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July 15, 2020

Lauren Alder Reid, Assistant Director,  
Office of Policy,  
Executive Office for Immigration Review,  
5107 Leesburg Pike, Suite 1800, Falls Church, VA 22041

**RE: Comments in Opposition to the Department of Homeland Security (DHS)/United States Citizenship and Immigration Services (USCIS) and the Department of Justice(DOJ)/Executive Office for Immigration Review (EOIR) Joint Notice of Proposed Rulemaking (NPRM or “proposed rule”) entitled *Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review*; [RIN 1615-AC42](#) / [1125-AA94](#) / EOIR Docket No. 18-0002 / A.G. Order No. 4714-2020**

Dear Ms. Reid:

I am writing on behalf of Futures Without Violence (FUTURES), in response to DHS/USCIS and DOJ/EOIR Joint Notice of Proposed Rulemaking: *Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear* published in the Federal Register on June 15, 2020.

FUTURES strongly opposes the proposed rule as it radically transforms our asylum system by severely restricting the asylum process and impermissibly overruling long-standing asylum laws and regulations. The proposed rule will foreclose asylum protections for hundreds of thousands of vulnerable refugees, especially immigrant survivors of domestic violence, sexual assault, and other gender-based abuses, leading to more women and children being beaten, raped, trafficked and killed. Additionally, because the proposed rule is so expansive and sweeping and the timeframe to respond exceedingly short, we are not able to comment on every proposed change. The fact that we do not set forth and discuss a particular change to the law, does not mean that we agree with it. We oppose the proposed rule in its entirety and strongly urge DHS/USCIS and DOJ/EOIR (“the Departments”) to withdraw and rescind the entire proposed rule.

FUTURES is a national nonprofit organization that has worked for more than 35 years to prevent and end violence against women and children in the United States (US) and around the world. We educate about and work to eliminate domestic violence, sexual assault, child abuse, and human trafficking through education and prevention campaigns; training and technical assistance to state agencies, public and private entities, judges and court systems, colleges and

universities, and global organizations; and we advance sound policies and evidence-based practices at the state and federal level that prevent violence and help survivors and their children heal and thrive.

FUTURES staff are experts on family violence prevention, sexual assault, child trauma and human trafficking and the services and supports necessary for children and women to heal from violence and trauma. Based on that experience, we know that violence against women and children is a global pandemic, affecting one in three women in the world and up to ¾ of the world's children. Recent data from the World Health Organization reveals that up to 1 billion children **aged 2–17 years, have experienced physical, sexual, or emotional violence or neglect in the past year.** A report co-authored by FUTURES in partnership with the Civil Society Working Group on Women, Peace and Security, shows that women and children in the Northern Triangle – the countries of origin for the overwhelming majority of those seeking asylum at our southern border --- experience rates of sexual assault and violence higher than global averages.<sup>1</sup>

At the outset, FUTURES submits that a 30-day comment period is insufficient and the proposed rule should be rescinded on this basis alone. The Departments completely rewrite asylum law and asylum procedures in this proposed rule, which is more than 160 pages long with more than 60 of those pages being the proposed regulations themselves. This complex and confusing rule, which uses dense, technical language and sets forth sweeping new restrictions, has the power to send those fleeing gender-based violence back to their countries where they face further continued persecution and even death. Any one of the sections of these proposed regulations, standing alone, would merit 60 days for the public to fully absorb the enormity of the proposed changes, perform research on the existing rule and its interpretation, and respond thoughtfully. Instead, the Departments have allowed the public just 30 days to respond to a massive document that eviscerates current asylum law.

Further, allowing just 30 days to comment on the proposed rule is even more unjust in the current environment of the COVID-19 pandemic. FUTURES is a national organization with offices in San Francisco, Boston, and the District of Columbia and, like many organizations, is attempting to work remotely while allowing staff necessary leave to care for themselves and family members affected by the pandemic. It is challenging to access physical documents, information, and technology as well as coordinate, convene, and respond to a 160-page proposed rule in such a short time period. For this reason alone, we urge the Departments to rescind the proposed rule. If the Departments choose to reissue the proposed rule, they should do so after the majority of workplaces reopen across the country and then allow the public at least 60 days to have adequate time to provide comprehensive comments.

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<sup>1</sup> <https://www.futureswithoutviolence.org/wp-content/uploads/5th-US-CSWG-Policy-Brief-December-312c-2017-v7.pdf>)

## **THE PROPOSED RULE ELIMINATES ASYLUM AS A PATHWAY TO SAFETY AND PROTECTION FOR SURVIVORS OF GENDER-BASED VIOLENCE**

Immigrant survivors of gender-based violence who flee to the United States to seek asylum do not make the choice lightly. They must leave everything they know, brace themselves for the tremendous danger and peril that awaits them and their children during their journey, and traverse thousands of miles with very few possessions of their own. They do this because they have no choice. They know that they will be killed or seriously injured if they stay in their countries of origin where their governments do little to protect them from their abusers. Thus, for many survivors of gender-based violence, asylum is their pathway to safety and protection.

