



July 15, 2020

VIA ELECTRONIC SUBMISSION

William P. Barr, Attorney General
U.S. Department of Justice

Chad R. Mizelle,
Senior Official Performing the Duties of the
General Counsel,
U.S. Department of Homeland Security

Re: Public Comment OPPOSING Proposed Rule on Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review; RIN 1125-AA94 (or EOIR Docket No. 18-0002, A.G. Order No. 4714-2020) and RIN 1615-AC42

Dear Attorney General Barr and Mr. Mizelle:

Lambda Legal Defense and Education Fund, Inc. (“Lambda Legal”) appreciates the opportunity provided by the Departments of Homeland Security (“DHS”) and Justice (“DOJ” and together, “the Agencies”) to offer this comment explaining why we oppose the Joint Notice of Proposed Rulemaking, “Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review” RIN 1125-AA94, EOIR Docket No. 18-0002, A.G. Order No. 4714-2020 and RIN 1615-AC42 (the “NPRM” or “Proposed Rule”), published in the Federal Register on June 15, 2020.¹

Lambda Legal is the oldest and largest national legal organization dedicated to achieving full recognition of the civil rights of lesbian, gay, bisexual, transgender and queer (“LGBTQ”) people and everyone living with HIV (together, “LGBTQ/H”) through impact litigation, policy advocacy,² and public education. Throughout our nearly fifty-year history, Lambda Legal has

¹ 85 Fed. Reg. 36264 *et seq.* (proposed June 15, 2020), to be codified at 8 C.F.R. Parts 208 and 235, and at 8 C.F.R. Parts 1003, 1208, and 1235.

² As in this comment, Lambda Legal recently has opposed numerous other of this administration’s proposed rule changes because they are inconsistent with governing law and invite significant harm to LGBTQ/H people. *See, e.g.*, Lambda Legal Comments re U.S. Department of Health and Human Services’ Proposed Rule, “Uniform Administrative Requirements for HHS Awards” (Dec. 19, 2019) (the “grants rule”), available at https://www.lambdalegal.org/sites/default/files/legal-docs/downloads/20191220_hhs-comment-on-proposed-rule-re-rin-0991-ac16.pdf; Lambda Legal Comments re the U.S. Department of Labor Office of Federal Contract Compliance Program’s Proposed Rule, “Implementing Legal Requirements Regarding the Equal Opportunity Clause’s Religious Exemption” (Sept. 16, 2019) (“faith-based organizations rule”), available at <https://www.regulations.gov/document?D=OFCCCP-2019-0003-107397>; Lambda Legal Comment re U.S. Department of Health and Human Services’ Proposed Rule, “Nondiscrimination in Health and Health Education Programs or Activities” (Aug. 13, 2019) (the “1557 rule”), available at



*U.S. Depts. of Homeland Security and Justice
Lambda Legal Comments re Proposed Rule,
Procedures for Asylum & Withholding of Removal
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advocated for humane and legally sound treatment of LGBTQ/H people who are seeking refuge in the United States from persecution in other countries, in keeping with our nation’s immigration and asylum laws and policies.³ This advocacy has included establishing numerous legal precedents in this area, including that practices employed in order to try to change a person’s sexual orientation can be recognized as torture regardless of the subjective intent of those engaging in those practices,⁴ that individuals perceived as male who have a female gender identity can be recognized as members of a particular social group,⁵ and that persons facing persecution because of their same-sex sexual orientation may not be denied asylum based on others’ perception that they could avoid persecution by concealing that identity.⁶

In addition to impact litigation and policy advocacy, Lambda Legal operates a legal help desk, through which we respond directly to members of the communities we serve who are seeking legal information and assistance regarding many types of abuse related to sexual orientation, gender identity or HIV status. While Lambda Legal has always received such requests throughout its year history, we now have four full-time lawyers dedicated solely to handling the thousands of these calls we receive each year.

Our staff retains records of these assistance requests, which are kept in a searchable electronic database currently spanning from 2013 to the present. Between 2013 and 2020 (our current data set), we received 452 inquiries concerning persecution based on LGBTQ/H status and resulting in need for asylum. These inquiries have been consistent over these years, ranging from 40 to 70 per year in no particular pattern. Ten percent of these inquiries have come from individuals located in other countries, and ninety percent have come from foreign nationals located within

<https://www.regulations.gov/document?D=HHS-OCR-2019-0007-154936>; Lambda Legal Comments re the U.S. Department of Health and Human Services’ Proposed Rule, “Protecting Statutory Conscience Rights in Health Care” (Mar. 27, 2018) (the “denial of care rule”), available at <https://www.regulations.gov/document?D=HHS-OCR-2018-0002-72186>. Lambda Legal also has challenged multiple of these recent rule changes when they have been given effect. See, e.g., *Whitman-Walker Clinic, Inc., et al. v. U.S. Dep’t of Health and Human Svcs.*, Case 1:20-cv-01630-JEB (D.D.C., filed June 22, 2020) (challenging the 1557 rule), more case information is available at <https://www.lambdalegal.org/in-court/cases/whitman-walker-clinic-v-hhs>; *Family Equality, et al. v. Azar, et al.*, Case 1:20-cv-02403-MKV (S.D.N.Y., filed Apr. 1, 2020) (challenging the grants rule), more case information is available at <https://www.lambdalegal.org/in-court/cases/family-equality-v-azar>; *City and County of San Francisco v. Azar*, 411 F.Supp.3d 1001 (N.D. CA 2019) (enjoining the denial of care rule), more case information is available at <https://www.lambdalegal.org/in-court/cases/county-of-santa-clara-v-hhs>.

³ See generally the materials available at Lambda Legal, *Immigration*, <https://www.lambdalegal.org/issues/immigration>. Where this comment includes linked material in the text or in footnotes, we request that the Agencies review the linked material in its entirety and consider it part of the record.

⁴ *Pitcherskaia v. I.N.S.*, 118 F.3d 641 (9th Cir. 1997).

⁵ *Hernandez-Montiel v. I.N.S.*, 225 F.3d 1084 (9th Cir. 2000).

⁶ *Soto Vega v. Gonzales*, 183 Fed. Appx. 627 (9th Cir. 2006).

the United States at the time of the inquiry. Of those within the United States, the inquiries came from all corners of the country.

Regardless of where the person was physically located when making their inquiry, these inquiries have come from citizens of fifty-nine countries, representing every continent except Antarctica: sixteen African countries; seventeen Asian countries; five European countries; thirteen countries in North America (delineated as including Central America); six South American countries; and two countries in Oceania. In descending order, the most numerous inquiries have come from Mexico, Russia, Nigeria, Jamaica, Honduras, El Salvador, Uganda, Turkey, Venezuela, and Saudi Arabia.

Typical requests for help include the inquiry from F.W., who came to the United States in August 2017 from Kenya and identifies as a gay man.⁷ When F.W. contacted us, he was sheltering in a church due to his lack of any other peer or community support. He explained to us that it is illegal to be gay in Kenya.⁸ When he was in Kenya, members of the Mungai tribe threatened him with death daily. Prior to coming to the United States, he had been imprisoned three times for being gay.

