.3d 251, 255 (1st Cir. 2009); \textit{In re S-A-}, 22 I.&N. Dec. 1328 (BIA 2000).

\textsuperscript{69} See, e.g., \textit{Juan Antonio v. Barr}, 959 F.3d 778 (6th Cir. 2020).

\textsuperscript{70} See UNHCR PSG Guidelines at 5 (explaining that a government’s inability or unwillingness to assist victims of persecution by non-state actors is often due to the applicant’s protected characteristic(s), and noting that asylum is appropriate in such cases).
and domestic violence, by private actors. We proved, for example, that those women were persecuted because their governments thought their issues raised only matters of “family concern,” so they refused to make police reports or get involved in “family business.” We also proved, for example, that a horrible abuser could continue his ongoing abuse with impunity because of his role in the government. It would be much more difficult, if not impossible, to prove those claims under the new proposed standard. The governments in those situations made themselves “unaware or involved,” which is precisely what allowed the persecution. The standard for asylum should not depend on such willful blindness to human rights violations. Because the proposed regulations make it more difficult, perhaps impossible in some situations, for those women to obtain the safety and freedom of asylum, the proposed regulations are likely to cause abuse, persecution, violence, and death of women in those situations.

There is no basis for excluding these claims, which are based on groups that share immutable characteristics, are defined with particularity, and are distinct in many societies.

The proposed regulations do not attempt to explain why membership in these groups would be insufficient to qualify for asylum. The proposed regulations include one conclusory sentence which states that, “without additional evidence,”—at least some of which applicants are now banned from providing—such groups are “generally insufficient to demonstrate a PSG that is cognizable because it is immutable, socially distinct, and particular, that is cognizable because the group does not exist independently of the harm asserted, or that is cognizable because the group is defined exclusively by the alleged harm.” However, the only PSG which the BIA has ever recognized as cognizable under these requirements—“married women in Guatemala who are
unable to leave their relationship”—involved precisely this situation. Nevertheless, the BIA found that the group was sufficiently particular because “[t]he terms used to describe the group—‘married,’ ‘women,’ and ‘unable to leave the relationship’—have commonly accepted definitions within Guatemalan society based on the facts in this case, including the respondent's experience with the police.” The BIA also found that the group was sufficiently socially distinct because of “unrebutted evidence that Guatemala has a culture of machismo and family violence and the fact that even though Guatemala has laws in place to prosecute domestic violence crimes, enforcement can be problematic because the National Civilian Police often failed to respond to requests for assistance related to domestic violence.” Finally, the group existed independently of the harm asserted and was not defined exclusively by that harm because married women in Guatemala may have many reasons they are unable to leave their relationship which are not based on the domestic violence suffered, including “societal expectations about gender and subordination, as well as legal constraints regarding divorce and separation.” The proposed regulations do not attempt to explain why this is no longer the case.

The proposed regulations appear to be a thinly-veiled attempt to codify the controversial dicta of Matter of A-B- and eliminate claims based on gender, domestic violence, and gang violence

Former Attorney General Sessions’ opinion in Matter of A-B- has been heavily criticized for its sweeping dicta purporting to bar asylum claims based on gang recruitment, domestic

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72 Id. at 393.
73 Id. at 394.
74 Id. at 393.
violence and gender-based persecution. Indeed, this opinion has been abrogated in multiple Circuits, and the United States District Court for the District of Columbia permanently enjoined the Government from applying several aspects of this opinion as arbitrary, capricious, and unlawful.75 The Departments now attempt to evade the difficulties they face in judicial review of these issues by instead promulgating regulations which codify Matter of A-B-’s unprecedented and unauthorized restrictions on the scope of asylum eligibility.

The proposed regulations’ enumerated categories of claims which will not “generally” be eligible for relief seem specifically targeted to restrict claims based on domestic violence (see restraints on claims based on “interpersonal disputes” and “private criminal acts”), gang violence (see prohibitions on “past or present criminal activity or associations;” “past or present persecutory activity or association;” “presence in a country with generalized violence or a high crime rate;” and “attempted recruitment of the applicant by criminal, terrorist, or persecutory groups”), and gender-based persecution (see categorical ban on claims based on persecution on account of gender).

The Departments offer no explanation for the categorical rejection of these claims other than citing to Matter of A-B-, which itself “cites only fiat” to support this policy.76 The proposed regulations do not appear to be the product of any particular expertise in this area on the part of the Departments. Even if it is intended as the product of such, the Departments offer no detailed information or data from such alleged expertise. Instead, they offer only broad generalizations and fears. Indeed, the Departments are not experts in applying treaty interpretation principles to


76 De Pena-Paniagua, 957 F.3d at 93.
determine the United States’ obligations under international law. This is the province of the judiciary, and it is therefore especially inappropriate for the Departments to ignore the fact that a growing number of United States courts have concluded that these restrictions are arbitrary, capricious, and unlawful.

Of course, the lack of explanation on the part of the Departments is not surprising. There is no rational basis for denying these claims, which the United Nations has specifically recognized. As the UNHCR has observed, the Convention’s definition of refugee “has been interpreted through a framework of male experience,” and special attention is now required to ensure that the role of gender to “influence, or dictate, the type of persecution or harm suffered and the reasons for this treatment” is not ignored. The UNHCR has gone further, stating explicitly that “[t]he refugee definition, properly interpreted, therefore covers gender-related claims.”

VIII. The Proposed Rule Impermissibly Narrows the Definition of Nexus

In asylum adjudications, the statute requires that an applicant prove their persecution was or will be on account of a protected characteristic. This is known as the nexus requirement. The standard for nexus has consistently been determined to require only that the applicant prove that at least one central reason motivating the persecutor is the applicant’s possession or perceived possession of a protected characteristic. The Board has reinforced that the “one central reason”

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77 UNHCR, GUIDELINES ON INTERNATIONAL PROTECTION: GENDER-RELATED PERSECUTION WITHIN THE CONTEXT OF ARTICLE 1A(2) OF THE 1951 CONVENTION AND/OR ITS 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES 2 (May 7, 2002).

78 Id. at 3.

language should be interpreted consistent with prior Board precedent that allows nexus to be established where the persecutor has mixed motivations.\textsuperscript{80} Moreover, punitive intent is not required for the nexus analysis.

The relevant inquiry for nexus is simply whether the persecutor has committed an intentional action, or intends to commit an intentional action, because of a characteristic (or perceived characteristic) of the victim.\textsuperscript{81} Such inquiry does not yet involve an analysis of whether that characteristic is an acceptable social group or protected ground. Instead, the factfinder must only look at the intentions of the persecutor for committing or intending to commit the act.

In proposing to narrow this element, the proposed rule not only changes these long-held standards, but conflates the nexus requirement with the protected grounds to which nexus must relate. Nexus does not generally define which bases merit asylum (the protected group prong); rather, it focuses on whether at least one central reason that motivated the persecutor’s actions was the applicant’s characteristic and not some other motivation, such as a crime of opportunity. For example, nexus does not look at whether gender is a protected ground. Instead, it looks at whether, assuming gender were a protected ground, the persecutor targeted the applicant because of their gender instead of some other reason, such as a crime of opportunity. Put differently, in order to show nexus, an applicant must prove that, all things being the same, if the applicant lacked the protected characteristic, the persecutor would not have targeted them.

\textsuperscript{80} \textit{Matter of J-B-N-} & \textit{S-M-}, 24 I&N Dec. at 214 (“Having considered the conference report and the language of the REAL ID Act, we find that our standard in mixed motive cases has not been radically altered by the amendments.”)

\textsuperscript{81} \textit{Matter of Kasinga}, 21 I&N Dec. 357 (BIA 1996); see also \textit{Pitcherskaia v. INS}, 118 F.3d 641, 648 (9th Cir. 1997).
Here, however, the Departments propose to shift the focus from the motivations of the persecutor, and do not analyze how the new standard will apply in mixed motive or imputed characteristic cases. Instead, they simply provide a “nonexhaustive” list of cases in which nexus will be unlikely to be found, focusing on the characteristic of the victim rather than the motive of the persecutor. This is entirely contrary to a long history of asylum law that has consistently reinforced that the persecutor’s perceptions of the applicant are what matter.82

Not only is the standard contrary to well-established norms and the plain language of the statute, it is arbitrary and capricious. There is no analysis, data or explanation that justifies how the Departments chose their nonexhaustive list of cases and did not include others. Moreover, the rule arbitrarily requires that the persecutor target more than one member of the group in order to prove nexus. Yet, no data or analysis is provided to explain why having two people targeted is any more likely to show the motivations of the perpetrator.

The proposed regulations, which bar meeting the “nexus” requirement for entire groups of cases, therefore, are too broad.83

IX. The Departments’ Proposed Discretionary Factors are Unlawful, Unsubstantiated and Arbitrary

The Proposed Rule identifies new factors it proposes that “adjudicators must consider” when evaluating whether “an applicant merits the relief of asylum as a matter of discretion.”

82 Matter of Fuentes, 19 I&N Dec. 658, 662 (BIA 1988); Matter of S-P-, 21 I&N Dec. at 489; INS v. Elias-Zacarias, 502 U.S. 478, 482 (1992); See also Pedro-Mateo v. INS, 224 F.3d 1147 (9th Cir. 2000)

83 See, e.g., DHS’s Supplemental Brief in Matter of L-R-, April 13, 2009 (arguing that an individual in the particular social groups of “Mexican women in domestic relationships who are unable to leave” or “Mexican women who are viewed as property by virtue of their positions within a domestic relationship” could establish a nexus to a particular social group if the persecutor believed that he had the right to abuse the victim because she possessed the characteristics that defined the group).
85 Fed. Reg. 36264, 36283 (June 15, 2020) (hereinafter 85 Fed. Reg.). The Departments maintain that these new mandatory considerations “will better ensure that immigration judges and asylum officers properly consider, in all cases, whether applicants for asylum merit the relief as a matter of discretion, even if the applicant has otherwise demonstrated eligibility for asylum.” Id. (emphasis added). But, “reasonable regulation ordinarily requires paying attention to the advantages and the disadvantages of agency decisions.” Michigan v. EPA, 135 S. Ct. 2699, 2707 (2015). Simply put, “the crucial question—one the [Proposed Rule] le[aves] unaddressed—is whether the program [the Departments have proposed] will do more good than harm.” Edison Mission Energy, Inc. v. FERC, 394 F.3d 964, 969 (D.C. Cir. 2005). There is nothing in the Departments’ proposal, despite its length, that suggests it has even examined this central question. And its failure to do so infects the entire Proposed Rule.

Consider one example of harms the Departments claim they are trying to address—that in cases where the “applicant has otherwise demonstrated eligibility for asylum,” 85 Fed. Reg. at 36283 (emphasis added), immigration officials are not exercising their discretion to deny the applications frequently enough. There are two types of errors an immigration official can make on an asylum claim in exercising discretion—the official can wrongly provide asylum relief or can wrongly deny a deserving asylum claim. The former error (particularly given the criminal records screening for applicants, ability to deport those who have made false claims, and legal authority to revoke an improper grant of asylum in the future) is far less serious than mistakenly denying asylum to a person who faces torture, persecution, or death upon deportation.

It is crucial, given the magnitude of the changes proposed, to know whether the Departments have taken these critical factors into account. Yet, despite nearly 200 pages of proposed rule, there is no analysis or evidence that they have. This is particularly so based on the
Departments’ aim—by their own account—not merely to root out invalid claims, but to require immigration officials to exercise their discretion more often to *deny* eligible applicants. The Departments’ goal, in other words, is not to get immigration officials to exercise their discretion based on the facts, but to constrain that discretion in favor of a pre-ordained result that seeks to deny more applications in contradiction of our international obligations and Congressional intent.

Assuming *arguendo* this objective falls within the Departments’ delegated authority to adopt, they have not explained—because they cannot—why or how their Proposed Rule would advance, rather than impede, the goals of the immigration laws the Departments are tasked with administering. The protections for refugees and asylees holding a “well-founded fear of persecution” apply not just when asylum applicants are objectively “more likely than not to be persecuted,” but also when their “subjective beliefs” are that they may either be “put to death or sent to some remote labor camp.” *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987) (quoting 1 A. Grahl-Madsen, The Status of Refugees in International Law 180 (1966)). “The Supreme Court has explained that an individual can qualify for asylum if she demonstrates a ten percent likelihood that she will be persecuted on the basis of race, religion, nationality, social group, or political opinion.” *Capital Area Immigrants’ Rights Coal. v. Trump (CAIR Coal.),* No. 19-2117, 2020 WL 3542481, at *2 n.2 (D.D.C. June 30, 2020). And, at the “credible fear” interview stage, “an asylum applicant ‘need only show a ‘significant possibility’ of a one in ten chance of persecution, i.e., a fraction of ten percent.’” *Id.* (quoting *Grace v. Whitaker*, 344 F. Supp. 3d 96, 127 (D.D.C. 2018)).