The proposed rule seeks to bar these vulnerable survivors of violence from qualifying for asylum in five significant ways. First, it sets forth a new asylum adjudication process that removes critical due process protections that will deny survivors of gender-based violence their day in court. Second, it narrows and restricts long-standing legal definitions and heightens legal standards so that survivors of violence will have little chance of succeeding on the merits of their cases. Third, it forecloses discretionary relief and imposes new bars to asylum. Fourth, it redefines “frivolous” so broadly and inaccurately that it will deter and prevent survivors of violence from pursuing meritorious claims for asylum. Fifth it weakens confidentiality provisions that will likely harm and deter survivors of gender-based violence from applying for asylum.

These additional draconian barriers that work to prevent survivors of violence from seeking safety and protection in the United States are unnecessary. The laws, regulations, and processes governing asylum adjudications are already exceedingly stringent and harsh. Asylum seekers bear the evidentiary burden of establishing their eligibility for asylum in the face of complex laws and regulations, without the benefit of appointed counsel and often from a remote immigration jail or a tent erected at the border. New policies that mandate that asylum seekers apply for asylum in a third country of transit and that they return to Mexico to wait for the adjudication of their cases have imposed additional and more imposing barriers. These new proposed changes are the Administration’s latest attempt to completely shut the door to vulnerable individuals seeking protection from persecution. Indeed, this rule increases the likelihood that a woman or child will be trafficked for sex or experience other forms of gender-based violence.<sup>2</sup> Rather than restricting access to protection, the administration should expand opportunities for vulnerable survivors of gender-based violence to access safety and protection.

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<sup>2</sup> Fernandez, Manny, (2019, March 3), “‘You Have to Pay with Your Body’: The Hidden Nightmare of Sexual Violence on the Border,” The New York Times. Retrieved from <https://www.nytimes.com/2019/03/03/us/border-rapes-migrant-women.html>.

## **I. The Proposed Rule Makes Sweeping Changes to the Asylum Process that Will Deny Survivors of Gender-Based Violence Due Process.**

The proposed rule dramatically changes the asylum process by erecting insurmountable road blocks that essentially make it all but impossible for survivors of gender-based violence to have their asylum cases heard and considered in a meaningful way. It does this by heightening the legal standards for credible fear interviews, offering asylum-withholding only proceedings, allowing immigration judges to pretermite a case, and expanding and further restricting the firm resettlement bar.

### **A. The Proposed Rule Impermissibly Heightens the Legal Standards for Credible and Reasonable Fear Interviews and Creates an Asylum-Withholding Only Proceeding that Denies Asylum Seekers Due Process -- 8 CFR § 208.30; 8 CFR § 1208.30.**

Credible Fear Interviews (CFI) are preliminary screenings for individuals subject to expedited removal proceedings at or near the border. Individuals who pass their CFI can proceed with their claim to asylum.<sup>3</sup> Under the current system, anyone subject to expedited removal must prove that they have a “credible fear” of persecution in their country of origin. Individuals who make that showing to an asylum officer get referred to an immigration judge for “full” removal proceedings. In these full removal proceedings, the applicant can apply for any relevant form of relief from removal. For survivors of gender-based violence, additional relief may include VAWA self-petitions, or U or T visas.

The proposed rule dramatically changes this existing process by heightening the standard of review in CFIs. When Congress added expedited removal to the Immigration and Nationality Act (INA), it intentionally set the standard for the credible fear interview low – “significant possibility” – to ensure that asylum seekers who are fleeing persecution are not deported back to persecution. Under the proposed rule, the Departments redefine the “significant possibility” standard to mean “a substantial and realistic possibility of succeeding.” The Departments lack the authority to redefine the standard as the new language clearly contradicts the language of “significant possibility” that Congress set forth in the Immigration and Nationality Act. INA § 235(b)(1)(B)(v). Additionally, requiring asylum seekers, such as survivors of violence, to meet this heightened standard within hours or days of arriving at the US border is unfair, unjust, and cruel. Most survivors of gender-based violence who arrive at the border do not have access to legal counsel. Many survivors are ill equipped to effectively communicate with immigration officials due to profound traumatization, hunger, exhaustion, lack of understanding of our legal process, and language and cultural barriers. To expect them to meet this higher burden in a screening interview is unrealistic and unconscionable.

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<sup>3</sup> The Trump administration has proposed to expand “expedited removal” away from the borders, allowing immigration agents to pick up any person anywhere in the country and deport them without judicial review unless the person can convince the immigration agent that they are a citizen, or that they have some lawful status in the United States. Although this expansion was enjoined by a federal judge in September 2019, a federal appeals court lifted the injunction in June 2020.

The proposed rule also changes the existing process by requiring applicants to make and support their case to an asylum officer rather than an immigration judge. In the case of survivors of gender-based violence, this proposed rule change will give immigration officers an unprecedented amount of authority to make determinations that involve the complex dynamics surrounding gender-based violence. In order to properly and accurately assess gender-based violence, including domestic violence, a decision-maker must have experience and in-depth knowledge of the intricacies of abuser-survivor relationships and dynamics; the nuances of the tactics abusers and perpetrators use to control, intimidate, and manipulate survivors; understanding of the ongoing pattern of behavior in abusive relationships; specific vulnerabilities of immigrants to being victimized; and many other important analyses of the domestic nature of abusive conduct. Immigration officers, in all likelihood, lack this expertise and intimate understanding.