A.N., from Pakistan, provides another typical example. When A.N. contacted us, she was a student in Oregon and legally present in the United States on a student visa. She explained to us that she is a trans-feminine Muslim who was identified as male at birth, and who had begun her gender transition. The medical treatment had resulted in the intended physical changes to her body, however, she feared returning to Pakistan because of the extreme hostility she expected she would encounter due to those changes.

In the pages that follow, we provide more information about the persecution many LGBTQ/H people experience in their countries of origin, which drives some to seek refuge in the United States. Some of that persecution is official government policy. Some is inflicted primarily by private actors with government support or at least acquiescence. Some reflects pervasive social norms and is inflicted by a mix of private and governmental action. This comment explains some of the many problems the Proposed Rule improperly will exacerbate for LGBTQ/H asylum applicants who have legitimate claims, many of whom will experience horrifying abuse, if not

⁷ Throughout this comment, initials or pseudonyms are used to protect the identities of persons who have sought legal help from Lambda Legal and who both are entitled to that confidentiality and need it due to fear of persecution.

⁸ Indeed, Kenyan law does criminalize same-sex sexual conduct, as the State Department’s 2019 Human Rights Report discusses. *See* Department of State, *2019 Country Reports on Human Rights Practices: Kenya*, pp. 1, 45 (March 11, 2020) (reporting that “Significant human rights issues include ... the existence and use of laws criminalizing consensual same-sex sexual conduct between adults,” and that, since activists have launched legal challenges to those laws, “police more frequently used public-order laws (for example, disturbing the peace) than same-sex legislation to arrest LGBTI individuals. NGOs reported police frequently harassed, intimidated, or physically abused LGBTI individuals in custody.”), <https://www.state.gov/wp-content/uploads/2020/03/KENYA-2019-HUMAN-RIGHTS-REPORT.pdf>.



death, if returned to their countries of origin. Because the Proposed Rule is inconsistent with governing law and betrays both the goals and the spirit of our longstanding asylum system, Lambda Legal urges the Agencies to withdraw it in its entirety.

I. The Proposed Rule Is Inconsistent With the Agencies’ Duties Under United States and International Law.

Under the Immigration and Nationality Act, 8 U.S.C. §§1101 *et seq.* (“INA”), and subsequent statutes and governing case law, LGBTQ/H refugees, like other refugees, are entitled to present their claims for asylum before a hearing officer and to a fair opportunity to substantiate their claims. The hearing process is intended to ascertain whether the claim is legitimate, and not to put administrative expediency above the duty to provide refuge to those facing real danger for any of the reasons Congress has identified and courts have explained and applied. The NPRM’s proposed changes instead have been designed both explicitly and self-evidently to restrict eligibility, speed termination of claims and deportation, and limit appeals. It is beyond obvious that the Agencies’ goals are, to a significant degree, to purge and then shrink the system, not to more effectively accomplish the system’s purposes.

In service of its obviously improper goals, the NPRM proposes to up-end decades of legal precedent, attempts to rewrite laws, and flouts U.S. treaty obligations by aiming to return refugees who have worthy claims, including LGBTQ/H asylum seekers, to countries where they face severe harm and even death. In many respects, as discussed herein, the proposed changes would be especially harmful for LGBTQ/H people. Accordingly, and given the improperly brief comment period, the most significant of the NPRM’s many legal infirmities are set forth below.

A. The Proposed Rule Redefines and Limits What Qualifies as “Persecution” In Improper Ways That Would Be Especially Detrimental for Many LGBTQ/H Asylum Applicants.

1. The Proposed Rule heightens the persecution standard, ignoring the ways many LGBTQ/H refugees are harmed.

Asylum law requires that our government protect persons who have a well-founded fear of persecution from being returned to that danger. *See, e.g., I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 428 (1987). The NPRM improperly heightens the standard of what qualifies as persecution by requiring that threats be “exigent” and that harm be “extreme.” It then lists types of harm that presumptively will not meet that heightened standard, including: “repeated threats with no actions taken to carry out the threats,” “intermittent harassment, including brief detentions,” and “government laws or policies that are infrequently enforced, unless there is credible evidence that those laws or policies have been or would be applied to an applicant personally.” Proposed Rule §§ 208.1(e), 1208.1(e).

Each of these exclusions is inappropriate. Moreover, the NPRM neither defines key terms (such as “exigent” and “extreme”), nor addresses cumulative harm. It also does not recognize that

different types of harm affect different groups of people differently. Many of the types of harm that the NPRM proposes to exclude are precisely the types that affect LGBTQ people disproportionately and with terrible effects.

a. Serious threats of harm must be able to qualify as persecution.

As the Sixth Circuit recently stated, “it cannot be that an applicant must wait until she is dead to show her government’s inability to control her persecutor.” *Juan Antonio v. Barr*, 959 F.3d 778, 794 (6th Cir. 2020). Yet the Proposed Rule states that “repeated threats with no actual effort to carry out the threats” would not qualify as persecution. Proposed Rule §§ 208.1(e), 1208.1(e); Notice at 60–61. This appears to mean that asylum applicants must expose themselves to risk of violence — up to and including death — in order to meet this proposed new definition of persecution. This is nonsense. After being subjected to serious threats, the person so targeted should be encouraged to seek safety, not required to tempt fate by staying in harm’s way. This is especially true for LGBTQ people, who often are targeted with unrelenting terror campaigns, which should be the very definition of persecution.

b. Intermittent harassment and brief detentions can be enough to qualify as persecution.

The NPRM also states that persecution “does not include intermittent harassment, including brief detention.” Proposed Rule §§ 208.1(e), 1208.1(e); Notice at 61. However, detention itself can rise to the level of persecution.⁹ Moreover, “intermittent” incidents readily can repeat and amount to persecution.¹⁰ The Proposed Rule nowhere acknowledging that adjudicators must consider the cumulative effect of harassment. And as noted above, it is tragically commonplace for LGBTQ people to be targeted, terrorized and detained on a regular basis to express societal contempt for their sexual orientation or gender identity, and to attempt to coerce them to change. This causes many people to attempt desperately to conceal their identity to avoid sexual assault, other physical attacks, imprisonment, and even worse.

⁹ See *Haider v. Holder*, 595 F.3d 276, 286 (6th Cir. 2010) (“[T]he types of actions that might cross the line from harassments to persecution include [] detention [].”); *Beskovic v. Gonzales*, 467 F.3d 223, 227 (2d Cir. 2006) (“The circumstances surrounding a petitioner’s arrest or detention require a case-by-case adjudication by the BIA.”); *Shi v. U.S. Atty. Gen.*, 707 F.3d 1131, 1237 (11th Cir. 2013) (detention rose to level of persecution); *Choezom v. Mukasey*, 300 F. App’x 79, 80 (2d Cir. 2008).

¹⁰ See *Herrera-Reyes v. Atty. Gen.*, 952 F.3d 101, 107 (3d Cir. 2020) (holding threats constitute persecution when “the cumulative effect of the threat and its corroboration presents a real threat to a petitioner’s life or freedom”); *Mejia v. U.S. Atty. Gen.*, 498 F.3d 1253, 1258 (11th Cir. 2007) (“In assessing past persecution we are required to consider the *cumulative* effect of the mistreatment the petitioners suffered.”) (emphasis added).

c. Absent desuetude, criminal statutes must create presumptions of persecution.