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84 An individual can have an “objectively well-founded fear of persecution even if it is improbable that he will be persecuted upon his return to his own country.” *Guan Shan Liao v. Dep’t of Justice*, 293 F.3d 61, 69 (2d Cir. 2002). There need only be “a slight, though discernible, chance of persecution.” *Tambadou v. Gonzales*, 446 F.3d 298, 302 (2d Cir. 2006). The question is whether “a reasonable person in the same circumstances would have such a fear.” *Carranza-Hernandez v. I.N.S.*, 12 F.3d 4, 7 (2d Cir. 1993); see also *Cardoza-Fonseca*, 480 U.S. at 431.
While the Departments may consider a number of factors in awarding discretionary asylum, not all factors are equal. In discussing the balancing of favorable and adverse factors, the Board of Immigration Appeals (“BIA”) has stated that “[t]he danger of persecution will outweigh all but the most egregious adverse factors.” *Huang v. INS*, 436 F.3d 89, 98–100 (2d Cir. 2006) (internal citations omitted). This principle—that the value of human life and freedom takes primacy—is a core value of American society. Benjamin Franklin put it this way over 235 years ago: “it is better 100 guilty Persons should escape than that one innocent Person should suffer.” Benjamin Franklin, Works 293 (1970), Letter from Benjamin Franklin to Benjamin Vaughan (Mar. 14, 1785).

Considered against this foundational principle, the Departments’ concerns about “improving” officials’ exercise of their discretion to reject applicants that have *proven this likelihood of harm* pale in comparison to the alternative. Under the Proposed Rule adjudicators must treat as “significantly adverse” an otherwise eligible applicants who has *either* (1) entered the United States illegally (unless they were able secure non-stop plane tickets from the countries they are fleeing), (2) failed first to seek asylum from any country through which they transited *or* (3) used falsified documents to enter the United States (again, unless they managed to secure a non-stop flight to the United States). But treating these as “significantly adverse factors” ignores that “if illegal manner of flight and entry were enough independently to support a denial of asylum . . . virtually no persecuted refugee would obtain asylum.” *Huang*, 436 F.3d at 100 (emphasis added). By “improving” agency exercise of discretion (if one could call it an improvement) in a way designed to increase the likelihood that immigration officials will more frequently deny an applicant who “has otherwise demonstrated eligibility for asylum,” the Departments risk a far, far worse mistake—putting *eligible* applicants in harm’s way. 85 Fed. Reg. at 70.
The Departments correctly point out that asylum applicants who have been turned down do not necessarily face deportation, but this is an empty promise. 85 Fed. Reg. at 36285. Even if these individuals receive orders of removal, the Departments observe, they may contest their removal in one of two ways. They may seek (1) withholding of removal under section 241(b)(3) of the INA, see 8 U.S.C. § 1231(b)(3); 84 Fed. Reg. at 33,834; or (2) protection under the regulations implementing article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”), see Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105–277, § 2242(b), 112 Stat. 2681; 84 Fed. Reg. at 33,834. 85 Fed. Reg. at 36285 (“[An] applicant may still seek non-discretionary statutory withholding of removal and protection under the CAT regulations.”). But these “options” do not remotely address the relative harms and benefits of the Proposed Rule. These are “more difficult avenues to avoid removal from the United States.” CAIR Coal., 2020 WL 3542481, at *2. Indeed, they are immensely more difficult. An applicant seeking withholding of removal must “prove to an immigration judge that ‘it is more likely than not’ that she would be persecuted on a protected ground. 8 C.F.R. § 1208.16(b)(2).” Id. at *2. And, an individual invoking CAT has an even steeper hill to climb—she must show that “it is more likely than not that he or she would be tortured if removed to the proposed country of removal.” Id. (emphasis added).

The bottom line cannot be overstated. The ineluctable results are evident from the face of the Proposed Rule and are all bad. First, applicants will more frequently be turned down “even if the applicant has otherwise demonstrated eligibility for asylum.” As noted above, the Departments
have not even attempted to demonstrate that they have weighed the primacy of preventing persecution against other less important factors.\textsuperscript{85}

Second, even though applicants denied asylum may contest their removal, their odds of success are far smaller and at least some of them by definition will face persecution, death, or torture if the Proposed Rule becomes final. The math is inescapable. To avoid removal, the applicant must show a greater than 50% chance he or she will be persecuted or tortured. This means that some percentage of those returned to the country of removal who have not met the 50% test will nonetheless be persecuted, tortured, or killed—even though they would have “otherwise demonstrated eligibility for asylum.”

Third, even if persons who have “otherwise demonstrated eligibility for asylum” but who would nonetheless be denied asylum under the Proposed Rule somehow manage to avoid deportation, that denial will have an indelible deleterious impact on their lives. Avoidance of removal “does not preclude the government from removing the alien to a third country where the alien would not face persecution, does not establish a pathway to lawful permanent resident status and citizenship, and does not afford derivative protection for the alien’s family members.” \textit{CAIR Coal.}, 2020 WL 3542481, at *3.

Finally, the “fall back” of withholding of removal and protections under CAT—offering the very lowest amount of protections to avoid blatantly violating our international obligations by simply allowing a person not to be removed for a period of time—harms the country, and there is

\textsuperscript{85} The Departments assert that adjudicators will retain the “ability to consider whether there exist extraordinary circumstances, such as those involving national security or foreign policy considerations, or whether the denial of asylum would result in an exceptional and extremely unusual hardship to the alien.” 85 Fed. Reg. at 36285. But this is scant solace to those who have “otherwise demonstrated eligibility for asylum.” The Departments admit that this stringent new test replaces its existing policy that the risk of persecution “should generally outweigh all but the most egregious adverse factors.” \textit{Id}. And, as noted above, the Departments’ “explanation” for this flip-flop on asylum policy—that those denied asylum may still seek non-discretionary statutory withholding of removal and protection under the CAT regulations—is entirely feckless.
no evidence the Departments have analyzed this. Making the default ostensibly be to provide a
benefit with no path to citizenship, no ability to travel outside the U.S., the requirement to
constantly apply for and wait to receive work authorization—which is connected to one’s ability
not only to support their family but also to obtain a driver’s license and myriad other daily needs—and the inability to reunite with family members creates a class of those who will be indefinitely
“in limbo” despite being in our community with no ability to return to the place from which they fled.

There is no plausible reason why this would be a fair or reasonable outcome. But the
Departments do not even seem to have pondered the question itself.

X. The Proposed Changes to the Discretionary Review Framework Impermissibly
Create Policy in Arenas Expressly Reserved to Congress.

An agency has only such authority, including whether to implement major policy decisions,
as expressly delegated to it by Congress, and an agency cannot act in arenas outside that delegated
authority. Absent an express delegation, the authority to make major policy decisions remains
with Congress. See FLRA, 464 U.S. at 97; see also, e.g., Chamber of Comm. v. N.L.R.B., 856 F.
Supp. 2d 778, 791–92 (D.S.C. 2012). Judicial deference to an agency’s decision does not apply
to decisions that Congress did not entrust to an agency. See Sebelius, 567 U.S. 519.

Here, the underlying statutory intent and purpose, as exhibited through decades of
congressional policy and the legislative history discussed infra, favors granting asylum to
otherwise eligible aliens. While Congress has delegated to the Attorney General discretionary
authority to grant or deny asylum to an alien who has otherwise demonstrated that he or she “is a
refugee within the meaning of section 1101(a)(42)(A) of this title,” 8 U.S.C. § 1158(b)(1)(A), no
evidence suggests that such discretion was to be used in contravention of that statutory intent or
purpose. Congress has not entrusted the Departments to develop and implement discretionary
policies, the results of which would foreclose asylum to virtually all applicants in contradiction of the Congressional preference for broad protections. At a minimum, the proposed rule would result in a dramatic increase in the number of otherwise eligible asylum applicants who will get turned down. Yet, that is what the Departments seek to accomplish through this Proposed Rule. Specifically, the Proposed Rule would create procedures that would increase: (1) the discretionary denials of asylum applicants who would otherwise be granted asylum under existing law; (2) the number of asylum applicants who will be returned to their country of removal and face persecution, torture, or death; and (3) the denial of asylum applicants who would otherwise be eligible, but who will be granted significantly fewer protections and create a cadre of people in limbo in our communities.

a. The Proposed Rule Unlawfully Constrains Asylum Officers from Exercising Discretion to Grant Asylum to Otherwise Eligible Applicants, Contrary to Congressional Intent.

The Proposed Rule would, contrary to congressional intent, increase the frequency with which adjudicators issue discretionary denials of asylum applications to otherwise eligible aliens. Indeed, the Proposed Rule was expressly designed to “expand[] the bases on which an asylum officer may determine that a claim does not merit referral (and, as a consequence, make a negative fear determination).” 85 Fed. Reg. at 36289. Put plainly, the Proposed Rule constrains asylum officers by directing them to make adverse and significantly adverse findings more often, and imposes a stricter burden upon applicants to overcome such findings and still be granted asylum—allowing such only where one can show it is in the interest of national security or where extraordinary circumstances exist to grant asylum. Nothing shows Congress ever intended the Departments to constrain their discretionary review so heavily, or to place such a heavy burden on asylum applicants who have otherwise shown they are eligible for asylum.
To the contrary, Congress enacted the Refugee Act “to protect refugees, i.e., individuals who are unable to protect themselves from persecution in their native country.” *Grace*, 344 F. Supp. 3d at 123 (“The Congress declares that it is the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands, including . . . humanitarian assistance for their care and maintenance in asylum areas.”). A primary purpose for enacting the Refugee Act was “to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees.” *Cardoza-Fonseca*, 480 U.S. at 436. Indeed, “the [Refugee] Act should be read consistently with the United Nations’ interpretation of the refugee standards.” *Grace*, 344 F. Supp. 3d at 124 (citing *Cardoza-Fonseca*, 480 U.S. at 438–39). The issue of discretion has been addressed by Congress, and there is clear intent that the provision of discretion is not intended to give the Departments unfettered discretion to deny applications in contradiction of the law.

In drafting the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), the Leahy Amendment was proposed to ensure meritorious asylum applicants cannot be summarily denied access to recourse in the U.S. immigration system. In proposing the amendment, Senator Leahy sought to prevent “less accountable government action and unfettered discretion being exercised by overburdened immigration agents to the detriment of refugees fleeing oppression.” He consistently emphasized that the goal of asylum legislation should be to “give real refugees a fair opportunity to present their circumstances and seek asylum.” 104 Cong. Rec. S11903 (daily ed. Sept. 30, 1996) (statement by Senator Leahy). When the IIRIRA was passed, while it did not contain the strong language Senator Leahy advocated, it did incorporate a provision that ensures asylum applicants can seek review of a decision in their case, upholding the tenets of
the Leahy Amendment’s goal to ensure discretion is not used against meritorious asylum seekers.\textsuperscript{86} In 2005, the REAL ID law did heighten immigration judges’ discretion,\textsuperscript{87} but also further enshrined the ability of the appeals courts to review immigration court decisions.\textsuperscript{88}

The United Nations Convention Relating to the Status of Refugees (the “Convention”) sheds light on how Congress intended the Attorney General to exercise his or her discretion under 8 U.S.C. § 1158(b)(1)(A). The Convention, “as made binding on the United States through the Protocol,” “provides that the contracting States shall as far as possible facilitate the assimilation and naturalization of refugees.” Cardoza-Fonseca, 480 U.S. at 436, 441 (emphasis added) (citing Convention Relating to the Status of Refugees art. 34, July 28, 1951, 189 U.N.T.S. 150). Yet, the Departments, through the structure of this rule, propose creating a system in which the default will be a grant of withholding of removal—if the applicant may obtain any relief—which, as discussed herein does nothing to facilitate assimilation; instead, creating a class of community members in eternal limbo.

It is true that “an alien who satisfies the applicable standard under § 208(a) does not have a right to remain in the United States; he or she is simply eligible for asylum, if the Attorney General, in his discretion, chooses to grant it.” Id. at 443. However, the Supreme Court has indicated that asylum officers should use their discretion as often as possible to grant asylum to those applicants who are eligible. Id. at 441. Under this long-standing practice—consistent with congressional intent—“[d]iscretionary denials of asylum are exceedingly rare.” Huang, 436 F.3d


\textsuperscript{87} Sarah Rogerson, Waiting For Alvarado: How Administrative Delay Harms Victims of Gender-Based Violence Seeking Asylum, 55 WAYNE L. REV. 1811, 1833.

at 92; see also Zuh v. Mukasey, 547 F.3d 504, 507 (4th Cir. 2008); Gulla v. Gonzales, 498 F.3d 911, 916 (9th Cir. 2007) (“It is rare to find a case where an IJ finds a petitioner statutorily eligible for asylum and credible, yet exercises his discretion to deny relief.”).