If the survivor of violence passes the CFI, then she is placed into “asylum-and-withholding-only proceedings.” This means that she would be prohibited from seeking any form of relief other than asylum, withholding of removal, and protection under the Convention Against Torture (CAT). This change dramatically limits the survivor’s day in court by restricting access to many of the avenues of relief currently available under the INA, in violation of congressional intent. US immigration laws should be implemented in a manner that makes relief as accessible as possible to those who are eligible, yet the proposed rule operates in exactly the opposite manner, unnecessarily excluding those who meet the statutory guidelines for relief.

Finally, under the proposed rule, there is no review in immigration court of denials of credible fear screenings unless the applicant proactively requests such review. This proposed change in the process is exceedingly unjust. As noted above, most asylum seekers lack counsel and lack knowledge of immigration laws and procedures. To place the burden on asylum seekers to affirmatively request an appeal or understand the consequences of declining to do so is exceedingly unfair.

These new proposed restrictions contravene the purpose of CFIs, which are threshold screenings intended to preserve the ability of arriving asylum seekers to develop and present their claims to an immigration judge. Taken together, they make the CFI insurmountable for many asylum seekers. This will mean that the vast majority of survivors of gender-based violence will never be able to present their claims in court.

#### **B. The Proposed Rule Denies Asylum Seekers Due Process by Allowing Immigration Judges to Pretermitt Their Case -- 8 CR § 1208.13 (e).**

The proposed rule would allow immigration judges to deny asylum to asylum seekers without allowing them a hearing or chance to testify, if they determine, on their own initiative or at the request of a government attorney, that the application form does not adequately make a claim for asylum. This radical change, that allows immigration judges to “pretermitt” asylum claims, denies asylum seekers due process.

Survivors of violence, like many asylum seekers, will suffer swift pretermission for failing to establish a *prima facie* claim. Most arrive at the border and are not represented by an attorney, do not speak English fluently, and are not familiar with the complexities of immigration law. When given a 12-page asylum application, many survivors of gender-based violence struggle to complete it. It is exceedingly unfair to expect asylum seekers to lay out every element of their asylum claims in the application before arriving in court. Allowing immigration judges to deny asylum cases without even taking any testimony or looking beyond the asylum application would inevitably lead to meritorious cases being denied and vulnerable asylum seekers being returned to harm and even death.

**C. The Proposed Rule Unfairly Redefines and Expands the Firm Resettlement Bar -- 8 CFR § 208.15; 8 CFR § 1208.15.**

Under current regulations, asylum seekers are barred from protection in the US if they are found to have been firmly resettled in another country -- they received an offer of permanent status in the country of transit. 8 C.F.R. § 208.15 and § 1208.15. The burden rests on the US Department of Homeland Security (DHS) to prove that an offer of permanent status exists. If DHS meets that burden, the asylum seeker can rebut the evidence by showing that she did not receive an offer of firm resettlement or did not qualify for the status. If the immigration judge concludes that the asylum seeker resettled, the asylum seeker can appeal to two exceptions to ensure that *bona fide* applicants are not improperly barred from asylum. 8 CFR § 1208.15(a-b). Specifically, asylum seekers have not resettled if they remained in the third country only as long as was necessary without establishing significant ties *or* faced “substantially and consciously restricted” conditions in that country. These two exceptions are consistent with Congress’ desire to welcome refugees who have faced long journeys and hardships on their way to seeking safety and permanent shelter in the US.

The proposed rule redefines and expands firm resettlement by barring asylum to any asylum seeker who “could have resided” in renewable or permanent legal immigration status in a country she transited through prior to arriving/entering the United States. Additionally, it bars asylum to any asylum seekers whose journey keeps them in transit for one year or more in one country and has not suffered torture or persecution in that country.

The proposed rule relieves DHS of its burden and it strips asylum seekers of the two important defenses, without justification. Also, as written, the proposed firm resettlement definition would apply to nearly all asylum applicants. In fact, the logical conclusion of the proposed rule is that only asylum seekers from Mexico or Canada or asylum seekers who were lucky enough to get a direct flight to the US would not be barred from seeking asylum under this provision. The proposed rule is not only arbitrary and capricious but the outcomes unfair and absurd. Take for instance, the case of two survivors of gender-based violence from Uganda. If they both left Uganda on the same date, but one took a direct flight to the US and one took a flight that stopped over in Germany, the survivor with the layover in Germany would be barred under the proposed firm resettlement rule but the survivor with the direct flight would not.

Additionally, the proposed rule completely disregards the plight, risks, and challenges that asylum seekers make as they flee from their persecutors. Survivors of gender-based violence often have limited access to financial resources which makes flights directly from a home country to the United States very challenging for women and girls. Additionally, to escape their abusers, many survivors of gender-based violence must take a circuitous route as persecutors are known to pursue survivors in neighboring countries after they escape. And, once a survivor of violence has reached a country of transit, resettlement may not be safe despite an offer of refugee or asylee status. Finally, for individuals who have been trafficked into a third country, the proposed rule would make no exception and would likely bar asylum to these traumatized and vulnerable girls and women.

## **II. The Proposed Rule Narrows and Restricts Long-Standing Legal Definitions and Heightens Legal Standards That Will Preclude Survivors of Violence From Qualifying for Asylum.**

Applicants for asylum are legally required to demonstrate that the *persecution* they fear is on account of a protected characteristic: *race, religion, nationality, membership in a particular social group (PSG), or political opinion*. INA § 101(a)(42)(emphasis added). The proposed rule dramatically changes and restricts the definitions of “particular social group,” “political opinion,” “persecution,” and “on account of.” It also redefines the standards for internal relocation. These substantive changes will preclude vulnerable populations, including sexual assault and domestic violence survivors, LGBTQI asylum seekers, and survivors of gang violence from obtaining safety and protection from their persecutors under asylum law.