The NPRM proposes to exclude from persecution “laws or government policies that are unenforced or infrequently enforced” without “credible evidence that those laws or policies have been or would be applied to an applicant personally.” Proposed Rule §§ 208.1(e), 1208.1(e); Notice at 61–62. It is simply mistaken in stating that “the mere existence of potentially persecutory laws or policies is not enough to establish a well-founded fear of persecution.” Notice at 60. Consider the many countries in which same-sex relationships are punishable by years in prison and even death. “Infrequent” imposition of such penalties is more than sufficient to intimidate, and indeed to terrify, LGBTQ people into paranoid hiding and fear of having such a relationship, let alone engaging in political advocacy to change the law. To say otherwise deprives the word “persecution” of its meaning and betrays our country’s commitment to humanitarian protection. Any nation that has criminalized LGBTQ identity, regardless of the frequency of actual prosecutions, is engaging in *per se* persecution.

Moreover, the NPRM ignores the well-recognized effect that persecutory laws have merely by their existence.¹¹ These laws dictate the scope of acceptable behavior, providing official endorsement of abuse of LGBTQ people, thereby increasing the intensity of that abuse. As Human Rights Watch has recognized, “[c]riminalizing sexual intimacy between men offers legal sanction to discrimination against sexual and gender minorities, and in the context of widespread homophobia, gives social sanction to prejudice and helps create a context in which hostility and violence is directed against LGBT people.”¹² Persecutory laws create opportunities for targeting and violent abuse of those persons, with an unmistakable promise that the law will not intervene. Thus, even when the government does not overtly enforce such laws, LGBTQ people are subject to violence, sexual abuse, and even murder, not to mention, extortion, job loss, denial of access to healthcare, and loss of parental rights. Finally, such laws effectively disenfranchise groups that otherwise could advocate for change by reducing their safety and stability in society.

Further still, the NPRM provides that adjudicators must not consider persecutory laws that are “unenforced or infrequently enforced” unless the applicant can show the laws will be enforced against them personally. This rule ignores the chilling effect described above, and the impossible choice it would require LGBTQ people to make between the limited safety of hiding and the dangerous risk of visibility. Consider the LGBTQ person who has been the victim of a hate crime, who understandably fears reporting it to the police due to the laws forbidding any conduct that expresses or reveals one’s LGBTQ identity. Whether or not the person can prove that they would be subject to prosecution were they to seek police help, they are effectively being denied

¹¹ See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 575 (2003) (among reasons to recognize that criminal laws against same-sex sexual intimacy are unconstitutional is that, “When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.”).

¹² Human Rights Watch, *Not Safe at Home*, at p. 10 (2014), https://www.hrw.org/sites/default/files/reports/jamaica1014_ForUpload_1.pdf.

law enforcement protection by their reasonable fear of that possibility, and thus they are left to be targeted by those who seek to harm them based on who they are. INA §101(a)(42).

2. LGBTQ/H people face systematic persecution in many parts of the world.

In scores of countries globally, it is illegal or fundamentally unsafe to be an LGBTQ person due to pervasive persecution of those perceived as having this identity. Common forms of this persecution are described here.

a. LGBTQ people are subject to criminal sanctions, violence and other extreme abuse without recourse in many countries.

Same-sex adult intimacy is subject to criminal punishment in approximately 70 countries.¹³ Of those, 31 carry a sentence of ten years or more in prison, and 12 countries allow the death penalty. Twelve countries target gender identity through “cross-dressing” or “impersonation” laws.¹⁴ Moreover, these laws are not historical remnants. For example, last year, Brunei further reinforced its extreme version of Sharia law, making adultery and same-sex relationships punishable by stoning.¹⁵ The parliament of Uganda approved life imprisonment as a punishment for same-sex relationships in 2013, after repeatedly giving serious consideration to approving the death penalty as punishment.¹⁶ And although it recently withdrew the provision in response to widespread international outrage, the new penal code Gabon adopted just last year criminalized consensual adult same-sex intimacy.¹⁷

Looking beyond the existence and impact of criminal laws, LGBTQ people experience rampant violence and other forms of abuse around the globe, commonly including rape and sexual assault as well as other forms of physical abuse, and even murder. As reported by the UNHCR, “88 percent of LGBTI asylum seekers from the Northern Triangle interviewed [] reported having

¹³ See International Lesbian Gay, Bisexual, Trans and Intersex Association (ILGA), *State-Sponsored Homophobia: Global Legislation Overview*, at 48–52 (Dec. 2019), https://ilga.org/downloads/ILGA_World_State_Sponsored_Homophobia_report_global_legislation_overview_update_December_2019.pdf.

¹⁴ Human Dignity Trust, *Map of Countries That Criminalise LGBT People* (last accessed July 14, 2020) <https://www.humandignitytrust.org/lgbt-the-law/map-of-criminalisation/>.

¹⁵ Alan Yuhas, *The Sultan of Brunei: Opulence, power and hard-line Islam*, New York Times (Apr. 4 2019), <https://www.nytimes.com/2019/04/04/world/asia/who-is-sultan-brunei.html>.

¹⁶ Abby Ohlheiser, *Uganda’s New Anti-Homosexuality Law Was Inspired by American Activists*, The Atlantic (Dec. 20, 2013), <https://www.theatlantic.com/international/archive/2013/12/uganda-passes-law-punishes-homosexuality-life-imprisonment/356365/>.

¹⁷ ILGA, *State-Sponsored Homophobia*, at 10; Alessandra Prentice, *Gabon senate votes to decriminalise homosexuality*, Reuters (June 29, 2020), <https://af.reuters.com/article/topNews/idAFKBN240256-OZATP>.

suffered sexual and gender-based violence in their countries of origin.”¹⁸ Private actors, including family and community members, often are responsible for this violence. Gay Iraqi men, for example, report severe beatings and death threats at the hands of their own family members.¹⁹ Tellingly, such persecution routinely goes underreported. In Jamaica, attacks by mobs and the police target low-income LGBTQ people, producing homelessness.²⁰ As the State Department has noted, “[r]eluctance to report abuse—by women, children, lesbian, gay, bisexual, transgender, or intersex persons (LGBTI), and members of other groups—is, of course, often a factor in the underreporting of abuses.”²¹ Violence is sometimes outside the reach of the state, and sometimes takes place where weak governments depend on allied armed groups to provide security.²² That said, anti-LGBTQ violence can sometimes occur at the direction of the police, as in Chechnya, where hundreds of individuals suspected to be LGBTQ have reportedly been detained and tortured by the police since 2017.²³

LGBTQ people frequently cannot report private violence to the police in the countries where they experience persecution. Police officers and other authority figures are often the agents of persecution themselves, and LGBTQ people are terrified that going to the police will result in retaliation in the form of rape, beatings, or murder.²⁴ Even if the police are not themselves the agents of persecution, they often harbor the same intolerant attitudes, viewing violence against LGBTQ people as justified. For this reason, for example, in Russia, police facing LGBTQ violence are “dismissive and reluctant to investigate effectively, often blaming victims for the

¹⁸ See Amnesty International, *No Safe Place*, at 7 (2017), <https://www.amnesty.org/download/Documents/AMR0172582017ENGLISH.PDF>.