The Proposed Rule would result in a 180-degree shift; discretionary grants of asylum would become exceedingly rare for two principal reasons. First, the Proposed Rule creates—for the first time—three mandatory factors, any one of which, would be considered “significantly adverse for purposes of the discretionary determination.” 85 Fed. Reg. at 36283. While creating these proposed mandatory factors, the rule provides virtually no path for applicants to overcome or counterbalance these factors. Only (1) in “extraordinary circumstances, such as those involving national security or foreign policy considerations,” or (2) where “the denial of asylum would result in an exceptional and extremely unusual hardship to the alien” may an applicant overcome the default denial—a bar far too high to have any meaningful path to relief. Thus, an applicant whose application includes a mandatory “discretionary” factor would appear to be mandatorily denied by operation the regulation—rather than in the operation of discretion.

Two of these factors—the use of false documents to enter or otherwise illegal entry—are designated by Congress as considerations related to inadmissibility to the United States, see 8 U.S.C. § 1182(a)(6)(A), (C). Congress, however, explicitly excluded asylum seekers from triggering these grounds of inadmissibility, both for a grant of asylum as well as in subsequent application for permanent residence. This is highlighted by the fact that an asylee need not apply for a waiver of inadmissibility. The Proposed Rule, however, now elevates these grounds for inadmissibility to the United States into grounds for denying asylum with what is effectively a “direct flight” requirement that has no anchor in the Act. Under the Proposed Rule, the “significantly adverse” factors include:
(1) an alien’s unlawful entry or unlawful attempted entry into the United States unless such entry or attempted entry was made in immediate flight from persecution or torture in a contiguous country; . . . and

(3) an alien’s use of fraudulent documents to enter the United States, unless the alien arrived in the United States by air, sea, or land directly from the applicant’s home country without transiting through any other country.

85 Fed. Reg. at 36283. Unlawful entry or use of false documents as general grounds for a finding of inadmissibility have long been tempered by a recognition that they do not preclude granting asylum. “The INA and its implementation of the U.N. Protocol reflect the balance Congress struck between the public interests in rendering aliens who enter illegally inadmissible and subject to criminal and civil penalties, . . . and notwithstanding such conduct, preserving their ability to seek asylum.” E. Bay Sanctuary Covenant v. Trump, 354 F. Supp. 3d 1094, 1117–18 (N.D. Cal. 2018), aff’d, 950 F.3d 1242 (9th Cir. 2020). In other words, Congress has already spoken on the balance it intended to strike between these factors and an alien’s opportunity to be granted asylum. Nothing suggests that Congress delegated authority to undermine that balance by Departments mandating that adjudicators must treat these two factors as “significantly adverse” for purposes of their discretionary review of an asylum application.

Indeed, mandating these as significantly adverse factors is not only contrary to congressional intent, but also inconsistent with existing caselaw. “[A]n applicant’s entry into the United States using false documentation is worth little if any weight in” the exercise of discretion. Gulla, 498 F.3d at 917. This rests on the common sense understanding that “genuine refugees may lie to immigration officials and use false documentation” to escape their persecutors and

89 It is further administrative overreach to focus on these factors in particular. Congress enumerated several other classes of aliens, all of which are generally rendered inadmissible into the United States. See 8 U.S.C. § 1182(a)(1)–(10). The emphasis on these factors over other enumerated classes of inadmissibility impermissibly attempts to rewrite the statutory plan.
secure entry to the United States. Indeed, “[w]hen a petitioner who fears deportation to his country of origin uses false documentation or makes false statements to gain entry to a safe haven, that deception “does not detract from but supports his claim of fear of persecution.” Id. (emphasis added) (quoting Akinmade v. INS, 196 F.3d 951, 955 (9th Cir. 1999)).

Furthermore, these two proposed mandatory factors—(1) unlawful entry or attempted entry into the United States and (2) use of fraudulent documents to enter the United States—may adversely affect virtually every asylum applicant. See Huang, 436 F.3d at 100 (“[I]f illegal manner of flight and entry were enough independently to support a denial of asylum, we can readily take notice, from the facts in numerous asylum cases that come before us, that virtually no persecuted refugee would obtain asylum.”). Congress certainly did not intend the Attorney General’s discretion to “eclipse the substance of [c]ongressional policies,” id. at 101, by making it virtually certain that refugees would be denied asylum on the basis of a factor that is so inherit in the reality of one’s escape from persecution, and yet, that is precisely what would occur under the Proposed Rule.


Congress has also indicated clear intent to give “statutory meaning to our national commitment to human rights and humanitarian concerns.” Ramirez-Osorio v. I.N.S., 745 F.2d 937, 943 (5th Cir. 1984). Currently, an adjudicator’s discretionary review recognizes that “general humanitarian reasons, independent of the circumstances that led to the applicant’s refugee status, such as his or her age, health, or family ties, should also be considered in the exercise of discretion.” In Re H-, 21 I. & N. Dec. 337, 347–48 (B.I.A. 1996); accord Pula, 19 I. & N. Dec. at 474. Despite acknowledging BIA’s existing treatment of humanitarian considerations, see 85 Fed. Reg. at 36283 (stating that discretionary determination is currently “based on the totality of
the circumstances,” which includes “general humanitarian considerations”), the Proposed Rule does not give any indication that these humanitarian considerations should be given any weight in future determinations. Failing to incorporate these well-established humanitarian concerns into discretionary review is inconsistent with congressional intent.

The Proposed Rule directly conflicts with settled caselaw and congressional intent regarding the weight to be given to humanitarian considerations in these determinations and therefore is unlawful. *Grace*, 344 F. Supp. 3d at 123–24.

b. Leaving Aside Lack of Authority, the Proposed Changes to the Discretionary Review Framework Are Arbitrary and Capricious.

As discussed above, an agency “must apply a reasoned analysis” in changing its course, “indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedence without discussion, it may cross the line from the tolerably terse to the intolerably mute.” *Greater Boston Television Corp.*, 444 F.2d at 852. Nor may an agency “upset the settled expectations of regulated parties” without providing a “reasoned explanation for the change.” *Exelon Generation Co., LLC*, 676 F.3d at 578 (citing *Fox Television Stations*, 556 U.S. at 515); see also *Regents of the Univ. of Cal.*, 140 S. Ct. at 1913 (holding that DHS’s failure to consider “serious reliance interests” was arbitrary and capricious).

1. The Proposed Rule Is a Significant and Inadequately Explained Departure from Existing Law.

Under the current framework for discretionary review of an asylum application, an adjudicator must consider a nonexhaustive list of factors based on “the totality of the circumstances”—no one factor is given greater weight than any other. *Pula*, 19 I. & N. Dec. at 473; see also *In Re Haddam*, No. AXX XX1 813 - ARLI, 2000 WL 1901995, at *30 (DCBABR Dec. 1, 2000). Except, however, that “[t]he danger of persecution will outweigh all but the most
egregious adverse factors.” Huang, 436 F.3d at 98–100 (internal citations omitted). Additionally, “general humanitarian reasons, independent of the circumstances that led to the applicant’s refugee status, such as his or her age, health, or family ties, should also be considered in the exercise of discretion.” In Re H-, 21 I. & N. Dec. at 347–48. Finally, because “[d]iscretionary denials of asylum are exceedingly rare,” balancing these factors generally dictates that an adjudicator grant asylum to an alien who is otherwise eligible absent extraordinary circumstances. Huang, 436 F.3d at 92.

The Proposed Rule turns the historic test on its head, with a stark departure from existing agency practice that has been consistently followed for over three decades. First, while giving cursory acceptance of the “totality of the circumstances” approach, the proposal would effectively limit asylum officers to consideration of only the three significantly adverse factors in the discretionary review of an otherwise eligible asylum applicant. Instead of granting asylum to otherwise eligible applicants absent extraordinary circumstances, the Proposed Rule would allow otherwise eligible applicants with negative factors to overcome them only with a showing of extraordinary circumstances. 85 Fed. Reg. at 36283–84. Second, the new approach would reorder the previously equal weight assigned to all factors, and, instead, give added (and primarily negative) weight to certain factors, while simultaneously omitting other factors from the discretionary balance. Third, the new approach fails to consider humanitarian factors.

To be sure, the Proposed Rule acknowledges the drastic change in course in at least some respects:

- The Proposed Rule “will better ensure that immigration judges and asylum officers properly consider” these adverse and significantly adverse factors to determine “whether
applicants for asylum merit the relief as a matter of discretion, even if the applicant has otherwise demonstrated eligibility for asylum.” 85 Fed. Reg. at 36283.

- “To the extent that” the third mandatory factor—use of fraudulent documents to effect entry to the United States—“may conflict with any prior holdings by the Board of Immigration Appeals, this rule would supersede such decisions.” Id. n.35.

- “[The Proposed Rule] expands the bases on which an asylum officer may determine that a claim does not merit referral (and, as a consequence, make a negative fear determination).” Id. at 36289.

But merely acknowledging a change in course does not suffice. Administrative agencies must explain the reasons for the policy change and address any variances from the factual premises underlying the existing policy and reliance interests. Fox Television Stations, 556 U.S. at 515. The Departments, however, altogether failed to adequately explain how the current approach to determining the discretionary exercise of asylum is unworkable or places any material burden on the government, nor does it explain what circumstances have changed to warrant the starkly different approach taken in the Proposed Rule. Instead, the proposal merely redefines—and unlawfully constrains—who should be granted discretionary asylum based on a new and restrictive discretionary framework, without adequate explanation. Four points highlight the inadequate explanations.

First, although asserting that it may be “appropriate to establish criteria for considering discretionary asylum claims,” the Departments proffer no explanation as to why it is appropriate; neither is there any discussion of how immigration judges and asylum offers are not already “properly consider[ing], in all cases, whether every applicant merits a grant of asylum as a matter
of discretion, even if the applicant has otherwise demonstrated asylum eligibility.” 85 Fed. Reg. at 36285.

Second, the purported purpose of creating these mandatory factors rings hollow. The Departments claim the purpose is to reduce “the significant strain on . . . resources required to apprehend, process, and adjudicate the cases of the growing number of aliens who illegally enter the United States putatively in order to seek asylum,” and to mitigate concerns “that the use of fraudulent documents makes the proper enforcement of the immigration laws difficult and requires an immense amount of resources.” 85 Fed. Reg. at 36283. However, the Departments advance no evidence showing that a problem exists or, if it does, connecting any strain on resources or difficulty in enforcing immigration laws with an adjudicator’s discretionary review of an asylum application for an alien who has already demonstrated eligibility for asylum. Indeed, denying more applications in an exercise of discretion will serve only to further strain resources as denied applicants will be referred to immigration court and/or may appeal to the BIA or a circuit court. Whereas, approving eligible applications stops the process—and incident use of resources—at the earliest stage in the process possible. Yet, the Departments offer analysis as to why this option was discounted—indeed, it is not even considered under the proposed rule.

Third, the Departments failed to explain why the three mandatory factors and nine additional factors it has chosen are the only, much less the proper, factors for immigration officials to consider, nor have they explained why weight (controlling in some cases, and heavy in others), should be applied to each such factor in making these discretionary decisions to the detriment of other factors that have long been part of the decision making. It is far from clear as to how these factors are the most crucial or why including them furthers any legitimate purpose of the
Departments. Why only nine, instead of ten or five, factors, for example? Without these explanations, the inclusion of these factors is arbitrary and capricious.

Fourth, the Departments’ creation of a “direct flight” exception to the mandatory consideration of unlawful entry or false documents is a cynically empty gesture. Far from taking the fleeing applicant’s circumstances into account, the Departments have offered an exception that they must know applicants fleeing from virtually anywhere else than Canada or Mexico could almost never satisfy. Such a bizarre result is not only at odds with the purposes and history of refugee protections, but is completely arbitrary since one fleeing Canada on a direct flight can have no stronger claim than one who fled, for example, from Somalia through Brazil and up Latin America before securing safety.

These explanations are inadequate in the face of the major policy shift signaled by the obvious and acknowledged goal of the Proposed Rule to reduce an adjudicator’s discretion and to minimize, if not effectively eliminate, favorable factors that have long been considered in decisions of whether to grant an applicant asylum, as has been discussed.