### **A. The Proposed Rule Will Make it Virtually Impossible for Survivors of Gender-Based Violence to Prevail on a Particular Social Group Claim -- 8 CFR § 208.1(c); 8 CFR § 1208.1(c).**

To qualify for asylum, an individual must demonstrate a well-founded fear of persecution based on one of five protected characteristics. Membership in a particular social group (PSG) is one of the five protected characteristics and it was designed to allow the refugee definition to be flexible and capture those individuals who do not fall within the other listed characteristics (race, religion, nationality, political opinion). According to guidance by the United Nations High Commissioner on Refugees (UNHCR), the term membership of 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.”<sup>4</sup>

The proposed rule ignores UNHCR guidance as well as years of legal precedent to dramatically change and circumscribe what constitutes PSG. The proposed rule defines PSG as

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<sup>4</sup> United Nations High Commissioner on Refugees (UNHCR) Guidelines On International Protection: “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, May 7, 2002. Retrieved at: <https://www.unhcr.org/en-us/publications/legal/3d58de2da/guidelines-international-protection-2-membership-particular-social-group.html>.

“one that is based on an immutable or fundamental characteristic, is defined with particularity, and is recognized as socially distinct in the society at question.” It then sets forth that the PSG “cannot be defined exclusively by the alleged persecutory acts or harms and must also have existed independently of the alleged persecutory acts or harms that form the basis of the claims.”

The proposed rule further proposes a non-exhaustive list of characteristics that would generally be insufficient to establish a PSG, including:

- “interpersonal disputes of which governmental authorities were unaware or uninvolved”
- “private criminal acts of which governmental authorities were unaware or uninvolved,” and,
- “being the subject of a recruitment effort by criminal, terrorist, or persecutory groups.”

Through these proposed rules, the Departments seek to categorically bar asylum to individuals who are fleeing gender-based violence. Indeed, under the proposed rules, women and girls fleeing honor killings by family members, female genital mutilation by family and neighbors, and domestic violence by intimate partners would not be able to establish PSG. These proposed categorical bars are not supported by law. In [\*Matter of Kasinga\*](#), female genital mutilation (FGM) was recognized as a basis for asylum and the cognizable PSG was “Young women who are members of the Tchamba-Kunsuntu Tribe of northern Togo who have not been subjected to FGM, and who oppose it.” Additionally, in April 2020, the U.S. Court of Appeals for the First Circuit, [\*Jacelys Miguelina de Pena-Paniagua v. William Bar\*](#), [hereinafter *De Pena v. Barr*], the court confronted the question of whether the requirement for establishing membership in a PSG in support for a request for asylum or withholding of removal categorically reject any group defined in material part as women “unable to leave” a domestic relationship. The court held that there is no categorical rule precluding any and all applicants from successfully relying upon such group in support of a request for asylum or withholding of removal. <http://media.ca1.uscourts.gov/pdf/opinions/18-2100P-01A.pdf>.

Further, the mandate that PSGs cannot be based on “interpersonal disputes” and/or “private criminal acts” “of which governmental authorities were unaware or uninvolved” with exceptions in “rare circumstances” is archaic, sexist, and wrong. This framing reverts us back several decades, prior to the passage of laws and protections under the Family Violence and Prevention Services Act (1984) and the Violence Against Women Act (1994). This retrogressive framing of family violence as a “personal dispute,” even when an asylum seeker can document that it is severe, pervasive, and widely tolerated by authorities and others in her country, runs afoul of and contravenes US domestic laws and policies.

Moreover, the new proposed standard would require survivors of violence to report non-state actors persecution to authorities. This requirement is unrealistic and dangerous, ignoring the realities for women and girls across the globe. Laws against gender-based violence



are limited or non-existent in many countries.<sup>5</sup> Additionally, reporting gender-based violence in and of itself can even be life threatening due to retribution for doing so in some countries. Also, while some law enforcement officers ignore or dismiss reports of gender-based violence, others may be complicit in harming survivors. In some circumstances, officers may have a family or personal relationship with the perpetrator.

Current asylum law permits submission of evidence as to why reporting was not possible or dangerous. There is no legitimate justification for prohibiting an applicant from even presenting such evidence, and rather, requiring her to show that she potentially risked her life to do so. Survivors should be able to seek asylum as victims of systemic human rights abuses, sanctioned by the state. Survivors should not be punished twice: first by the failure of their own government to protect them, and second by our asylum system's refusal to accept evidence of that failure.

Moreover, one of the most unfair aspects of this proposed rule is its requirement that an asylum seeker state with exactness every PSG to which they might belong before the immigration judge or forever lose the opportunity to present the PSG. An asylum seeker's life should not be dependent on an applicant's ability to expertly craft arguments in the English language in a way that satisfies technical legal requirements. The asylum officer or immigration judge has a duty to help develop the record. It would be unconscionable to send a survivor of violence back to persecution for failure to adequately craft PSG language. Applying this proposed regulation to asylum seekers, most of whom who are unrepresented, would raise serious due process issues.