¹⁹ See Human Rights Watch, *Audacity in Adversity: LGBT Activism in the Middle East and North Africa* (Apr. 16, 2018), <https://www.hrw.org/report/2018/04/16/audacity-adversity/lgbt-activism-middle-east-and-north-africa>.

²⁰ See Rebekah Kebede, *Jamaican LGBTQ youths escape persecution in city storm drains*, Reuters (Mar. 1, 2017), <https://www.reuters.com/article/us-jamaica-lgbt-homeless/jamaican-lgbtq-youths-escape-persecution-in-city-storm-drains-idUSKBN1685AY>.

²¹ Department of State, *2019 Country Reports on Human Rights Practices* (March 11, 2020), <https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/>.

²² See Human Rights Watch, *Audacity in Adversity: LGBT Activism in the Middle East and North Africa* (2018), https://www.hrw.org/sites/default/files/report_pdf/lgbt_mena0418_web_0.pdf.

²³ Andrew E. Kramer, *Chechnya Renews Crackdown on Gay People, Rights Group Says*, N.Y. Times (Jan. 14, 2019), <https://www.nytimes.com/2019/01/14/world/europe/chechnya-gay-people-russia.html>.

²⁴ See Ivette Feliciano & Zachary Green, *LGBTQ asylum seekers persecuted and home and in US custody*, PBS News Hour (Aug. 10, 2019) (“[O]ne night while doing outreach with sex workers in . . . San Salvador, she was beaten and shot in the shoulder by a group of gang members. . . . Police detained but eventually released the men with no charges. Castro says they knew she was the one who had complained, so they began to follow her and threaten her with death.”), <https://www.pbs.org/newshour/show/lgbtq-asylum-seekers-persecuted-at-home-and-in-u-s-custody>.

attacks.”²⁵ In El Salvador, “[o]nly 12 out of 109 LGBT+ murders recorded between December 2014 and March 2017 went to trial . . . and there has never been a successful conviction.”²⁶ Last March, Uganda used the COVID-19 outbreak as a pretext to arrest 23 people living at an LGBT shelter.²⁷ In October 2019, a mob in Uganda attacked 16 LGBTQ activists. After dispersing the mob, the police arrested the 16 LGBTQ individuals and subjected them to homophobic insults and forced anal examinations.²⁸

In many countries, LGBTQ people are subject to so-called “corrective rape.” For example, in Jamaica, lesbians are raped due to a common belief that intercourse with a man will “cure” them of their sexual orientation.²⁹ Likewise, many countries impose rape and torture under the guise of pseudoscientific “therapy.” In Ecuador, LGBTQ individuals are involuntarily detained in “corrective therapy” clinics, where they are beaten, locked in solitary confinement, and force-fed psychoactive drugs.³⁰ The International Rehabilitation Council for Torture Victims reports that in Tunisia, Tajikistan, and Ukraine, conversion therapy or “corrective violence” is ordered by the state or the police.³¹

b. In many countries, LGBTQ/H people are kept in terror of being identified as, or believed to be, LGBTQ by pervasive, extreme social stigma and threats.

Many countries have a pervasive culture of systemic anti-LGBTQ bias. In those countries, LGBTQ status carries extreme social stigma. Many nations punish LGBTQ people by

²⁵ See Human Rights Watch, *License to Harm: Violence and Harassment against LGBT People and Activists in Russia* (Dec. 15, 2014), <https://www.hrw.org/report/2014/12/15/license-harm/violence-and-harassment-against-lgbt-people-and-activists-russia>.

²⁶ See Oscar Lopez, *Pressure mounts for El Salvador to investigate wave of LGBT+ killings*, Reuters (Nov. 21, 2019), <https://www.reuters.com/article/us-el-salvador-lgbt-murder-trfn/pressure-mounts-for-el-salvador-to-investigate-wave-of-lgbt-killings-idUSKBN1XW01G>.

²⁷ See Neela Ghoshal, *Uganda LGBT Shelter Residents Arrested on COVID-19 Pretext*, Human Rights Watch (Apr. 3, 2020), <https://www.hrw.org/news/2020/04/03/uganda-lgbt-shelter-residents-arrested-covid-19-pretext>.

²⁸ See Human Rights Watch, *Uganda: Stop Police Harassment of LGBT People* (Nov. 17, 2019), <https://www.hrw.org/news/2019/11/17/uganda-stop-police-harassment-lgbt-people>.

²⁹ See *Human Rights Violations Against Lesbian, Gay, Bisexual, and Transgender (LGBT) People in Jamaica: A Shadow Report*, submitted at 118th Session of Human Rights Committee in Geneva, at 5 (Sept. 2016), https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/JAM/INT_CCPR_CSS_JAM_25269_E.pdf.

³⁰ Anastasia Moloney, *Gays in Ecuador raped and beaten in rehab clinics to "cure" them*, Reuters (Feb. 8, 2018), <https://www.reuters.com/article/ecuador-lgbt-rights/feature-gays-in-ecuador-raped-and-beaten-in-rehab-clinics-to-cure-them-idUSL8N1P030Q>.

³¹ International Rehabilitation Council for Torture Victims, *It's Torture Not Therapy: A Global Overview of Conversion Therapy*, at 15 (2020), https://irct.org/assets/uploads/pdf_20200513134339.pdf.

preventing them from participating in everyday life. LGBTQ people are shunned as vile, prevented from obtaining an education,³² refused employment, refused housing and healthcare, stripped of family or parental rights,³³ and denied access to politics or power. Such remarkable exclusion rises to the level of persecution. In Brunei, for example, a woman was outed as a lesbian and then ostracized by her community. She lost everything. She was fired from her job, and an influential man blackmailed her into sex work. She stated to *The Telegraph* that she was “already living a prison sentence.”³⁴

c. People perceived as HIV-positive often are targeted due to beliefs that they probably are LGBTQ, and thus worthy of extreme abuse.

Many countries impute LGBTQ status to HIV-positive individuals, assuming that HIV is a “gay disease.” This results in severe stigma and a lack of privacy, subjecting individuals to abuse. In addition to the types of abuse described above, individuals perceived to be LGBTQ are often subject to HIV tests as conditions for employment. This leads to serious public health concerns: research shows that perceptions and experiences of sexual stigma are associated with less access to HIV services and lower odds of viral suppression.³⁵

d. Requests to our Legal Help Desk confirm persecution of LGBTQ and HIV-positive people is global and severe.

Considering only the countries about which Lambda Legal received the most numerous requests for help, as listed on page 3 above, the State Department’s own recent reports³⁶ — which are cited, briefly excerpted, and incorporated fully herein by these references — confirm the

³² Advocates for Youth, *Lesbian, Gay, Bisexual, and Transgender (LGBT) Youth in the Global South*, at 2 (last accessed July 14, 2020) (Bolivian study found 72% of transgender people abandoned secondary school studies due to discrimination), <https://advocatesforyouth.org/wp-content/uploads/storage//advfy/documents/Factsheets/lesbian-gay-bisexual-and-transgender-youth-in-the-global-south.pdf>.