2. The Departments Have Frustrated Settled Expectations.

Decades of prior agency practice have created settled expectations in aliens subject to an adjudicator’s discretionary review of an asylum applicant, as well as organizations created to aid and assist refugees and asylees and the family members of asylum applicants. Those settled expectations—about what factors adjudicators should consider in their discretionary review and what weight adjudicators should give such factors—rest on the statutory intent and purpose that asylum applications will be fairly treated. While the intricacies and nuances of discretionary review are not likely known by refugees and asylees, the long-standing approach of favoring asylum was generally known as presenting a real opportunity for those who sought refuge or
asylum. Asylum applicants, their family members who may already be settled in the United States, and those assisting or supporting applicants have developed settled expectations in prior practice, given the length of time the existing policy has been in effect. As one example, refugees and asylees who, at great risk in their home countries, relied on fraudulent documents to leave and start a new life in the U.S. would no longer have the benefit of the existing practice that “an applicant’s entry into the United States using false documentation is worth little if any weight in” judging whether asylum should be granted.  *Gulla*, 498 F.3d at 917. Instead, absent a showing of extraordinary circumstances, use of such documents will virtually guarantee denial. Such abrupt departures from long-standing practices without a strong justification constitutes arbitrary and capricious decision making. *See Regents of the Univ. of Cal.*, 140 S. Ct. at 1915.

The settled expectations of asylum seekers, their families, aid agencies, governments and communities are shattered by this proposed rule. No longer may they rely on the settled practice that an eligible asylee will receive asylum absent extraordinary circumstances *disfavoring* the grant, but the proposed rule would now leave hundreds of thousands with uncertainty even where they have meritorious claims that meet the plain language of the statute, agency precedent, and purposes of asylum protections internationally. This is a particularly striking move given the reliance interest of asylum seekers—people who have left behind everything, often incurring extortionary costs of travel and smuggling, on the promise that the U.S. offers safety—or at least a very meaningful chance to find such. With the proposed rule, those who make such an investment in their safety are now facing no certainty of return on their investment.

3. The Proposed Rule Lacks Substantial Evidence to Support It.

Finally, the Proposed Rule lacks substantial evidence to support it. Although the Proposed Rule is purportedly justified as better “ensur[ing] that immigration judges and asylum officers
properly consider, in all cases, whether every applicant merits a grant of asylum as a matter of discretion, even if the applicant has otherwise demonstrated asylum eligibility,” 85 Fed. Reg. 36285, no evidence demonstrates widespread failure by adjudicators in making proper discretionary determinations. Equally telling, no evidence shows that the proposed enumerated factors—the significantly adverse factors in particular—are the right factors to implement the INA as intended by Congress.

Turning to the first mandatory adverse factor—unlawful entry or attempted entry—the Proposed Rule claims it is needed to reduce “the significant strain on . . . resources required to apprehend, process, and adjudicate the cases of the growing number of aliens who illegally enter the United States putatively in order to seek asylum.” Id. at 36283. Yet, no evidence is proffered that unlawful entries or attempted entries are made by people who putatively seek asylum.

The Proposed Rule’s justification for the third mandatory factor—use of fraudulent documents to enter the United States—is similarly supported with no evidence showing that an asylum applicant’s “use of fraudulent documents makes the proper enforcement of the immigration laws difficult and requires an immense amount of resources.” Id. at 36283.

The Proposed Rule significantly departs from existing law without adequate explanation, it has frustrated settled expectations, and it is unsupported by any evidence. Therefore, it is arbitrary and capricious.

4. The Departments Failed to Address the Substantial Harm that Would Be Caused By the Proposed Revision.

A “reasonable regulation ordinarily requires paying attention to the advantages and the disadvantages of agency decisions.” Michigan, 135 S. Ct. at 2707. When, as here, “an agency decides to rely on a cost-benefit analysis as part of its rulemaking, a serious flaw undermining that analysis can render the rule unreasonable.” Nat’l Ass’n of Home Builders v. EPA, 682 F.3d 1032,
In making a cost-benefit analysis, cost encompasses “any disadvantage” of a regulation and not merely fiscal considerations or harms that fall within the Departments’ regulatory mandate. *Michigan*, 135 S. Ct. at 2707. The failure to examine all disadvantages fatally infects the entire Proposed Rule.

Here, the Proposed Rule’s “clear standards” for discretionary consideration of asylum applications will allegedly “not add any operational burden or increase the level of operational analysis required for adjudication.” 85 Fed. Reg. at 36289. But even if this were accurate, the Proposed Rule will engender severe disadvantages (costs) that were not weighed against the putative benefit. In particular, no consideration was given to the countervailing factor of adding mandatory negative factors to the discretionary decision, namely, the *wrongful denial* of asylum to a *deserving* applicant.

Moreover, these discretionary determinations occur only after screening to identify whether the applicant is inadmissible because, for example, the applicant has a criminal record, is likely to become a public charge, or may be a security risk. Because the Proposed Rule addresses only applicants eligible for asylum, the harm caused by making a discretionary error to grant asylum is minimal. On the other hand, the harm caused by making a discretionary error to deny

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* It does not take speculation to understand that mandating consideration of what the Departments term “significant adverse” factors will reduce the number of otherwise eligible persons granted asylum. One need look no farther than the public charge rule, which uses a similar framework. As with the determination regarding eligibility for asylum, immigration officials tasked with determining whether an applicant for permanent residence status would instead be a “public charge,” are to base their determinations on a “totality of the circumstances.” Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41292, 41397 (Aug. 14, 2019). And, similar to the Proposed Rule, the public charge rule now requires an immigration officer to consider a list of factors that are “heavily weighted negative” in the public charge determination. *Id.* The Departments do not have to speculate what the effect of adding mandatory consideration of newly labeled negative factors will have. At the time DHS proposed its public charge rule, the State Department had put a nearly identical “public charge” test into effect. But as the State Department conceded, its revision to the public charge standard “could potentially lead to individuals being denied visas on ‘public charge grounds’ more frequently.” *Mayor and City of Baltimore v. Trump*, 416 F. Supp. 3d 452, 505 (D. Md. 2019). Even before the State Department rule took effect, denials on public charge grounds had skyrocketed. *Id.* at 477 (noting that prior to rule change State Department “denied 897 visa applications on public charge grounds” in 2015, but denied over 13,000 visa applications in fiscal year 2018).
asylum to an alien who is otherwise eligible—subjecting the applicant to the threat of torture, persecution or death upon the resulting return to his or her home country—is severe, and in some cases irreparable. The Departments’ failure to weigh the Proposed Rule’s harm against its putative—and unsubstantiated benefits—particularly as to those individuals who “otherwise qualify for asylum,” runs contrary to the humanitarian purposes of our immigration laws and is arbitrary and capricious.

Moreover, for the reasons noted, below, in section XII, infra, we oppose the mandatory discretionary factor related to third country travel.

c. **The additional, non-mandatory discretionary factors are improper.**

In addition to mandatory factors that adjudicators must consider substantially adverse, the Proposed Rule enumerates nine other discretionary factors, “the applicability of any of which would ordinarily result in the denial of asylum as a matter of discretion.” 85 Fed. Reg. at 36283. The Proposed Rule suggests that an applicant may overcome an adverse finding only (1) in “extraordinary circumstances, such as those involving national security or foreign policy considerations,” or (2) where “the denial of asylum would result in an exceptional and extremely unusual hardship to the alien.” Id. at 36283–84. Placing such a burden on the applicant is not part of the statutory plan, but instead has its origins in a single case in which the ultimate determination did not turn on who bore the burden because the adjudicator indicated he would have exercised his discretion to deny asylum in any event. See In re Jean, 23 I. & N. Dec. 373, 385 (B.I.A. 2002).

Nothing in the statutory language or caselaw suggests that this stringent burden should be borne by every alien seeking asylum. To the contrary, the underlying intent to “give real refugees a fair opportunity to present their circumstances and seek asylum.” suggests this heavy burden on those who have otherwise proven their eligibility is well beyond the scope of discretionary
authority delegated to decide whether to grant or to deny asylum. Congress created the INA, incorporating the Refugee Convention in 1980, with explicit language. In doing so, it left to the agency the option to exercise discretion in making a determination to grant asylum. Such discretionary decision is not a mandatory analysis. Where one meets the definition of asylum, they may be granted such under the law. However, Congress recognized that some cases may meet the definition of asylum, not be precluded by legislative bars to asylum, but still include such facts—extraordinary circumstances—as to not merit a grant of asylum. Under the rules of statutory interpretation, the agencies are required to read such grants of discretion as narrowly tailored as possible—unless Congress expressed an intention for such to be read broadly.

Yet, the Departments here take a broad brush to this clause by interpreting the INA and Refugee Act such that one must not be granted asylum unless that person merits discretion based on a number of factors arbitrarily determined to be “relevant” to discretionary analysis. This is not the intention of Congress, nor is it in line with agency rulemaking. Such a rule will surely result in arbitrary and capricious decisions and should be withdrawn.

In enacting the Act, “Congress sought to give the United States sufficient flexibility to respond to situations involving political or religious dissidents and detainees throughout the world.” Cardoza-Fonseca, 480 U.S. at 449. Consistent with congressional intent, existing agency practice enables adjudicators to consider, for example, “the seriousness of the fraud” in evaluating the effect of an alien’s use of fraud to circumvent orderly refugee procedures on an asylum application. Matter of Pula, 19 I. & N. Dec. 467, 474 (B.I.A. 1987) (emphasis added). However, the flexibility to consider the seriousness of any of the discretionary factors is expressly removed from the Proposed Rule. The Proposed Rule thus strips adjudicators of any flexibility and constrains them to deny virtually all asylum cases.
As shown above the Departments’ proposed policy is contrary to settled law which, under *Brand X*, overrides any subsequent, contrary agency interpretations. And, even assuming some ambiguity in the Act, the Proposed Rule sets forth an impermissible interpretation of the INA. *Grace*, 344 F. Supp. 3d at 128. The Departments maintain that persons denied asylum will still have the right to challenge removal orders or invoke CAT to prevent their removal, but as discussed, these avenues to avoid deportation place a substantially higher burden on the party facing removal and should not be favored as the default as they would create a cadre of community members in an infinite limbo rather than potential citizens with reason and ability to invest and flourish. Even if an applicant fends off removal under the proposed regulation, that person, even though “otherwise eligible for asylum,” will forever be foreclosed from permanent resident status. And since permanent residence status is the pathway to citizenship, they will be denied an opportunity to become citizens in direct contravention of settled law that the Departments facilitate naturalization for refugees “as far as possible.” *Cardoza-Fonseca*, 480 U.S. at 436, 441 (emphasis added). Indeed, the Proposed Rule is transparently designed to “facilitate the assimilation and naturalization of refugees” as little as possible.

Furthermore, The Advocates opposes this list of discretionary factors as arbitrary and capricious. The Departments provide no evidence or support to explain why these factors are relevant. Such evidence is particularly important where, as here, the Departments propose a significant change. Until this proposed rule, discretion was left wholly to the adjudicator with no specific factors outlined. Yet, now, the Departments propose three factors that *must* be considered and nine others that *should* be considered—all without any explanation as to how it chose these. It is unclear how the Departments arrived at these nine—not five or ten or some other number—factors. The Departments offer no explanation or evidence showing that these
nine factors were consistently raised through data analysis, community outreach, case review, or the like. Without such, and given the underlying purpose of the proposed rule in general, this change must fail as arbitrary.

XI. The Proposed Rule is an Unreasonable Interpretation of the INA’s Firm Resettlement Bar.

The Proposed Rule would extend the definition of “firm resettlement”—and the bar on asylum—to asylum seekers who “could have resided in . . . any non-permanent, potentially indefinitely renewable legal immigration status” in a country through which they transited prior to arriving in the United States “regardless of whether the alien applied for or was offered such status.” It would also define as “firmly resettled” asylum seekers who spent more than one year in another country, regardless of whether they even could have sought status there. The Proposed Rule would create a categorical bar, eliminating the current, longstanding exceptions for those who, even though they received an offer of permanent status, did not have significant ties to the country that made the offer or would experience poor living conditions, reduced employment opportunities, and minimal or unequal rights or privileges in the country that made the offer. See 8 C.F.R. § 1208.15 (2020); 28 C.F.R. § 208.15 (1991); 8 C.F.R. § 208.14 (1981). Further, it would shift the burden of proof from the government to the asylum seeker to show that he or she was not firmly resettled. This proposed definition is an unreasonable interpretation of the statutory text and stands in stark opposition to both the history and purpose of the statute.

First, the Proposed Rule’s expansion of the definition of “firm resettlement” to include those who merely transited through countries where they “could have” received some sort of legal status and to those who merely spent over a year in another country regardless of legal status in that country is contrary to the plain meaning of the text. “Resettlement” suggests to be “settled”—
that is, to “establish a residence”—somewhere new. 91 “Firm” suggests a high degree of stability and permanence. 92 Although there is room for reasonable interpretations of what exactly constitutes a stable new residence, merely transiting through another country without an offer, direct or otherwise, to permanently remain there clearly falls outside of the zone of reasonableness. Such an asylum seeker is not “resettled,” much less “firmly resettled.” Moreover, it is similarly unreasonable to suggest that all asylum seekers who have spent over one year in a country have established stable residences there regardless of whether they have any legal rights to remain in that country.