#### **B. The Proposed Rule Redefines Political Opinion Contravening Long-Established Principles -- 8 CFR § 208.1(d); 8 CFR § 1208.1(d)**

The proposed rules redefine "political opinion" as "an ideal or conviction in support of the furtherance of a discrete cause related to political control of a state or a unit thereof." The proposed rule goes on to explicitly reject the possibility that applicants' expression of opposition to terrorist, gang organizations, or other non-state organizations can qualify as a political opinion, unless the asylum seeker's "expressive behavior" is "related to efforts by the state to control such organizations or behavior that is antithetical to or otherwise opposes the ruling legal entity of the state or a legal sub-unit of the state."

This restriction utterly fails to recognize that many asylum seekers flee their homelands precisely because the government of their country is unable or unwilling to control non-state actors. Additionally, this redefinition is an attempt to close off asylum for women, survivors of gender-based violence, as well as victims of gang violence. Under the proposed rule, persecution on account of "feminism" as a political opinion – the right to equality under the law for women - would not be accepted, no matter how extreme the harm inflicted on activists.

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<sup>5</sup> <http://pubdocs.worldbank.org/en/679221517425064052/EndingViolenceAgainstWomenandGirls-GBVLaws-Feb2018.pdf>

Also, women holding feminist political opinions that men do not have the right to rape them would be barred from meeting the political opinion definition under this rule. The proposed rule's redefinition of political opinion in the narrowest possible way contradicts existing case law and will send many survivors of gender-based violence back to their abusers.

**C. The Proposed Rule Impermissibly Restricts and Narrows the Definition of Persecution to Exclude Many Serious Harms -- 8 CFR § 208.1(e); 8 CFR § 1208.1(e).**

Fundamental to asylum law is the obligation of countries to protect individuals with well-founded fears of persecution from being returned to harm. *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 428, (1987). The proposed rule would, for the first time, provide a regulatory definition of persecution—a definition that would unduly restrict what qualifies as persecution.

Under the new definition, “persecution requires an intent to target a belief or characteristic, a severe level of harm, and the infliction of a severe level of harm by the government of a country or by persons or an organization the government was unable or unwilling to control.” It further defines persecution as needing to include “actions so severe that they constitute an exigent threat,” but not including “generalized harm that arises out of civil, criminal or military strife . . . intermittent harassment, including brief detentions; threats with no actual effort to carry out the threats; of non-severe economic harm or property damage.”

The rule proposes to drastically limit the definition of persecution to harm so severe that it “constitute[s] an “exigent threat.” There is no acknowledgement or discussion of the vastly different forms of harm experienced by different asylum seekers and the importance of a case-by-case analysis. Also, the proposed rule excludes wide-spread consensus that adjudicators must examine harm cumulatively when determining whether an applicant experienced persecution. UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, ¶ 201 (Geneva 1992) (“The cumulative effect of the applicant’s experience must be taken into account.”). For survivors of domestic violence cumulative harm is critical. Indeed, persecution may consist of relentless cumulative harassment, intimidation, threats, or acts of violence to oneself or one’s children, resulting in chronic, extreme, and debilitating post-traumatic stress disorder. Under this proposed rule, such harm will be arbitrarily dismissed regardless of the devastating impact on the individual who must endure it

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

**D. The Proposed Rule Impermissibly Lists Claims/Categories that Precludes a Finding of Nexus -- 8 CFR § 208.1(f); 8 CFR § 1208.1(f).**

As noted earlier, applicants for asylum are legally required to demonstrate that the persecution they fear is on account of a protected characteristic: race, religion, nationality, membership in a particular social group, or political opinion. INA § 101(a)(42). In asylum law, “nexus” refers to the requirement that an asylum applicant’s persecution be *on account of* one or more protected grounds.

The proposed rule lists eight specific types of claims/categories that would categorically preclude a finding of nexus.<sup>6</sup> The Departments, in setting forth a list of categories that cannot support a finding of nexus, mistakenly conflates nexus with the definition of the protected grounds. Nexus concerns whether a person is persecuted “on account of” their group—not the group itself.

Under the proposed rule, “gender” is explicitly deemed invalid as a basis for establishing a nexus between persecution and a protected ground. A categorical denial of all cases where gender is part of the nexus is antithetical to the case-by-case analysis required under asylum law. Additionally, asylum claims will fail that involve persecution where the alleged nexus includes:

- “personal animus or retribution,”
- “interpersonal animus in which the alleged persecutor has not targeted, or manifested an animus against, other members of an alleged particular social group in addition to the member who has raised the claim at issue,” and,
- “generalized disapproval of, disagreement with, or opposition to...non-state organizations absent expressive behavior in furtherance of a discrete cause against such organizations related to control of a state or expressive behavior that is antithetical to the state or a legal unit of the state.”

Thus, under the proposed rule, the Departments once again shut the door to gender-based violence claims, such as persecution by abusive boyfriends and husbands, persecution by family members who are able and willing to carry “honor” crimes, and persecution by family and neighbors who are able and willing to carry out FGM/C.