³³ United Nations General Assembly, *Report of the independent expert on protection against violence and discrimination based on sexual orientation and gender identity*, 3-4 (July 17, 2019) (LGBT students and children of LGBT parents face taunts, physical and sexual violence, social isolation, and death threats), https://undocs.org/A/74/181?fbclid=IwAR3xrYojctnW46K2HAFgf4ju4C_Wd-4xEzezVG_cyD3_foUOILbhjuO3538.

³⁴ Chloe Govan, *Brunei LGBT community living in fear despite sultan's death penalty reprieve*, *The Telegraph* (May 10, 2019), <https://www.telegraph.co.uk/news/2019/05/10/brunei-lgbt-community-living-fear-despite-sultans-death-penalty>.

³⁵ Avert, *Homophobia and HIV* (last accessed July 14, 2020), <https://www.avert.org/professionals/hiv-social-issues/homophobia>.

³⁶ Department of State, *2019 Country Reports on Human Rights Practices* (March 11, 2020), <https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/>.

persecutory conditions confronting LGBTQ/H people in these countries: Mexico,³⁷ Russia,³⁸ Nigeria,³⁹ Jamaica,⁴⁰ Honduras,⁴¹ El Salvador,⁴² Uganda,⁴³ Turkey,⁴⁴ Venezuela,⁴⁵ and Saudi Arabia.⁴⁶

³⁷ Department of State, *2019 Country Reports on Human Rights Practices: Mexico*, p. 27 (March 11, 2020) (citing research that “six of every 10 members of the LGBTI community reported experiencing discrimination in the past year, and more than half suffered hate speech and physical aggression”; and “in the first eight months of the year, there were 16 hate crime homicides in Veracruz, committed against nine transgender women and seven gay men.”), <https://www.state.gov/wp-content/uploads/2020/02/MEXICO-2019-HUMAN-RIGHTS-REPORT.pdf>.

³⁸ Department of State, *2019 Country Reports on Human Rights Practices: Russia*, pp. 1, 2, 63-64 (March 11, 2020) (reporting “Significant human rights issues included: extrajudicial killings, including of lesbian, gay, bisexual, transgender, and intersex (LGBTI) persons in Chechnya by local government authorities” and more generally “crimes involving violence or threats of violence against ... LGBTI persons”; “government agents attacked, harassed, and threatened LGBTI activists.”; “Openly gay men were particular targets of societal violence, and police often failed to respond adequately to such incidents.” “In April 2018 the Russian LGBT Network released a report that documented 104 incidents of physical violence, including 11 killings, towards LGBTI persons in 2016-17.”), <https://www.state.gov/wp-content/uploads/2020/03/RUSSIA-2019-HUMAN-RIGHTS-REPORT.pdf>.

³⁹ Department of State, *2019 Country Reports on Human Rights Practices: Nigeria*, p.1 (March 11, 2020) (reporting “substantial interference with the rights of peaceful assembly and freedom of association in particular for lesbian, gay, bisexual, transgender, and intersex (LGBTI) persons ...; crimes involving violence targeting LGBTI persons; criminalization of same-sex sexual conduct between adults), <https://www.state.gov/wp-content/uploads/2020/02/NIGERIA-2019-HUMAN-RIGHTS-REPORT.pdf>.

⁴⁰ Department of State, *2019 Country Reports on Human Rights Practices: Jamaica*, p. 8 (March 11, 2020) (reporting that the government generally protected Jamaicans freedoms of peaceful assembly and association, however, “[a]buses of these freedoms often involved the lesbian, gay, bisexual, transgender, and intersex (LGBTI) community”; also, “The law criminalizes consensual same-sex sexual relations and anal sex between men. Physical intimacy between men, in public or private, is punishable by two years in prison, and anal sex between men is punishable by up to 10 years with hard labor.”), <https://www.state.gov/wp-content/uploads/2020/02/JAMAICA-2019-HUMAN-RIGHTS-REPORT.pdf>.

⁴¹ Department of State, *2019 Country Reports on Human Rights Practices: Honduras*, pp. 1, 19 (March 11, 2020) (Significant human rights issues included: unlawful or arbitrary killings, including extrajudicial killings; torture; harsh and life-threatening prison conditions; arbitrary arrest or detention;...; and threats and violence against ... lesbian, gay, bisexual, transgender, and intersex (LGBTI) persons.” “social discrimination against LGBTI persons persisted, as did physical violence.”; cites “an increase in the number of killings of LGBTI persons during the year. Impunity for such crimes was a problem.”), <https://www.state.gov/wp-content/uploads/2020/02/HONDURAS-2019-HUMAN-RIGHTS-REPORT.pdf>.

⁴² Department of State, *2019 Country Reports on Human Rights Practices: El Salvador*, pp. 1, 22-23 (March 11, 2020) (including among “Significant human rights issues ... security force violence against lesbian, gay, bisexual, transgender, and intersex (LGBTI) individuals”; reporting that “Persons from the LGBTI community stated that the PNC and the Attorney General’s Office harassed transgender and gay individuals when they reported cases of violence against LGBTI persons, including by conducting unnecessary and invasive strip searches.”; and illustrating the current situation with details of four

gruesome murders of transgender women), <https://www.state.gov/wp-content/uploads/2020/02/EL-SALVADOR-2019-HUMAN-RIGHTS-REPORT.pdf>.

⁴³ Department of State, *2019 Country Reports on Human Rights Practices: Uganda*, pp. 1, 31 (March 11, 2020) (including among “Significant human rights issues ... crimes involving violence or threats of violence targeting lesbian, gay, bisexual, transgender, or intersex persons (LGBTI); and the existence of laws criminalizing consensual same-sex sexual conduct between adults.” “The government was reluctant to investigate, prosecute, or punish officials who committed human rights abuses, ... impunity was a problem.” “LGBTI persons faced discrimination, legal restrictions, harassment, violence, and intimidation. Authorities perpetrated violence against LGBTI individuals ...” “the UPF subjected 16 homosexual and transgender people to forced medical examinations in an effort to “gather evidence” to support criminal charges against them for having participated in activities ‘against the order of nature.’” ; reporting government arrest of “33 transgender persons who were attending a training on sustainable development goals,” who were detained, charged with holding an illegal assembly, and later put on trial), <https://www.state.gov/wp-content/uploads/2020/02/UGANDA-2019-HUMAN-RIGHTS-REPORT.pdf>.

⁴⁴ Department of State, *2019 Country Reports on Human Rights Practices: Turkey*, pp. 1-2, 63 (March 11, 2020) (“Significant human rights issues included ... violence against women and lesbian, gay, bisexual, transgender, and intersex (LGBTI) persons ... The government took limited steps to investigate, prosecute, and punish ... officials accused of human rights abuses; impunity remained a problem” “provisions of law concerning “offenses against public morality,” “protection of the family,” and “unnatural sexual behavior” sometimes served as a basis for abuse by police and discrimination by employers.” “During the year LGBTI individuals experienced discrimination, intimidation, and violent crimes. ... police and prosecutors frequently failed to pursue cases of violence against transgender persons”), <https://www.state.gov/wp-content/uploads/2020/03/TURKEY-2019-HUMAN-RIGHTS-REPORT.pdf>.