Longstanding judicial and regulatory interpretations of “firm resettlement” as encompassing only asylum seekers who have established some sort of permanent residence in another country support the plain meaning interpretation of the term. As the Supreme Court explained, “[b]oth the terms ‘firmly resettled’ and ‘fled’ are closely related to the central theme of all 23 years of refugee legislation—the creation of a haven for the world’s homeless people. . . . [U.S. asylum law] was never intended to open the United States to refugees who had found shelter in another nation and had begun to build new lives.” Rosenberg v. Yee Chien Woo, 402 U.S. 49, 55–56 (1971). However, the Supreme Court also cautioned that the “firm resettlement” bar extended only to those who had found some sort of stable residence and “begun to build new lives”; it did not “exclude from refugee status those who have fled from persecution and who make their flight in successive stages. Certainly, many refugees make their escape to

91 Settle, Merriam-Webster, https://www.merriam-webster.com/dictionary/settle#h1; Resettle, Merriam-Webster, https://www.merriam-webster.com/dictionary/resettle; Resettlement, UNCHR, https://www.unhcr.org/en-us/resettlement.html (“Resettlement is the transfer of refugees from an asylum country to another State that has agreed to admit them and ultimately grant them permanent settlement.” (emphasis added)).

92 Firm, Merriam-Webster, https://www.merriam-webster.com/dictionary/firm (“securely or solidly fixed in place;” “not subject to change or revision;” “not easily moved or disturbed”).
freedom from persecution in successive stages and come to this country only after stops along the way. *Such stops do not necessarily mean that the refugee’s aim to reach these shores has in any sense been abandoned.*” *Id.* at 57 n.6 (emphasis added); *see also* Chinese Am. Civic Council v. Attorney Gen. of U.S., 566 F.2d 321, 328 n.18 (D.C. Cir. 1977) (explaining that factors other than time elapsed—such as an asylum seeker’s family ties, intent, business or property connections—are relevant to determining whether the asylum seeker has “firmly resettled”); *id.* at 332 (Kaufman, J., concurring) (explaining that it was error for the Immigration and Naturalization Service to suggest that “long residence creates an irrebuttable presumption of ‘firmly resettled’”) (emphasis removed).

Executive agencies have consistently interpreted “firm resettlement” to encompass only those who have found a permanent residence in another country. 8 C.F.R. § 208.14 (1981) (noting, in the context of refugees, that “an alien is considered to be ‘firmly resettled’ if he was offered resident status, citizenship, or some other type of permanent resettlement by another nation” (emphasis added); 28 C.F.R. § 208.15 (1991) (“An alien is considered to be firmly resettled if, prior to arrival in the United States, he entered into another nation with, or while in that nation received, an offer of permanent resident status, citizenship, or some other type of permanent resettlement.”) (emphasis added)).

93 The Department of Justice first defined “firm resettlement” in the context of asylum applications in 1990. The government had the burden of showing that the asylum seeker received an offer of permanent status, and the asylum seeker could rebut the presumption that the offer constituted firm resettlement by establishing:

(a) That his entry into that nation was a necessary consequence of his flight from persecution, that he remained in that nation only as long as was necessary to arrange onward travel, and that he did not establish significant ties in that nation; or

(b) That the conditions of his residence in that nation were so substantially and consciously restricted by the authority of the country of refuge that he was not in fact resettled. In making his determination, the Asylum Officer or Immigration Judge shall consider the conditions under which other residents of the country live, the type of housing made available to the refugee, whether
When Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. Law. No. 104-208, 110 Stat. 3009 (1996)—making ineligible for asylum those who have “firmly resettled in another country prior to arriving in the United States,” 8 U.S.C. § 1158(b)(2)(A)(vi)—it did so in light of this regulatory and judicial backdrop. See Matter of A-G-G-, 25 I. &N. Dec. 486, 502 (BIA 2011) (discussing history of firm resettlement bar). The statutory text must therefore be read in conjunction with the preexisting regulatory definition. It is unreasonable to interpret the statute as allowing for a definition of “firm resettlement” that is directly at odds with the longstanding understanding that only those who have found a permanent home in another country are ineligible for asylum under the firm resettlement bar.

Additionally, the Proposed Rule’s expansive definition of “firm resettlement,” which would make ineligible for asylum many with only tangential ties to third countries, is at odds with the purpose of the asylum provisions and the purpose of the firm resettlement bar. The United States’ asylum provisions seek to protect vulnerable refugees fleeing persecution, while sharing the burdens of protection with other countries. While Congress closed the door to asylum to those who have found permanent new homes, the statutory bar to those who are “firmly resettled” cannot be interpreted in such a way as to violate the United States’ obligation of non-refoulement. “The purpose of these regulations is to ensure that if this country denies a refugee asylum, the refugee will not be forced to return to a land where he would once again become a victim of harm or persecution.” Andriasian v. I.N.S., 180 F.3d 1033, 1046–47 (9th Cir. 1999). The Proposed Rule’s categorical approach to firm resettlement, its abandonment of the multi-factor approach to permanent or temporary, the types and extent of employment available to the refugee, and the extent to which the refugee received permission to hold property and to enjoy other rights and privileges, such as travel documentation including a right of entry and/or reentry, education, public relief, or naturalization, ordinarily available to others resident in the country.

28 C.F.R. § 208.15 (1991). These regulations have remained substantively the same to this day.
rebutting presumptions of firm resettlement, and its burden shifting to the asylum seeker to show that he or she had not been firmly resettled\textsuperscript{94} would do nothing to ensure that those denied asylum in the United States can actually return to and live in another country free from persecution. And, although withholding of removal or protection under the Convention Against Torture may provide an additional avenue for relief for some asylum seekers, these mechanisms are insufficient to meet the United States’ non-refoulement obligations, improperly subjecting asylum seekers to a higher standard of proof.

\textbf{A. The Proposed Rule’s Limitation on the Attorney General’s Favorable Exercise of Discretion Related to Resettlement and Third Country Travel is Inconsistent with the INA.}

The Proposed Rule provides that “the Attorney General . . . will not favorably exercise discretion under section 208 of the Act for an alien who . . . [i]mmediately prior to his arrival in the United States or en route to the United States from the alien’s country of citizenship, nationality, or last lawful habitual residence, spent more than 14 days in any one country” unless the asylum seeker demonstrates that he or she applied for and received final judgment denying protection in that country, the asylum seeker demonstrates that he or she is a victim of a severe form of human trafficking, or the country where the asylum seeker spent more than 14 days was not a party to the 1951 United Nations Convention relating to the Status of Refugees, the 1967 Protocol, or the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Although the Attorney General may impose conditions and limitations on asylum in addition to those provided for in the INA, 8 U.S.C. § 1158(d)(5)(B) requires that “any other conditions or limitations on the consideration of an application for asylum” imposed by the Attorney General be “not inconsistent with this chapter.” The Proposed Rule’s limitation on the Attorney General’s favorable exercise of discretion is inconsistent with the firm resettlement bar, the mechanism provided by Congress to consider an asylum seeker’s connection to a country through which he or she transited. As discussed above, the plain text of the provision, regulatory history, and case law have long made clear that firm resettlement requires far more than merely transiting or stopping shortly through another country. “[M]any refugees make their escape to freedom from persecution in successive stages and come to this country only after stops along the way. Such stops do not necessarily mean that the refugee’s aim to reach these shores has in any sense been abandoned.” Rosenberg, 402 U.S. at 57 n.6. Firm resettlement requires some sort of stable residence.

The Attorney General cannot disrupt the balance Congress struck with the firm resettlement bar by linking it to the general discretionary power granted to the Attorney General in asylum cases. The proposed change would not involve a case-by-case discretionary analysis—as intended by Congress—but, instead, creates an impermissible across-the-board limitation without explanation. This issue has been settled by the federal courts, making all the more inappropriate for inclusion in this proposed regulation. As the Ninth Circuit explained,

The purpose of [the firm resettlement regulations] is to ensure that if this country denies a refugee asylum, the refugee will not be forced to return to a land where he would once again become a victim of harm or persecution. The [government’s] argument that it has the discretionary authority to deny asylum when a refugee has spent a brief period of time in a third country but has no opportunity to return there or, if he does, would be subject to further serious harm, would permit just such a
result and would totally undermine the humanitarian policy underlying the regulation.

Andriasian, 180 F.3d at 1046–47. This logic also applies to the Proposed Rule’s designation of an asylum seeker’s failure to apply for asylum or refugee status in a country through which he or she transited as a “significant adverse discretionary factor.”

B. The Proposed Rule is inconsistent with international law.

Both the Proposed Rule’s definition of “firm resettlement” and its addition of a discretionary factor barring the granting of asylum to those who spend more than 14 days in one country, absent certain very limited exceptions, are inconsistent with the United States’ obligations under international law and are at odds with peer countries’ asylum laws.

A country receiving asylum seekers is prohibited from returning them to a country in which they would likely be in danger of persecution. Protocol Relating to the Status of Refugees, Oct. 4, 1967, 19 U.S.T. 6223. This means a refugee cannot be forced to return to a place “where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” Convention Relating to the Status of Refugees art. 33, July 28, 1951, 198 U.N.T.S. 130.

The Proposed Rule undermines this prohibition. The Convention Relating to the Status of Refugees already excludes from the definition of “refugee” a person who “has acquired a new nationality, and enjoys the protection of the country of his new nationality” and a 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.” Convention Relating to the Status of Refugees art. 1C, 1E, July 28, 1951, 198 U.N.T.S. 130. In
other words, an individual who obtains status in a different country, or who enjoys rights and obligations under a different country’s law, is already ineligible to obtain refugee status in the United States under international law.

The problem with the Proposed Rule is that it expands this bar to individuals who merely “could have resided in . . . any non-permanent but potentially indefinitely renewable legal immigration status,” regardless of whether they sought such status, the difficulty of obtaining such status, or the rights and privileges provided by such status. It would also prohibit the exercise of discretion to grant asylum to those that spent more than 14 days in a country during the course of their flight to the United States. The Proposed Rule would preclude an individualized analysis of whether an asylum seeker has a safe alternative, the rights and privileges the asylum seeker would be entitled to in the country where they “could” have received some sort of status, the living conditions in that country, or whether the asylum seeker has any ties to that country, in favor of a categorical determination.

This is inconsistent with UNCHR guidance, which has long provided that asylum should not be refused “solely on the ground that it could be sought from another State.” UNHCR, Note on Asylum ¶ 11, U.N. Doc. EC/SCP/12 (Aug. 30, 1979); see also Additional Paragraph to Draft Article 1, Report of the United Nations Conference on Territorial Asylum, UN doc. A/CONF.78/12, Apr. 21, 1997 (“Asylum should not be refused by a Contracting State solely on the ground that it could be sought from another State. However, where it appears that a person before requesting asylum from a Contracting State already has a connection or close links with another State, the Contracting State may, if it appears fair and reasonable, require him first to request asylum from that State.”); Guidance on Responding to Irregular Onward Movement of Refugees and Asylum-Seekers, UNHCR (Sept. 2019). The Proposed Rule ignores the wishes of
the asylum seeker and denies individuals protection based solely on the possibility that such protection could have been obtained elsewhere. See Report of the United Nations Conference on Territorial Asylum, A/CONF.78/12, Annex II (“Attention should, as far as possible, be paid to the wishes of the asylum-seeker, and the asylum-seeker should, in principle, not be required to seek asylum in a country with which he has not established any relevant links.”).

The Proposed Rule is also at odds with peer countries’ asylum laws. For instance, the European Union does not consider any transit before an asylum seeker reaches an E.U. country. To be sure, the European Union requires only one Member State to process an asylum seeker’s claim, and that State will usually be the one through which the asylum seeker first entered the European Union. See Regulation (EU) 604/2013 of the European Parliament and of the Council of 26 June 2013, L. 180/32 (“Dublin III Regulation”) art. 3. However, nothing in the Dublin III Regulation permits Member States to bar asylum seekers’ applications based on other countries they passed through on their way to that first E.U. country. See generally id. art. 13. Similarly, New Zealand considers whether an asylum seeker “has the protection of another country or has been recognized as a refugee by another country and can be received back and protected there” under non-refoulement principles. Immigration Act 2009, s 137(4) (N.Z.) (emphasis added). It does not consider whether an asylum seeker could have sought such protection.

Even countries that do consider whether an asylum seeker could have sought protected status in another country demand the kind of individualized analysis that the Proposed Rule would now bar. For example, the United Kingdom requires a robust inquiry into the asylum-seeker’s circumstances and the asylum system in a “first country of asylum” before it will deem an asylum seeker inadmissible for having been able to seek asylum in another country. According to the United Kingdom’s Home Office, an asylum seeker may be deemed inadmissible if she could have
applied in a “first country of asylum,” but only if “there were no exceptional circumstances preventing such an application being made” and the applicant could “enjoy sufficient protection” there, including non-refoulement. Home Office (UK), Immigration Rules (2016 updated June 2020) pt. 11 ¶ 345B. In addition to non-refoulement, the Home Office’s Guidance defines “sufficient protection” as “an organised and functioning asylum system” that can “be expected to make a valid decision regarding protection status in reasonable timescales.” Home Office Guidance, Inadmissibility: EU grants of asylum, first country of asylum and safe third country concepts, Oct. 1, 2019. This inquiry is the kind of individualized assessment that the Proposed Rule would abandon, placing the United States out of step with its international peers.