The proposed rule also notes that “pernicious cultural stereotypes — *machismo* as the example—have no place in the adjudication of applications for asylum and statutory withholding of removal.” This provision in the proposed rule is misplaced; it confuses

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<sup>6</sup> This list of disqualifying claims includes those based on: personal animus or retribution; interpersonal animus; generalized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerilla, or other non-state organizations absent expressive behavior in furtherance of a discrete cause against such organizations related to control of a state or expressive behavior that is antithetical to the state or a legal unit of the state; resistance to recruitment or coercion by guerilla, criminal, gang, terrorist, or other non-state organizations; the targeting of the applicant for criminal activity for financial gain based on wealth or affluence or perceptions of wealth or affluence; criminal activity; perceived, past or present, gang affiliation; and, gender.

allegations of negative stereotypes with objective country conditions information. Additionally, this insidious provision is actually a dangerous restriction on asylum adjudicators' ability to consider some of the most important evidence in any asylum claim—the societal norms informing a persecutor's intent.

**E. The Proposed Rule Redefines the Internal Relocation Standard and Significantly Burdens Survivors of Violence Seeking Protection -- 8 CFR § 208.13(b)(3); 1208.16; 8 CFR § 208.13(b)(3); 1208.16.**

Under current regulations, adjudicators must determine whether “[t]he applicant could avoid future persecution by relocating to another part of the applicant's country” and if so, whether “under all the circumstances, it would be reasonable to expect the applicant to do so.” 8 CFR § 208.13(b)(1)(i)(B) and (b)(2)(ii). A finding that internal relocation could be reasonably expected is fatal to an asylum claim. However, current regulations presume that relocation is not reasonable if an asylum seeker has experienced past persecution or where the government is the persecutor.

The proposed rule is unjust and unfair as it lays out a standard for analyzing the reasonableness of internal relocation that almost no applicant for asylum will be able to meet. Under the proposed rule, the adjudicator must take into consideration “the applicant’s demonstrated ability to relocate to the United States in order to apply for asylum.” This language suggests that if survivor of gender-based violence is able to travel and reach the United States, any testimony about the unreasonableness of relocating within her country of origin can be discounted. This proposed rule completely ignores the fact that survivors of violence make the journey to the US because they believe they will be safe here and they do not believe that their government is either willing or able to protect them from their abuser anywhere in their home country.

Also, the proposed rule significantly changes the internal relocation standard by presuming that relocation within the country of origin is reasonable for all asylum seekers fleeing persecutors who are not the government or government-sponsored actors. This means that survivors of gender-based violence, who are persecuted by their husbands, family members, and/or neighbors, must demonstrate by a preponderance of the evidence that is unreasonable for them to relocate in their home country. And, under the proposed rule, adjudicators must now consider the “size, reach, or numerosity of the alleged persecutor.” Survivors of violence will rarely if ever meet these standards. A survivor of violence often fears persecution from one individual or related family members. A common tactic of perpetrators is to threaten to find and punish victims for escaping, wherever they flee to. The proposed rule is exceptionally cruel because it essentially would require that a survivor would have to be harmed because her persecutor carried out his threats, and then present objective evidence of such harm, in order to meet this burden. It is unfair and unjust to impose this greater evidentiary burden on survivors of violence who have already undergone persecution and proven that the government is unable or unwilling to protect them.

Moreover, the proposed rule would remove important considerations that adjudicators must currently take into account. Currently adjudicators must consider numerous factors, including, “whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties.” See 8 CFR § 208.13(3); 8 CFR § 1208.13(3). The new rule would force adjudicators to make decisions in a vacuum ignoring the overall context of an applicant’s plight.

### **III. Under the Guise of “Discretion” the Proposed Rule Imposes a Laundry List of De Facto Bars to Asylum -- 8 CFR § 208.13(b)(3); 1208.16; 8 CFR § 208.13(b)(3); 1208.16.**

Along with meeting the legal standard of a refugee, asylum seekers must merit a favorable exercise of discretion. *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 423, (1987). Under both domestic and international law, it is well-established that a negative discretionary factor must be significantly egregious to result in a denial of asylum for an asylum seeker who has met the refugee definition. In *Matter of Pula*, 19 I&N Dec. 467 (BIA 1987), the Board of Immigration Appeals emphasized that the discretionary determination in an asylum case requires an examination of “the totality of the circumstances,” both positive and negative; the BIA held that within this “totality of the circumstances” analysis, “the danger of persecution should generally outweigh all but the most egregious of adverse factors.”

The proposed rule seeks to overturn this long-standing precedent to deny most asylum applications on discretionary grounds and it also severely limits the exercise of discretion by adjudicators. The proposed rule does this by creating two lists of discretionary factors, the first of which are presumptively “significantly adverse” to an exercise of discretion and the second of which preclude entirely a grant of asylum.

Three factors make up the first list and if they are present adjudicators are required to consider them as “significantly adverse” for purposes of the discretionary determination. They are: (1) unauthorized entry or attempted unauthorized entry, unless “made in immediate flight from persecution or torture in a contiguous country”; (2) failure to seek asylum in a country through which the applicant transited; and, (3) the use of fraudulent documents to enter the United States, unless the person arrived in the United States without transiting through another country.