⁴⁵ Department of State, *2019 Country Reports on Human Rights Practices: Venezuela*, p. 32 (March 11, 2020) (“Credible NGOs reported incidents of bias-motivated violence against lesbian, gay, bisexual, transgender, and intersex (LGBTI) persons. Reported incidents were most prevalent against transgender individuals. Leading advocates noted that law enforcement authorities often did not properly investigate to determine whether crimes were bias motivated. Local police and private security forces allegedly prevented LGBTI persons from entering malls, public parks, and recreational areas.” Government systematic refusal of identity documents to transgender and intersex persons left them especially vulnerable economically, and likely “to become victims of human trafficking or prostitution.”), <https://www.state.gov/wp-content/uploads/2020/03/VENEZUELA-2019-HUMAN-RIGHTS-REPORT.pdf>.

⁴⁶ Department of State, *2019 Country Reports on Human Rights Practices: Saudi Arabia*, pp. 2, 49-50 (March 11, 2020) (“Significant human rights issues included ... criminalization of consensual same-sex sexual activity”; “Under sharia as interpreted in the country, consensual same-sex sexual conduct is punishable by death or flogging, depending on the perceived seriousness of the case. It is illegal for men ‘to behave like women’ or to wear women’s clothes, and vice versa. Due to social conventions and potential persecution, lesbian, gay, bisexual, transgender, and intersex (LGBTI) organizations did not operate openly, nor were there LGBTI rights advocacy events of any kind. There were reports of official and societal discrimination, physical violence, and harassment based on sexual orientation or gender identity in employment, housing, access to education, and health care. Stigma or intimidation acted to

Given the extensive information about anti-LGBTQ/H persecution that the United States government collects, digests and reports annually, as exemplified by the reports referenced here, it is difficult to imagine that the Agencies are unaware of the likely consequences for LGBTQ/H people, among many others, of the proposed rule changes. It thus is puzzling as well as alarming that the NPRM seeks to redefine persecution to exclude serious threats of harm simply because they have not yet been fully carried out. Requiring a targeted person who knows threats are serious to wait and endure physical harm and risk of death is not merely cruel; it is absurd and contrary to law. In addition, contrary to our government’s recognition that use of arbitrary detention as a tool of intimidation violates human rights (as in the State Department’s annual reports cited above), the NPRM appears to propose that LGBTQ/H people who have been repeatedly so detained because of their identity should be refused asylum if an adjudicator considers those detentions “brief.” Further still, the NPRM proposes that persecutory laws that are enforced “infrequently” should no longer substantiate applicants’ persecution claims. It seems to say that LGBTQ people living under threat of long prison sentences and even the death penalty should nonetheless feel safe being themselves. Such a fantastical expectation betrays the purpose of asylum. It also is unjustifiable under governing law.

B. The Proposed Rule’s Requirement of Immediate, Specific Disclosure of One’s Identity and Related “Particular Social Group” Is Unreasonable for Many LGBTQ/H Applicants.

Applicants for asylum and withholding of removal must show that the persecution they fear is based on one of five protected characteristics: race, religion, nationality, membership in a particular social group (“PSG”), or political opinion. 8 U.S.C. § 1101(a)(42)(A). The PSG category is intended to allow the definition to include new, comparable groups that should be able to qualify for refugee protection. Accordingly, courts and the United States Citizenship and Immigration Services have determined that an identity based on a minority sexual orientation, gender identity, or HIV status can suffice to establish membership in a particular social group. *See, e.g., Avendano–Hernandez v. Lynch*, 800 F.3d 1072, 1082 (9th Cir. 2015) (recognizing that transgender individuals are members of a particular social group); *Nabulwala v. Gonzales*, 481 F.3d 1115, 1118 (8th Cir. 2007) (same for lesbians); *Karouni v. Gonzales*, 399 F.3d 1163, 1172 (9th Cir. 2005) (same for “all alien homosexuals”); *Amanfi v. Ashcroft*, 328 F.3d 719, 721 (3d Cir. 2003) (same for men imputed to be gay); *Matter of Toboso–Alfonso*, 20 I&N Dec. 819, 822 (BIA 1990) (same for gay men).⁴⁷

limit reports of incidents of abuse.”), <https://www.state.gov/wp-content/uploads/2020/03/SAUDI-ARABIA-2019-HUMAN-RIGHTS-REPORT.pdf>.

⁴⁷ *See also* U.S. Citizenship and Immigration Services, *Guidance for Adjudicating Lesbian, Gay, Bisexual, Transgender, and Intersex (LGBTI) Refugee and Asylum Claims Training Module*, at 15-17 (HIV status can create a recognized PSG), <https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/Asylum%20Native%20Documents%20and%20Static%20Files/RAIO-Training-March-2012.pdf>.

Troublingly, the NPRM proposes to codify nine exceptions to the PSG analysis, none of which is related to whether a PSG is cognizable. Proposed Rule §§ 208.1(c), 1208.1(c); Notice at 53–55. Were these exceptions to be adopted, they erroneously would prevent the case-by-case development of the PSG category by instructing adjudicators simply to deny classes of claims without the analysis required by law. Perhaps even more troublingly, the NPRM also provides that an applicant’s failure to articulate their PSG claim with specificity during their initial hearing “before an immigration judge shall waive any such claim for all purposes under the Act, including on appeal.” The proposal goes further and would even bar consideration of the PSG claim via any motion to reopen or reconsider, including one based on mistaken guidance by incompetent counsel. Proposed Rule §§ 208.1(c), 1208.1(c); Notice at 55–56.

This unprecedented requirement that applicants articulate and substantiate in detail every potentially relevant PSG immediately before the Immigration Judge or forever lose the opportunity to make that case would fall especially heavily and unjustifiably on many LGBTQ/H applicants due to characteristics specific to this identity.

1. Many LGBTQ people are traumatized by growing up in hostile, isolated circumstances without information or support, and cannot self-identify fully at the first official opportunity.

This proposed new requirement would create improper process barriers for a great many asylum applicants, however, it would be especially problematic for many LGBTQ asylum seekers. By allowing applicants only one opportunity at the start of the asylum process to declare themselves, this provision fails to appreciate that, for many LGBTQ people, coming to understand their minority identity is a process even in supportive environments. But many refugees come from countries with governments and non-governmental institutions that condemn, ostracize and invite harm to LGBTQ people. In such environments, accurate information is unavailable and even discussing the subject can create great risk. Unsurprisingly, many LGBTQ people fail to recognize and then later deny their own identity, often internalizing the powerfully negative messages they have absorbed from their environment. It can take years to free oneself from the shame instilled by severe social stigma and claim one’s identity. Indeed, sometimes that is only possible after time spent in a non-condemning environment in which a person has opportunities to form social and romantic relationships, and to recognize one’s social group.