Finally, the Proposed Rule stands in particularly stark contrast to the Safe Third Country Agreement the United States already has with Canada. Canada will deny claims of asylum seekers crossing the land border with the United States because it has entered into a safe third country agreement with the United States that features exhaustive safeguards for fair asylum proceedings in both countries. See Agreement on Safe Third Country, U.S.-Can., Dec. 5, 2002, https://www.refworld.org/pdfid/42d7b9944.pdf. In other words, Canada requires virtually all asylum seekers crossing into Canada from the U.S. to seek protection in the United States and vice versa. The Proposed Rule would extinguish any consideration of whether another third country can similarly protect asylum seekers from persecution or establish a fair system for adjudicating their claims.

C. The Proposed Rule Unlawfully Targets Asylum Seekers Travelling from Central America but Ignores Crucial Factors.

The Proposed Rule’s expansive definition of “firm resettlement,” its elimination of the DHS’s burden to make a prima facie case of firm resettlement, and its limitation on the Attorney General’s favorable exercise of discretion to grant asylum with respect to those who have spent
more than 14 days in another country during their flight to the United States, ignores the practical realities and dangers facing many of the asylum seekers fleeing to the United States from Central America—as well as the fact that numerous others travel through Central America en route to the U.S. due to the practical realities of travel and visas for many countries.

Even where countries formally provide some legal avenue through which individuals “could” attempt to seek status, these systems are often underfunded, overwhelmed, and difficult to navigate, making the opportunity for legal status more of a theoretical possibility than practical reality. Many of the countries through which asylum seekers flee on their way to the United States lack rigorous or manageable procedures for obtaining legal status. For example, Honduras’s asylum system is “tiny” and “lacks the ability” to adjudicate the claims of the many asylum seekers Honduras has, at least in theory, agreed to accept.\textsuperscript{95} Mexico has an inadequate budget to respond to the number of asylum seekers and is overwhelmed by a caseload that is five times larger now than it was five years ago.\textsuperscript{96} El Salvador’s office for processing asylum application is similarly understaffed.\textsuperscript{97} The Proposed Rule does not acknowledge the logistical barriers to obtaining legal status in other countries. Rather, it would categorically bar anyone who simply had a theoretical possibility of obtaining legal status or who spent more than one year in another country while fleeing persecution.

\textsuperscript{95} \textit{Is Honduras Safe for Refugees and Asylum Seekers?} HUMAN RIGHTS FIRST 2 (May 2020), \url{https://www.humanrightsfirst.org/sites/default/files/IsHondurasSafeforRefugeesandAsylumSeekersFINAL.pdf}.

\textsuperscript{96} \textit{See} Dan Kosten, \textit{Mexico’s Asylum System Is Inadequate}, NAT’L IMMIGR. FORUM (Oct. 28, 2019), \url{https://immigrationforum.org/article/mexicos-asylum-system-is-inadequate/} (“As the number of asylum seekers arriving to Mexico continues to grow, the allocated budget has not met the growing need, with [the supervising agency’s] budget falling between 2015 and 2017 even as asylum applications skyrocketed.”).

\textsuperscript{97} \textit{See} Nelson Rauda Zablah, \textit{El Salvador Signs Agreement To Accept Asylum Seekers the US Won’t Protect}, EL FARO (Sept. 21, 2019), \url{https://elfaro.net/en/201909/el_salvador/23667/El-Salvador-Signs-%20Agreement-to-Accept-Asylum-Seekers-the-US-Won%E2%80%99t-Protect.htm} (revealing “only a single officer works directly with asylum claims”).
Even if an asylum seeker receives some sort of legal status, the lack of family and social support may make it impossible for that individual to establish roots and safely remain there long term. For many asylum seekers from Central America, their persecutors would be likely to either have ties or the ability to travel throughout Central America, making them vulnerable to future harms. For asylum seekers from outside Africa or Asia who must transit through Central America if unable to obtain direct travel to the U.S., lack of language, cultural or family ties to Central America present real challenges in “resettling” in any Central American country. This is precisely what the international community, the U.S. Congress, and numerous courts have recognized in refusing to consider third country transit in asylum cases.

In addition, the Proposed Rule’s abandonment of a multi-factor approach to determining whether an individual has truly settled and put down roots in another country would bar from asylum many of the most vulnerable. Many asylum seekers have difficulty obtaining stable employment, housing, and other essential resources in the countries through which they pass, and many of these countries have proven woefully unable to provide asylum seekers with institutional support.

Finally, the Proposed Rule also ignores the violence faced by asylum seekers in the countries through which they pass. For example, Human Rights First tracked at least 1,114 public reports of murder, rape, kidnapping, torture, and assault against asylum seekers and migrants.

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returned to Mexico under the current Migrant Protection Protocols. 57.3% of migrants and refugees interviewed by Doctors Without Borders in Mexico “had been exposed to some kind of violence along the migration route through Mexico;” with 39.2% reporting that they had been violently attacked and 27.3% reporting that they had been threatened or extorted. Many are targeted for violence precisely because they are asylum seekers. Asylum seekers in Mexico also describe incidents of robbery, extortion, and other abuses by government authorities. This overwhelming threat of violence is present in other countries as well; the same gangs that prompted the asylum seekers to flee and seek asylum in the first place remain prominent in these neighboring countries. The Proposed Rule gravely underestimates the problems faced by individuals seeking asylum as they progress towards the United States, and simply does not reflect reality.


103 See Kirk Semple, Asylum Seekers Say U.S. is Returning Them to the Dangers They Fled, N.Y. TIMES (Jun. 27, 2020), https://www.nytimes.com/2020/03/17/world/americas/immigration-guatemala-us-asylum.html (“To be here is almost the same as being in Honduras… You’re in the same neighborhood of the criminal groups. The conditions here are not a guarantee of your safety.”); see also id. (“Guatemala? It’s the same as Honduras!”); Deportation with a Layover: Failure of Protection under the US-Guatemala Asylum Cooperative Agreement, HUMAN RIGHTS WATCH (May 19, 2020), https://www.hrw.org/report/2020/05/19/deportation-layover/failure-protection-under-us-guatemala-asylum-cooperative (“Several [of the people interviewed by Refugees International and Human Rights Watch] said they had no family or support networks in Guatemala and that they feared for their safety in Guatemala.”).
XII. The Proposed Rule Relating to Frivolous Asylum Findings is Overbroad, Unsubstantiated and Harmful.

The Advocates for Human Rights strongly opposes the sweeping changes to frivolous findings in asylum applications. The proposed change—which significantly alters agency precedent and procedure—is justified only by the Departments’ claims that fraud is rampant in the asylum system. Yet, the Departments provide no factual basis through data that support the alleged issue of fraud in applications. This lack of factual basis—when the Departments would most certainly have access to data of alleged abuses—undermine any justification for this change. In a telling absence of that data, however, the Departments choose instead to cite to case dicta in precedent *Angov v. Lynch* in attempting to justifying this change. While the federal court in that case speculated about immigration fraud in its decision, its dicta is a poor substitute for evidence needed to justify this proposed rule. This is particularly so since the cited dicta involved *all* fraud in immigration—not asylum only—and did not reference any data of such. Indeed, the Departments’ failure to provide any hard evidence whatsoever of the fraud they purport to address calls into question the validity of their contention and the justification upon which much of this proposed rule rests. Given that the Departments have access to all information relating to asylum applications in the United States, their failure to provide actual data suggests that the Departments know their contentions will not be borne out by the data and, as such, the Departments themselves are engaging in deception.

In an attempt to further these unsubstantiated concerns, the Departments cite to several other cases—not data, reporting, statistics or Congressional records—ostensibly to show the need for this change. So doing, however, the Departments overplay their hand by overstating the holdings in those cases. For example, the Departments claim that the current frivolous standard is insufficient because, in *L-T-M- v. Whitaker*, 760 F. App’x 498, 501 (9th Cir. 2019), an
applicant’s claim was found not per se frivolous even though the applicant had fabricated
evidence. However, the Departments’ analysis is misleading. There, the court did not hold that
evidence is not an element of a frivolous finding. Instead, the court reversed the finding of
frivolousness because the forged evidence was “not a material element of her claim.” Id. at 501.
That is an important distinction, the exclusion of which stands only as further evidence of the
Departments’ bent on upending asylum rather than making required changes where needed.

Without data, we cannot see how the proposed good could possibly outweigh the
significant concerns related to the likelihood of removing someone to a country in which they
would face persecution, torture or death. Yet, the Departments suggest that “nothing very bad
happens” if an asylum case is denied. This is unfounded. We know from the thousands of
applicants with whom we have worked, and the supporting evidence they provide, that a denied
asylum application can mean life and death for many. Indeed, the BIA has recognized the high
bar in balancing these concerns. In Matter of Y-L-, 24 I&N Dec. 151 (BIA 2007), the Board
emphasized the many “procedural safeguards” that must be in place when determining if an
application is frivolous because of the “serious consequences” that a frivolous finding has. Id. at
155. These safeguards include: (1) notice; (2) a specific knowingly frivolous finding by an IJ or
the BIA; (3) sufficient evidence that a “material element” was “deliberately fabricated”; and (4)
the applicant has been given “sufficient opportunity to account for any discrepancies of
implausible aspects of the claim.” Id. See also Muhanna v. Gonzales, 399 F.3d 582 (3rd Cir.
2005). This case also states that “it would be a good practice for an Immigration Judge who
believes that an applicant may have submitted a frivolous asylum application to bring this
concern to the attention of the applicant prior to the conclusion of proceedings.” Matter of Y-L-,
24 I&N Dec. at 160. While the Departments here allege the notice and opportunity prongs are
sufficient to avoid those serious consequences, by proposing to do away with half of the outlined protections—knowledge and material elements—they subvert Congressionally-mandated and commonsense protections.

Because the proposed rule violates congressional intent, it must be withdrawn. The term “frivolous” for an asylum application has lacked a stated definition in all of its accepted uses in Congressional statutes. However, discussions on the House and Senate floor clearly indicate that “frivolous” is a designation meant to bar those persons who knowingly file asylum applications that contain a material misrepresentation or an intentional deceit within them. Further, other Congressional uses of the term “frivolous” also endorse this meaning. Lastly, while the courts have shown significant deference to the immigration agencies in determining what frivolous means, this has been under a definition of “deliberately fabricated,” which the courts have established a strong case law as an acceptable interpretation of Congressional intent.

Currently, the government has defined frivolous to mean “any of its material elements deliberately fabricated.” Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 FR 10312, 10344 (Mar. 6, 1997). Here, however, the Government seeks to expand the definition of frivolous to mean both fraudulent and “plainly without legal merit.” 85 Fed. Reg. at 35, 39. Further, the Government seeks to expand frivolous to include applications that are both knowingly and willfully blind to their frivolous nature. This expansion exceeds the Congressional intent, which sought to prevent those who intentionally file applications with a false element from applying for asylum.

The term “frivolous application” was first incorporated into 8 USCS § 1158 in 1996 when asylum law was significantly updated and expanded. This iteration, and every iteration of this statute since, has included the phrase “knowingly” in connection to frivolous applications.
Congress has shown a clear intent to specify that a frivolous application must be knowingly, or intentionally, made. This understanding is furthered by the inclusion of a notice clause in § 1158 (d)(4) that requires all asylum applicants to be warned of the consequences of “knowingly filing a frivolous application.” (emphasis added). The Departments’ proposal to include willful blindness, therefore, does not conform with the Congressional intent as clearly shown in the plain language of the statute’s requirement that the frivolous application be knowingly filed.

Indeed, discussions in the Congressional Record of frivolous asylum applications often revolved around applicants who had falsified documents (104 Cong. Rec. S10572 (daily ed. Sept. 16, 1996) (statement of Senator Simpson)) or used a “willful misrepresentation or a concealment of a material fact” in their application (104 Cong. Rec. H2431 (daily ed. March 19, 1996) (emphasis added). Not only is the Congressional record clear that anything less than willful or intentional misrepresentation is insufficient for a frivolous finding, such discussions also clearly reiterate the importance of balancing the goal of keeping out untrue applications while ensuring valid asylum applications are able to swiftly gain status in the United States. The Departments here do neither: they propose an unlawfully expansive view of frivolousness while providing neither an analysis of the harms nor data to justify the change.