The first and third factors unfairly penalize asylum seekers for their manner of entry or presence in contravention of the United Nations Convention Relating to the Status of Refugees’ prohibition on imposing penalties based on a refugee’s manner of entry or presence.<sup>7</sup> This prohibition is critical because it recognizes that individuals fleeing persecution often have little control over the place and manner in which they enter the country where they are seeking protection. Additionally, the proposed rule completely ignores the reality that immigrant

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<sup>7</sup> Convention Relating to the Status of Refugees, July 28, 1951, 140 U.N.T.S. 1954.

survivors of violence face. Many survivors of violence make the perilous journey to the United States to escape horrific domestic and sexual violence, desperately hoping that they will be granted asylum and finally be safe. Unfortunately, under the Trump Administration policies and practices, these desperate asylum seekers are forced to remain in Mexico and face horrendous and dangerous conditions. By denying these immigrant survivors the opportunity to seek asylum, the proposed rule denies safety and protection to those with the greatest need.

Also, the proposed rule has the capacity to provide abusers with additional tools of control and coercion and unfairly penalizes immigrant survivors who have fallen victim to fraud. Abusers often hide or destroy survivors' documents in order to exert dominance and prevent survivors from being able to leave the relationship. As such, immigrant survivors who escape from violence must often search for other ways to obtain documentation. This reality leads survivors to be highly vulnerable to fraud by individuals who falsely claim to have the ability to prepare legal documentation for them. Immigrant survivors who have fraudulent documents may therefore genuinely believe that they had taken the necessary steps to acquire legal documents.

The second factor, failing to seek asylum in a country through which the individual transited, is completely unreasonable and could be potentially dangerous, especially for survivors of violence. Survivors of gender-based violence often are followed by their persecutors to wherever they try to escape, including neighboring countries. Additionally, it is not unusual for persecutors to enlist proxies to pursue, capture, punish and return survivors to them. Further, the countries that survivors of violence might travel through on their way to the United States, may be unsafe and unwelcoming to women and may not offer a viable way for them to stay and support themselves and their family.

As noted above, the proposed rule has two lists that adjudicators must take into consideration when deciding if the asylum seeker merits a favorable exercise of discretion. The second list is as egregious as the first. It delineates ten factors that entirely preclude the adjudicator from exercising discretion in an asylum case. These ten factors operate as de facto bars that would eliminate access to asylum for asylum seekers who: (1) spent more than 14 days in any one country immediately prior to arrival in the United States or en route to the United States; (2) transited through more than one country en route to the United States; (3) would otherwise be subject to one of the criminal conviction-based asylum bars at 8 C.F.R. § 208.13(c); (4) accrued more than one year of unlawful presence prior to applying for asylum; (5) failed to timely file or request an extension of the time to file any required income tax returns, (6) failed to satisfy any outstanding tax obligations, or has failed to report income that would result in a tax liability; (7) has had two or more asylum applications denied for any reason; (8) has withdrawn a prior asylum application with prejudice or been found to have abandoned a prior asylum application; (9) failed to attend an asylum interview, with limited exceptions; or (10) did not file a motion to reopen of a final order of removal based on changed country conditions within one year of those changed conditions.

FUTURES strongly objects to all ten factors. However, we will comment on a few that will significantly burden survivors of gender-based violence. The proposed rule bars most asylum seekers who spent 14 days in any country en route to the United States from qualifying for asylum. This proposed rule would disqualify most survivors of violence who travel through Mexico to get to the United States as the Administration has blocked asylum seekers from entering the US and is forcing them to wait for months in Mexico to request protection at ports of entry. These proposed rules place asylum seekers in an impossible position where they will be denied asylum if they wait on the “metering” lists at a ports of entry but will also be denied asylum if they cross the border without inspection in order to make their requests for protection.

The proposed rule also contradicts the plain language of INA § 208(a)(2)(d), which explicitly allows an exception to the one-year filing deadline for asylum based on changed or extraordinary circumstances by barring any asylum seeker who has been in the United States for more than one year without lawful status. This proposed rule ignores the fact that many survivors of gender-based violence are prevented by health and mental health issues, like post-traumatic stress disorder, or fear of being found from filing for asylum within the one-year time frame. On top of this, survivors of domestic violence in the United States who are seeking asylum contend with threats from their abusers for asserting independence. This can take the form of abusers thwarting survivors’ attempts to file paperwork, attend key appointments or meetings with service providers, communicate with potential witnesses who can corroborate their claims, and learn about their legal rights. The administration cannot eliminate these vital exceptions to the one-year-filing deadline in the guise of “discretion.”

The proposed rule would further require the denial of asylum applications if an asylum seeker did not file taxes prior to applying for asylum. Payment of taxes is in no way related to whether or not a person would suffer persecution in their home country.

Lastly, these new discretionary bars in this proposed rule constitute a dramatic departure from the statute, case law, and past practice, without any proffered evidence or data to support these changes. They will preclude bona fide asylum seekers from protection and effectively eliminate any discretionary authority by adjudicators.

#### **IV. The Proposed Rule Dramatically Redefines Frivolous Asylum Applications that Will Deter and Prevent Immigrant Survivors of Violence from Pursuing Meritorious Claims for Asylum -- 8 CFR § 208.20; 8 CFR § 1208.20.**

The proposed rule sets forth a harsh new definition of a “frivolous” asylum application. It redefines the term “knowingly” to include either “actual knowledge” or “willful blindness.” Additionally, it lays out circumstances that indicate when an application is frivolous. These circumstance include, if the asylum application “is filed without regard to the merits of the claim” and “is clearly foreclosed by applicable law.” Moreover, under the proposed rule the asylum officers can find applications frivolous and refer cases to immigration judges on that basis. Further, under the proposed rule an asylum seeker could be charged with filing a

“frivolous” application, and if found to have done so, would be ineligible to seek any form immigration relief in the future.