As a result, for some applicants, the asylum process can be the first time they reveal their identity and describe their experiences in any public way.⁴⁸ Yet for many, doing so was only possible because, by then, they had spent enough time in the United States that they had met other LGBTQ people, had access to accurate information, and been able to come to terms with who

⁴⁸ Marshall K. Cheney et al., *Living Outside the Gender Box in Mexico: Testimony of Transgender Mexican Asylum Seekers*, 107(10) Am. J. Public Health 1646 (Oct. 2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5607674/>.

they always had been. *Y.S. v. Gonzales* illustrates this challenge.⁴⁹ Lambda Legal submitted an amicus brief supporting the asylum claim of Y.S., a gay Palestinian man seeking to avoid persecution in his native country because of his sexual orientation. He was denied asylum initially because the immigration judge decided Y.S. had not come out of the closet quickly enough and should have informed the court earlier of his sexual orientation. Y.S. explained during his hearing:

I was in denial – right now, I’m a man, gay man. I have a lover.
I have a gay life, an open gay life ... It wasn’t easy for me. It was
really hard to accept I’m gay.⁵⁰

Another aspect of LGBTQ identity that would create a barrier were the proposed “immediate disclosure” rule to take effect is that, even for individuals growing up in less hostile circumstances, it can take time to understand one’s sexual orientation or gender identity. A person identified by others as male at birth might for years understand their feminine traits as indications that they are gay, and only later realize that they are a transgender woman. This does not mean that the person’s identity was mutable; rather, it shows how difficult it can be for people whose understanding of their own identity evolves over time to label themselves in a way that places them in a particular social group at the moment they commence their asylum process in the United States.

Geovanni Hernandez-Montiel, for whom Lambda Legal submitted an amicus brief to the Ninth Circuit, seems to illustrate this challenge.⁵¹ Although, starting at twelve years of age, Geovanni “began dressing and behaving as a woman,”⁵² he described himself as a gay man because he was attracted to men. Now, we might recognize the more appropriate PSG is transgender. Yet, there was no real question that Geovanni was persecuted in Mexico based on an LGBTQ identity and membership in that social group. It certainly would not have been proper to deny asylum because Geovanni’s self-description did not match language that was or is most current and precise in the United States.

Requiring LGBTQ applicants to self-disclose immediately to government officials at the start of the asylum process is unreasonable for the additional reason that government officials, and law enforcement officers in particular, frequently are responsible for targeting and violating people perceived as LGBTQ. Geovanni’s case also illustrates this appalling reality for too many

⁴⁹ *Y.S. v. Gonzales*, No. [redacted] (2nd Cir. 2007) (at the request of both parties, case remanded to the BIA for reconsideration of applicant’s credibility due to sexual orientation-specific concerns during hearing process). Case information is available at <https://www.lambdalegal.org/in-court/cases/in-re-ys>.

⁵⁰ *Matter of Y.S.*, Transcript of Nov. 25, 2002 Hearing In Deportation Proceedings, U.S. Dep’t of Justice Immigration Court (“Trans.”) 31:16-20, Lambda Legal Amicus Brief (Aug. 31, 2006), https://www.lambdalegal.org/in-court/legal-docs/in-re-ys_us_20060831_amicus-lambda-legal.

⁵¹ *Hernandez-Montiel v. INS*, 225 F.3d at 1084.

⁵² *Id.* at 1087.

LGBTQ people. As the Ninth Circuit detailed, Geovanni experienced abuse from family members and neighbors, but also vicious persecution by Mexican police officers, who “detained and even strip-searched Geovanni because he was walking down the street or socializing with other boys also perceived to be gay.”⁵³ Later, as a young teenager and due simply to his very feminine appearance, Geovanni was arrested multiple times and sexually assaulted by police officers twice.⁵⁴ Given the trauma many LGBTQ people suffer due to persecution, including persecution by government agents, applicants can be unable or unwilling to reveal their LGBTQ status immediately, and requiring them to do so or waive their legitimate claims is unreasonable and unjustifiable given the purpose of our asylum system.

2. The proposed changes in procedural rules to allow wider disclosure of applicant’s personal information will deter many LGBTQ/H people with valid claims from applying by increasing their risk.

The Proposed Rule allows for disclosure of information included in an asylum application under circumstances that currently are protected from disclosure. 8 CFR § 208.6; 8 CFR § 1208.6. Release of that information can create grave risks of harm for LGBTQ asylum seekers. Because gender identity, sexual orientation, and HIV status are deeply personal and often difficult to disclose and discuss, as discussed above, the newly proposed disclosure provisions will likely chill many LGBTQ/H asylum seekers from seeking relief to which they are entitled.

C. Precluding Consideration of Harm Inflicted by Private Actors, as Opposed to Government Actors, Would Improperly and Disproportionately Bar Many LGBTQ/H Asylum Claims.

The INA requires that an asylum applicant show that the unlawful motivation is “at least one central reason” for their persecution or well-founded fear of persecution. 8 U.S.C. § 1158(b)(1)(B)(i). But, contrary to the INA, the NPRM sets out eight situations which are to be deemed insufficient for substantiating a claim of persecution despite the covered motivation. *See* Proposed Rule § 208.1(f)(1)(i)–(viii); Notice at 36281.⁵⁵ Moreover, these proposed exclusions are so broadly drawn that they effectively would restrict the scope of PSG claims in an unjustifiable manner. Certain of these exclusions would be especially problematic given the realities of anti-LGBTQ/H persecution.

1. Precluding “personal animus or retribution” as motivations.

The NPRM proposes to exclude from assessments of persecution that entitles an applicant to asylum harmful actions motivated by “personal animus or retribution.” Proposed Rule §

⁵³ *Id.* at 1088.

⁵⁴ *Id.*

⁵⁵ Problematically, the NPRM also is ambiguous about whether it would support claims based on any of the precluded motivations together with covered motivations (for example, persecution due to personal animus and also membership in a particular social group).

208.1(f)(1)(i); Notice at 63. Yet actions motivated by anti-LGBTQ beliefs or emotions frequently are expressed as personal animus. Indeed, expressions of personal animus commonly accompany persecutory acts, whether those acts are taken as part of a large, official scheme or as an individual’s course of conduct. It is notable that the NPRM does not attempt to provide guidance on how to distinguish “personal animus” motivation from protected characteristic motivation; plainly, the distinction frequently does not exist.

The case of Carlos Alberto Bringas-Rodriguez illustrates this point.⁵⁶ Born in Veracruz, Mexico, Carlos was viciously abused by numerous close male relatives and a neighbor, all of whom perceived him to be gay or unacceptably effeminate. His uncle started raping him when he was just four years old, and the physical and sexual abuse by this group of men continued regularly until he was twelve years old and able to flee to live with his mother in the United States. They “never called him by his name, referring to him only as ‘fag, fucking faggot, queer,’ and they ‘laughed about it.’” His father also beat him, telling him, “Act like a boy. You are not a woman.” When Carlos returned to Mexico a couple of years later, the physical and sexual abuse intensified, prompting him in due course again to seek refuge in the United States. The Ninth Circuit’s description of the facts shows there was no distinction between the intimate, personal condemnation and the sexual orientation- and gender expression-based condemnation. Without dispute, it was Carlos’s lack of conformity with gender stereotypes and expectations that motivated his male relatives and neighbor to attack him and violate him unrelentingly.