In 1997 the INA defined frivolous as “deliberately fabricated”, directly rejecting a more expansive definition of “improper purpose.” Compare Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 FR 10312, 10344 (Mar. 6, 1997) (final rule) with Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 FR 444, 468 (Jan. 3, 1997) (proposed rule). While a regulation is not congressional intent, it does indicate the common understanding of frivolous within this context.
In 2019, 116 H.R. 3857, 2019 H.R. 3857 was introduced in the House and has received little support since. That bill, as the regulations at issue here, proposes to expand the definition of “frivolous” in the context of an asylum application to include both knowing fabrication of a material fact, and if it is “insufficient in substance.” The lack of approval of this statute indicates the lack of Congressional intent to expand the definition of frivolous.

Not only is the proposed rule an impermissible expansion, The Advocates vehemently opposes the proposed change that would allow a frivolous finding in cases where applicable law clearly prohibits the grant of asylum. This is not only an impossible standard to ensure applies consistently, but also improperly forecloses the opportunity to present nuanced asylum applications based on dynamic changes in the world—just as intended by the UN Convention and the Refugee Act implementing such. While our system does allow legislation and policy to provide the strictures through which asylum claims can be analyzed, the system is underpinned by the cannon that cases must be interpreted on a fact-specific basis with the ability of the system to respond to changes in the world and recognizing the inability to predict who will be in need of protection from what kinds of harms. Indeed, as has been noted, there is no limit to the imagination of human ability to harm each other. Thus, the asylum system must allow presentation of nuanced cases lest we fail to capture emerging human catastrophes. Therefore, the Departments cannot allow an asylum officer to find a case frivolous—and invoke all manner of bars and penalties associated with such a finding—simply because, in the opinion of the officer, the current legal framework does not allow such a claim. Doing so denies bona fide asylum claims and impermissibly limits cases to only those conceptualized at the present time.

Such a narrowing is also in direct contradiction of Congressional intent, case precedent, and longstanding understandings of the ability—and importance—of pursuing legal claims so
long as they are not completely baseless. When debating the meaning of frivolous for the 1996 amendments to 8 USCS § 1158, Congress was also discussing changes to § 240 which has become 8 USCS § 1229a. This discussion included a provision to sanction lawyers who conduct “frivolous” behavior in immigration court. The attorney general was given leeway to define this conduct, but based on an understanding of what is sanctionable conduct by a lawyer, frivolous is best understood as knowingly pursuing a baseless claim. (104 Cong. Rec. S10572 (daily ed. Sept. 16, 1996) (proposed legislation). Under the concept of in pari materia, it is reasonable to expect frivolous conduct by an asylum applicant’s lawyer to be defined in similar terms as frivolous conduct by the person applying for asylum as well. Indeed, the Second Circuit in Mei Juan Zheng v. Holder, 672 F.3d 178 (2d Cir. 2012) held that an “obvious legal insufficiency” does not support a frivolous finding.

Moreover, during the same session in 1996 that the immigration reform was being discussed, the Senate also looked at S.735, which became the Antiterrorism and Effective Death Penalty Act, to reduce the number of “frivolous” lawsuits from people who are facing the death penalty. In that discussion, ‘frivolous’ was determined to mean having no basis in fact, and it was used to discuss people who were pursuing legal action with a main intent to stall their punishment and cause the entire system to move more slowly. Thus, people who were filing frivolous applications were doing so knowingly, with an intent not to gain the legal relief but rather to stall the system in their favor. The Congressional Record shows discussion of the “endless” nature of these frivolous appeals and how Senators were upset that people are more likely to die of natural causes on death row rather than face capital punishment. 104 Cong. Rec. S. 3473-78 (Apr. 17, 1996) (statements by Senator Dole, Senator Biden, and Senator Nickles).
Simultaneous discussion of the filing of frivolous applications on two distinct issues—persons on death row and persons applying for asylum—indicates a united understanding of the meaning of the term frivolous as this Congressional body used it. Frivolous, therefore, must be consistently read to have been intended by Congress as an intentional application which the applicant knows is submitted with some element of fraud or with the intention to stall a proceeding.

This reading is supported by the fact that the proposed regulations cite Federal Rule of Civil Procedure 11(b)(2), which clarifies that legitimate arguments for change or modification of the law are not frivolous. The proposed regulations do concede that these types of arguments would not be “frivolous.” ABA Model Rule 3.1 defines “frivolous” claims as not including “a good faith argument for an extension, modification or reversal of existing law.” Further, the Comment to this Rule says, “the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.” The law also allows for leniency with fact collection and states, “the filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery.” Thus, the proposed rule’s expansive definition is at odds with the common understanding of frivolous as relates to legal bases. Therefore, the Departments’ proposal to allow frivolous findings in cases where it is believed there is “no legal basis,” without clearly defining how this would be applied in a manner consistent with long-held precedent and understanding of the dynamics and demands of nuanced cases, is in error.

We further contest the Departments’ conclusion that “an alien who files an asylum application already both knows whether the application is fraudulent or meritless and is aware of
the potential ramifications of knowingly filing a frivolous application.” 85 Fed. Reg. At 46. This is often untrue. Because the asylum process is incredibly complex, and because most asylum seekers either suffer from harms related to their persecution and escape, lack of education or language skills, or lack of resources, many asylum-seekers may face challenges in understanding how to present a case. Alternatively, they may look to and receive assistance from organizations that are not well-versed in the complex system and, therefore, submit improper filings notwithstanding the client’s bona fide case.

Moreover, as previously noted, the Departments claim that the proposed change furthers efficiency, but they have refused to implement a simple change, recommended by a federal commission tasked with examining the credible fear process: allowing asylum officers to grant clear cases rather than referring those to IJs for further court proceedings. The government’s willful refusal to make the process more efficient when it would result in a grant calls into question their motivation in this case. Efficient adjudication is in everyone’s interest – no one more so than the thousands of people languishing at the border, in ICE detention centers, and in pointless proceedings delayed solely by the government’s frivolous appeals.

XIII. The Proposed Rule Allowing Pre-termination of “Legally Insufficient Applications” Is Unlawful.

The Advocates opposes the changes improperly allowing pretermitance of “legally insufficient” asylum applications solely on the basis of the application and initial evidence. The Advocates first notes that this section of the rule denies all relief, including CAT and Withholding of Removal, thereby violating our obligations of nonrefoulment under international law in each instance that results in a denied application and the removal of the applicant on the basis of this proposed section. The Introductory Note by the UNHCR to the online version of the Refugee Convention states: “The principle of nonrefoulement is so fundamental that no
reservations or derogations may be made to it."  It provides that no one shall expel or return ("refouler") a refugee against his or her will, in any manner whatsoever, to a territory where he or she fears threats to life or freedom. Denials on the basis of the application and initial evidence risks, as detailed below, denials of bona fide cases where the applicant is simply unable—due to language, education, trauma, lack of counsel, or more—to meet this impossible standard and, thus, face improper refoulement in violation of our obligations under international law.

In addition, The Advocates opposes this rule as it creates an impossible—and unnecessary—standard. The asylum application is already incredibly complex. The Advocates works with pro bono attorneys to provide immigration support to asylum applicants, and many attorneys have reported to us a shock at how difficult it is to navigate the asylum requirements. This, despite having legal training, advanced degrees, command of the English language, support networks, and general good health—all things most of our clients lack. Indeed, many meritorious asylum seekers are illiterate or suffering from severe harms due to their persecution that prevent them from being able to immediately present a prima facie application on paper. Allowing denial based solely on the I-589 and initial evidence submitted unfairly precludes otherwise meritorious claims where one is simply unable to make an initial showing of eligibility due to factors beyond their control. Where, as in asylum claims, an applicant is not provided

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legal counsel to protect their rights, a balancing test must be applied to place the administrative burden on the government to ensure no undue harm.

Indeed, the UNHCR and Congress have expressly recognized these nuances and the need for safeguards in the asylum application process. In opposing the proposed 30-day bar on asylum (which became the one-year bar), Senator Kennedy, a sponsor of the 1980 Refugee Act, stressed the challenges asylum seekers face in putting together asylum applications.\textsuperscript{106} Additionally, Senator Leahy, in the debates around IIRIRA, noted “unsophisticated refugees who are truly in need of sanctuary [] may not be able to explain their situation to an overworked asylum officer.”\textsuperscript{107}

The UNHCR notes the unique circumstances and vulnerability of asylum seekers that may lead to weak or facially insufficient initial applications despite an underlying bona fide claim. For example, “With regard to any incomplete or late disclosure, including of relevant information in subsequent asylum applications . . . it may be the result of the asylum-seeker’s inability or reluctance to recall and recount the full extent of persecution suffered or feared and/or may be due to a lack of understanding that his or her experience may constitute grounds for refugee status.”\textsuperscript{108}

Therefore, the Guidelines (which, as noted, \textit{supra}, are intended to inform any asylum policy in the U.S.) go into great detail the procedural protections that must be afforded asylum applicants. For example, the Guidelines note that “while the asylum-seeker must present a


\textsuperscript{107} S. REP. NO. 105-249, 165 (1996).

claim, the duty to ascertain and evaluate all the relevant facts is shared between the asylum-seeker and the examiner.” The Department of Homeland Security provides specific training to asylum officers to implement this guideline. USCIS RAIO training recognizes that trauma: may cause the survivor to avoid discussing events; may cause the survivor to have difficulty remembering events; and that the survivor may react in unpredictable ways or may distrust the officer and avoid revealing information. USCIS trains asylum officers to address trauma and trains them to work with survivors. Yet, the proposed rule would eliminate access to this crucial safeguard by pretermitting applications before the interview phase based on the paper application and initial evidence. Without these protections—and given the vulnerability and special circumstances of many applicants—it is clear that asylum seekers would fail the Departments’ proposed test allowing pretermittance, and be unlawfully removed to face torture or persecution.

The proposed rule also allows denial without a hearing in violation of Due Process standards. First, the proposed rule would allow a sua sponte denial based on the I-589 and initial evidence without a hearing so long as the applicant has had an opportunity to respond. For the reasons noted above, applicants should not be denied a full opportunity to present their claim. This is also counter to precedent holding that an asylum seeker must have an opportunity to present additional evidence and obtain review. In Amaritei v. Ferro, a district court determined that it is not permissible to deny an asylum applicant based on their initial application, and not allow any further recourse. So holding, that court noted that courts have consistently held all


asylum applicants, even stowaways, have a right to a hearing. Courts have determined that
table.

refugee laws are meant to provide one streamlined process with appropriate procedural
safeguards to all. In *Bi Hua Weng v. Mukasey*, 257 F. App’x 983 (6th Cir. 2007), the court held
that court review *ensures* an asylum applicant’s due process and, therefore, that an applicant may
present additional evidence to the immigration judge that was not included in the initial
application. The proposed changes impermissibly limit the applicant and violate due process
rights by impinging on the right to review.

Further, in our experience, many clients have reported that they have felt prevented or
intimidated against presenting claims or requesting review. In several cases, such client did not
only have a valid asylum claim at the time they were prevented from reporting, but he was also a
victim of labor trafficking and had information that would have allowed investigation of a
powerful drug cartel. While cutting corners may reduce costs in some areas, these experiences
counsel against unduly restricting due process and foreclosing opportunities to present cases in
variety of ways.

In attempting to justify this impermissible imposition on the rights of asylum seekers, the
Departments contend 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 of
mandatory denial.” Yet, The Advocates notes that the referenced section requires no hearing
*once it is determined that a ground of mandatory denial applies*, not to pretermit if no prima
facie claim is immediately presented. Mandatory grounds for denial, unlike discretionary and
fact-specific bases for a grant of asylum or withholding of removal, are statutorily defined and
not case-specific. As detailed throughout the comment, however, the bases for asylum are
intended—in international and national law—to be dynamic and require a fact specific inquiry.
Thus, pretermitting applications without a hearing for failure to make a prima facie claim in the opinion of the adjudicator cannot be justified on the basis outlined by the Departments, and is arbitrary and capricious.

**XIV. The Proposed Changes to CAT Protections are Unlawful and Unnecessary**

The Advocates opposes the Departments’ proposed changes to protections afforded by the Convention Against Torture. The proposed regulations violate U.S. obligations under customary international law, the Convention Against Torture\(^\text{111}\) (“CAT”), and federal statute to prevent the return of any person to a country where there are substantial grounds for believing the person will be subject to torture. The Departments’ proposal violates international law and unambiguous congressional intent by redefining “acquiescence” in an effort to facilitate more deportations. And, as with much of the proposed rule, the Departments fail to demonstrate that the change is necessary.

The United Nations Convention Against Torture (CAT) open for signature in 1984, was signed by the U.S. in 1988, ratified in 1994, and largely implemented in the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA).\(^\text{112}\) Article I of the CAT defines torture as:

> [A]ny 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 a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him 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. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.\(^\text{113}\)

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In ratifying the CAT, the U.S. Senate specifically addressed the issue of “acquiescence,” stating that with reference to Article 1 of the Convention, the United States understands that the term “acquiescence” requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his legal responsibility to intervene to prevent such activity.”