The harsh and sweeping definition of frivolous is misplaced and will deter and prevent immigrant survivors from applying for asylum. Deeming an application frivolous because it “is clearly foreclosed by applicable law” ignores the fact that asylum law is not constant; it is continually being interpreted by immigration judges, the Board of Immigration Appeals, and the federal courts. The law with respect to asylum claims based on gender-based violence and domestic violence exemplifies this fact. *See, eg. Matter of A-R-C-G*, 26 I&N 388 (BIA 2014); *Matter of A-B*, 27 I&N 316 (A.G. 2018); *De Pena v. Barr* (April 2020 1<sup>st</sup> Circuit opinion). Additionally, the proposed rule contradicts existing regulations which specifically state that a filing is not frivolous if the applicant has “a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law and is not interposed for any improper purpose.” 8 C.F.R. 1003.102(j)(1).

Moreover, the proposed rule is particularly unjust for survivors of gender-based violence. Under the proposed rule, an asylum seeker whose application would likely be denied under a restrictive interpretation of asylum by the BIA or attorney general precedent, who intends to challenge that precedent in federal court, must risk a finding that would forever bar her from any immigration relief if that appeal is unsuccessful. Thus, under the proposed rules, individuals like Jacelys Miguelina de Pena-Paniagua who successfully challenged the IJ’s and BIA’s interpretation of the law with respect to PSG, would face an unfair choice – challenge unmerited interpretations of the law and risk being forever barred from immigration relief or be removed back to her home country and face being choked, raped, beaten or possibly killed by her abuser.

Finally, the proposed frivolous rule with its permanent bar on applying for immigration relief, completely overlooks the particular circumstances of survivors of violence. Survivors arriving at the U.S. southern border face a daunting task of understanding asylum law and filling out a complicated 12-page asylum application without the benefit of counsel and often from a remote immigration jail or dangerous tent city erected at the border. For survivors of violence who are living in the United States, the challenges are equally daunting. Many are blocked by abusers from accessing legal counsel and from accessing their bank accounts. Isolated and traumatized by their abusers, they are in no position to learn about their legal rights and have no ability to pay lawyers to help them file their asylum application.

#### **V. The Proposed Rule’s Severely Weakens Confidentiality Protections and Will Put Survivors of Violence at Risk of Serious Harm -- 8 CFR § 208.6; 8 CFR § 1208.6.**

The proposed rule sets forth a new set of vaguely worded circumstances that would allow for the disclosure of asylum records, without any clear limitations as to whom it may be disclosed. For instance, the proposed rule includes changes to expressly allow the disclosure of information in an asylum application “as part of a federal or state investigation, proceeding, or prosecution; as a defense to any legal action relating to the asylum seeker’s immigration or



custody status; an adjudication of the application itself or an adjudication of any other application or proceeding arising under the immigration laws; pursuant to any state or federal mandatory reporting requirement; and to deter, prevent, or ameliorate the effects of child abuse.”

This weakening of confidentiality protections will impair the asylum process and will place survivors of violence at risk of serious harm. Asylum adjudicators elicit painful, traumatic, and private confidences from asylum seekers, such as how they were beaten, raped, cut, and dragged through the street by their abuser, horrifically abused in front of their children, or had the lives of their children or other family members threatened. Their only tool to comfort asylum seekers and build trust is the strict safeguard against disclosure of these confidences. If the proposed rule goes into effect, this important safeguard will no longer exist.

Additionally, stringent confidentiality protections are critical for survivors of domestic violence living in the United States. It is not uncommon for abusers to file false reports of wrong doing with law enforcement agencies, state child welfare agencies, and with immigration authorities to maintain power and control over the survivor. The proposed rule would allow information in the asylum application and in asylum adjudication proceedings to be shared with these other agencies which could greatly impact the survivor’s and her family’s well-being.

Further, the proposed rule will hinder asylum seekers with meritorious claims from seeking asylum due to fear of reprisal. For some survivors who are fleeing persecution, the information that she discloses during the asylum process can challenge and implicate her home country’s laws and customs. If this information is not closely guarded, it could place both the asylum seeker and the asylum seeker’s family members, who reside in her country of origin, in grave danger of retaliation by the government.

Finally, the proposed rule might deter asylum seekers from disclosing critical details of their claims if they fear disclosure of such information. Yet, withholding any information about their fear of harm will damage their claim and could potentially – unjustly – impact a determination as to their credibility. Confidentiality is critical to full disclosures, and full disclosures are critical to a survivor’s chances for protection.

### **Conclusion**

For the reasons set forth above, Futures Without Violence strongly urges DHS/USCIS and DOJ/EOIR to rescind the proposed rule in its entirety. It violates our nation’s laws and moral obligations and cruelly prevents survivors of domestic violence, sexual assault, and human trafficking who are fleeing persecution from obtaining the asylum protections they need and deserve. We instead urge DOJ and DHS to promote policies that account for the desperate reality that immigrant survivors face and seek to maximize their safety throughout the asylum process.

Thank you for the opportunity to submit comments on the Joint Notice of Proposed Rulemaking entitled Procedures for Asylum and Withholding of Removal; Credible Fear and

Reasonable Fear Review. Please contact me if you have any questions or concerns relating to these comments.

Respectfully submitted,

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