The United States must ensure that any removal of a person from the U.S. is consistent with CAT’s non-refoulement prohibition. Article 3, paragraph 1 of the CAT provides that “[n]o State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.” Article 3, paragraph 2 goes on to state that “[f]or the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights."

The U.S. Senate also spoke directly to the meaning of “substantial grounds,” noting “[t]hat the United States understands the phrase, ‘where there are substantial grounds for believing that he would be in danger of being subjected to torture,’ as used in Article 3 of the Convention, to mean ‘if it is more likely than not that he would be tortured.’” The Senate intentionally drew upon the “more likely than not” standard found in the Immigration and Nationality Act’s withholding of deportation provision.

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115 Id.
116 CAT, supra note 110, at art. 3(1).
117 CAT, supra note 110, at art. 3(2).
States Party to the CAT have a fundamental responsibility to prevent torture. The UN Committee Against Torture, comprised of ten independent experts charged with the responsibility of monitoring compliance of States Parties to the CAT, has recognized that the treaty’s purpose is to ensure protection against torture and to respond to the shifting realities of who has power to torture. The Committee Against Torture makes clear that the duty to prevent torture extends to torture committed by non-State actors:

Equally, States parties should refrain from deporting individuals to another State where there are substantial grounds for believing that they would be in danger of being subjected to torture or other ill-treatment at the hands of non-State entities, including groups that are unlawfully exercising actions that inflict severe pain or suffering for purposes prohibited by the Convention, and over which the receiving State has no or only partial de facto control, or whose acts it is unable to prevent or whose impunity it is unable to counter.\(^{119}\)

In *Elmi v. Australia*, the Committee found that armed bands in Somalia count as public officials and held “this would include persons who, in certain regions or under particular conditions, actually hold and exercise authority over others and whose authority is comparable to government authority.”\(^{120}\) Similarly, in *Njamba and Balikosa v. Sweden*,\(^{121}\) the Committee clarified the duty of states in regard to torture by nonstate actors. The Committee held that “the failure to exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture facilitates and enables non-State actors to commit acts impermissible under the Convention with impunity . . . .”\(^{122}\)


\(^{122}\) *Id.*
The Departments’ reference to the standards required to establish criminal liability for torture as a justification for their new rule relating to Article 3 protection is singularly misplaced. The Departments point to testimony during the ratification process regarding the acquiescence requirement, not noting that this testimony addressed concerns that the definition of torture needed to be clear enough to give officials due process notice of what conduct was criminal. Imposing upon a prosecutor the responsibility of proving mens rea and actus reas to hold an alleged perpetrator of torture criminally liable is consistent with due process. Imposing this same burden upon an individual who is seeking protection from deportation to torture is absurd. It is also inconsistent with the very language of the Convention Against Torture, which requires adjudicators to take into account “all relevant considerations, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.”

The Departments’ proposed narrowing of state responsibility for torture undermines the integrity of this fundamental human rights norm itself. By focusing on the purported legal status of the torturer, the proposed standard would effectively allow governments to avoid any accountability for torture by simply claiming the act was committed by a “rogue official.” Under the Departments’ newly conjured standard, people would face deportation to torture if they could not provide evidence that torture is the policy. This interpretation misapprehends the nature of torture, which festers in systems with weak accountability and disregard for the rule of law. The Department’s proposal violates jus cogens norms, the text of the CAT to which the United States

123 85 Fed. Reg., at 36287.
124 CAT, supra note 110, at art. 3(2).
is legally bound, and the clear congressional language which implemented the treaty’s protections.

Further, like much of the proposed rule, the Departments’ proposal is unsupported by any evidence that the change is necessary. The Departments’ failure to support their proposal is easily explained: the mere possibility that a “rogue actor” might inflict torture simply is not enough to warrant a grant of protection under existing law. CAT protection is granted rarely. It requires an applicant to demonstrate of a clear probability that they would be subject to torture in the future. By placing upon people facing deportation the burden of producing evidence sufficient to convict their future torturers of criminal violations, the Departments seek to ensure that no one can avail themselves of the protection the United States has committed to provide.

XV. The Proposed Changes to the Credible Fear System are Unlawful and Harmful.

The Advocates further opposes the proposed changes to the CFI system because they impinge Due Process, unlawfully narrow the purpose of the CFI process, and fail to protect the rights of trafficking victims and vulnerable youth. In the INA, Congress provided expedited removal for arriving aliens; however, it carved out exceptions to that removal for those seeking asylum. See 8 U.S.C. § 1125. To give effect to these exceptions, the Regulations must ensure that CFI proceedings are fair and implemented to ensure nonrefoulment of bona fide asylum applicants. As noted throughout this comment, the Departments are obliged to formulate their rule in a manner consistent with balancing of potential harms—removal of a bona fide asylee who will face persecution or torture—with any proposed benefit. The proposed changes to the CFI system do not do so and must be withdrawn.

We also oppose the changes because the rule proposes to restrict access to full 240 proceedings, instead requiring applicants be placed in withholding only proceedings. The
Advocates opposes this change because it will harm trafficking victims and vulnerable youth. Full 240 proceedings allow migrants to present any and all forms of relief for which they would qualify. This is a crucial safeguard in identifying and recognizing trafficking victims, who may not only be eligible for relief in the form of T nonimmigrant status, but who also have valuable information that law enforcement may use to stop trafficking—a specific goal of Congress as outlined in the Trafficking Victims Protection Act and its reauthorizations. However, if, as the Departments propose, applicants are restricted to withholding only proceedings, the inquiry will not be broad enough to identify trafficking victims.

Additionally, the rule proposes to raise the standard for credible fear “from a significant possibility that the alien can establish eligibility for statutory withholding of removal to a reasonable possibility that the alien would be persecuted.” This is contrary to the plain language of the statute. Congress, through the INA, defined credible fear as: “there is a significant possibility . . . that the alien could establish eligibility for asylum under section 1158 of this title.” 8 U.S.C. § 1125(b)(1)(B)(v). The Departments cannot through regulation raise the standard beyond that expressly included in the plain language of the statute. In attempting to justify this change, however, the Departments cite policies which the Departments recognize have either been enjoined by the Federal Courts or withdrawn by the Administration. For example, the Departments cite to the November 9, 2018 Interim Final Rule (“IFR”) (referred to as the “Presidential Proclamation Asylum Bar IFR”) despite acknowledging in a footnote that the Rule is not good law (“On December 19, 2018, the U.S. District Court for the Northern District of California enjoined the Departments ‘from taking any action continuing to implement the Rule’ and ordered the Departments ‘to return to the pre-Rule practices for processing asylum applications.’ E. Bay Sanctuary Covenant v. Trump,
354 F. Supp. 3d 1094, 1121 (N.D. Cal. 2018). On February 28, 2020, the U.S Court of Appeals for the Ninth Circuit affirmed the injunction. *E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1284 (9th Cir. 2020)

We oppose the expansion of asylum officers’ authority to deny cases without a complimentary power to approve them at the same stage. The Departments propose that, to eliminate inefficiencies in the system, asylum officers should be empowered to deny cases at the CFI stage. So doing, however, the Departments fail to provide any evidence that such authority would decrease, rather than increase, backlogs. Further, the Departments provide no explanation of why this be could be accomplished only through the authority to deny, rather than approve cases. As noted, *supra*, the Departments’ reliance on claims that the system is too inefficient and that the proposed changes are crucial for remedying these alleged issues cannot stand without data and proof that the Departments have considered other, less harmful options. Had the Departments truly been motivated by inefficiencies, they would have included the power of asylum officers to grant cases at the CFI stage. Denying cases, as the proposed rule seeks to do, actually serves to create further inefficiencies as a denial may entail judicial review and, possibly, appeals. Conversely, an approval after a successful CFI would end the inquiry at the very initial stage and serve to expeditiously process claims without the involvement of additional actors. The proposal, therefore, cannot stand.

Moreover, The Advocates opposes the proposed changes to review of the mandatory bars in 240 proceedings. The Departments attempt to justify their proposed change, noting: “applying those mandatory bars to aliens at the ‘credible fear’ screening stage would eliminate removal delays inherent in section 240 proceedings that serve no purpose and eliminate the waste of adjudicatory resources currently expended in vain.” Yet, appearing to be subject to a bar during
a perfunctory screening and actually being subject to a bar are very different things. Review in full 240 proceedings of mandatory bars is a crucial safeguard that ensures mandatory bars are not improperly applied to deny relief to eligible applicants. Despite these concerns, the Departments again provide no data or evidence to justify their claims or to prove that other, less detrimental options were considered. For example, while the Departments would surely have access to data regarding the number of cases that were referred to and subsequently denied in 240 proceedings on the basis of mandatory bars, they do not cite to such. The lack of such data indicates either that the Departments are not keeping or accessing their records in their eagerness to implement sweeping changes, or that the data do not support their broad suppositions of inefficiencies. Either way, the proposed change must fail.

We further oppose the proposed expanded authority to deny claims as it does away with longstanding and crucial protections that allow asylum seekers to obtain judicial review. Any regulation must be formatted to comply with our international obligations. The UNCHR’s interpretations of the Convention are crucial to understanding such compliance. Yet, the Departments here propose to expand procedures that have been expressly denounced by the UNHCR. The UNHCR recommends that asylum-seekers who establish that their claims are not ‘manifestly unfounded’ be accorded the opportunity to present their asylum claims in a hearing before an immigration judge. This provision comports with the international standard for expeditious refugee status determinations as set forth in UNHCR Executive Committee Conclusion No. 30 (1983).”

Where the default has previously been to provide judicial review unless the applicant affirmatively declined review, the Departments now seek to deny review unless the applicant

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affirmatively requests such. This is an unsubstantiated reversal of policy and a due process violation. The Advocates knows from our more than 30 years of work on asylum that many applicants will be unable or unwilling to affirmatively request review—even where they have meritorious claims. Very few asylum seekers will be well-versed in the complex laws of asylum and due process of the United States. Most will not speak English as their first language, and many are illiterate. Others suffer trauma from their persecution or from experience en route. Those confronting the CFI process are doing so when they are often the most vulnerable and unable to advocate for themselves—at the U.S. border, the terminus of their journey to safety. Demanding that such vulnerable individuals not only present their asylum case—unaided by government appointed counsel—but be savvy enough to demand judicial review if denied, sets an impossible standard designed to deny protections. Additionally, many asylum applicants have experienced persecution or torture by law enforcement officials in their home countries. Often, they have only had interactions that generate mistrust or fear of such actors. Therefore, they are unlikely to have the courage to request judicial review even if they know that is an option. Indeed, the UNHCR has recognized these concerns, noting:

Moreover, certain types of claimants, e.g., torture or trauma victims and those with gender-related claims, will have difficulty stating their claims, much less establishing ‘credible fear.’ Some at-risk groups, such as unaccompanied minors, should not be subjected to summary procedures at all. Others, with novel or complex claims, such as persons fleeing situations of international or internal armed conflict, or torture survivors who should be protected by the Convention against Torture, should be provided with a full exclusion hearing. These claimants are at great risk of being returned to persecution if they must meet the heightened standard created by the expedited removal provisions.\(^{126}\)

Finally, The Advocates opposes changes that would require immigration judges to consider applicable precedent in proceedings of arriving asylum seekers. This requirement is

\(^{126}\) *Id.*
clearly an end-run to implementing agency decisions that remain contested in Federal Courts. Further, it improperly narrows bases for asylum despite the Refugee Act and Refugee Convention leaving room for interpretation and new classes of claims, as outlined in extensive detail, *supra*.

**CONCLUSION**

For the foregoing reasons, The Advocates for Human Rights encourages the Departments to withdraw the proposed changes in their entirety. The changes are unlawful under international law, contradict Congressional intent in numerous instances, can be struck down under administrative legal principles, and violate our moral traditions as a nation. The United States has stood as a bastion of hope for those who make the brave decision to leave their homeland in search of basic human rights. We must not abandon our principles as this bastion of hope in exchange for some administrative convenience or on the basis of perceived threats—especially where, as here, the proposed changes actually threaten to further inefficiencies and create more uncertainty. This is particularly important, moreover, because the justifications for the changes are not supported by data or other evidence.

The Advocates for Human Rights has served more than 10,000 asylum applicants and worked with numerous asylum and migrant communities in our over 30 years of existence. In that time, we have seen the crucial lifeline—rather than a legal loophole around immigration laws—asylum is for our most vulnerable communities. As a leader in international human rights, we also know the danger posed when countries choose to eschew human rights principles and values to further improper policies.

We, therefore, oppose the proposed changes and call for immediate withdrawal.