2. Interpersonal animus without evidence of others similarly targeted.

The NPRM also proposes to preclude evidence of persecution based on “interpersonal animus [when] 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.” Proposed Rule § 208.1(f)(1)(i); Notice at 63. This new requirement that survivors of persecution cannot substantiate their own asylum claim unless they also show that their persecutor(s) acted similarly toward others for the same covered reason, has no basis in law.

As the *Bringas-Rodriguez* case illustrates vividly, the persecution of LGBTQ people often is acutely personal and committed by private actors close to the applicant. In some cases, the applicant may have been the first LGBTQ person the tormentors believe they have encountered. An anti-LGBTQ family member who has never expressed animus toward other LGBTQ people — because they believe they have never met one — might target the applicant as their first opportunity to express their contempt and condemnation of LGBTQ people in general.

Geovanni Hernandez-Montiel provides another illustration of the infeasibility of this requirement.⁵⁷ Among the abuse detailed by the Ninth Circuit were two times when Geovanni,

⁵⁶ *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051 (9th Cir. 2017) (en banc) (holding young gay man had presented compelling evidence he was a refugee who was presumptively eligible for asylum based on past persecution by nongovernmental actors, which police were unable or unwilling to prevent).

⁵⁷ *Hernandez-Montiel v. I.N.S.*, 225 F.3d 1084 (9th Cir. 2000).

then 14 years old, was sexually assaulted by a police officer. The first time, he was grabbed by the officer, taken to a remote location, and forced to perform a sexual act on the officer. The second time was “[a]pproximately two weeks later, when Geovanni was at a bus stop with a gay friend one evening, [and] the same officer pulled up in a car, accompanied by a second officer. The officers forced both boys into their car and drove them to a remote area, where they forced the boys to strip naked . . . One of the officers grabbed Geovanni by the hair and threatened to kill him. Holding a gun to his temple, the officer anally raped Geovanni.”

According to the newly proposed requirement that asylum applicants show that their persecutors acted similarly toward other people who are members of the same PSG, Geovanni would have to detail what was done to his friend. But his friend refused to tell him. The proposed rule thus would create the perverse result that, because Geovanni’s friend was too traumatized to discuss how he had been treated, Geovanni would be precluded from establishing his own fear of persecution based on his own repeated experience.

Even without this example, it is obvious that it frequently would be unreasonable to require survivors of persecution to know their persecutors’ history of targeting and abusing others. In smaller communities, the asylum applicant might have been the only person perceived as LGBTQ. In larger communities, it would be harder for the applicant to have information about the perpetrator. This proposed new requirement often would operate to bar LGBTQ/H asylum claims, with no logical or legal basis for doing so.

D. The Proposed Rule Improperly Limits “Political Opinion” Grounds for Asylum to Protests Against Government Policy, Excluding Much Essential, Often Risky Advocacy to Change Pervasive Societal Attitudes Which Legitimize and Encourage Anti-LGBTQ/H+ Abuse.

The NPRM proposes to limit relief from persecution based on political opinion to situations in which the persecution was due to convictions in “furtherance of a discrete cause related to political control of a state or unit thereof.” Notice at 58; Proposed Rule 208.1(d), 1208.1(d). But doing so would narrow the scope of cognizable “political opinion” improperly in a way that could potentially eliminate all or most political opinion claims by LGBTQ/H asylum seekers. Such a result would be inconsistent with the statute and decades of precedent, which do not impose limits on the scope of cognizable political opinions. *See, e.g., Manzur v. U.S. Dep’t of Homeland Sec.*, 494 F.3d 281, 294 (2d Cir. 2007) (“This Court has rejected an ‘impoverished view of what political opinions are[.]’”) (citations omitted).

As discussed above, approximately 70 countries now criminalize open expression of an LGBTQ identity. Some countries impose, or at least threaten, the death penalty or significant prison time for engaging in same-sex intimate conduct. All of these laws are unjust and inhumane. Appropriately, the United Nations has recognized that living in open defiance of an unjust or inhumane law can be a political act, “particularly in countries where such non-conformity is viewed as challenging government policy or where it is perceived as threatening prevailing

social norms and values.”⁵⁸ Any persecution visited upon a person for doing so accordingly should be recognized as on account of political opinion.

Open expression of an LGBTQ identity and advocacy for social acceptance are fundamentally unsafe in many more countries due to extremely condemning, pervasive social norms enforced by nongovernmental institutions and actors. In those contexts, the punishment for violating the behavioral expectation will not be a criminal sentence, but rather ostracism, threats and/or physical violence. Such treatment is no less persecutory because it aims to enforce nongovernmental social controls and policies rather than governmental control. Yet under the NPRM, adjudicators would be given license to reject claims made by refugees who have endured persecution because, by living openly or advocating for change, they were seen as flouting either an anti-LGBTQ law or a pervasive custom, but were not advocating for a “discrete cause related to political control.”

The case of Rikki Nathanson, a national of Zimbabwe, illustrates this point. As publicly reported, she was living openly as a transwoman when she was arrested in Zimbabwe’s second-largest city “by six riot police officers on charges of ‘criminal nuisance’ for wearing female clothes and using a female toilet. She was forced to undergo invasive and humiliating medical/physical examination and asked to remove her clothes in front of five male police officers in order to ‘verify her gender.’ She was forced to spend two nights in police holding cells in the most appalling conditions.”⁵⁹ Rikki then was publicly prosecuted on the criminal nuisance charge. Eventually, the charge was dismissed because she had neither caused a public disturbance nor violated any law by using the women’s restroom.⁶⁰

Rikki then decided to challenge how she had been treated by suing the government. Soon after, she realized she was being followed, her phone was tapped, her home was broken into repeatedly, she was threatened, and during one of the home break-ins, she was severely beaten. She recounted that the “thugs” who attacked her were explicit that they objected to her

⁵⁸ Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees ¶¶ 40, 50 (HCR/GIP/12/09) (Oct. 23, 2012), <http://www.unhcr.org/509136ca9.pdf>.

⁵⁹ Southern Africa Litigation Centre, *Breaking News: Zimbabwe High Court awards damages in ground breaking judgment in favour of Ricky Nathanson, a transgender woman and activist* (Nov. 18, 2019), <https://www.southernafricalitigationcentre.org/2019/11/18/breaking-news-zimbabwe-high-court-awards-damages-in-ground-breaking-judgment-in-favour-of-ricky-nathanson-a-transgender-woman-and-activist/>.

⁶⁰ *Id.* See also Trudy Ring, *Trans Woman Wins Landmark Court Case in Zimbabwe*, *The Advocate* (Nov. 19, 2019), <https://www.advocate.com/world/2019/11/19/trans-woman-wins-landmark-court-case-zimbabwe>.

expressing her female gender identity.⁶¹ While visiting the United States on a visitor visa for a conference, she was informed by friends that the threats were continuing. She sought asylum, which appropriately was approved.⁶²

For purposes of the limitation proposed by the NPRM, Rikki had no way of knowing if the “thugs” were government actors, or private actors doing the bidding of powerful people in government, or private actors attacking her for their own anti-LGBTQ reasons. But there should be no doubt that her decisions to present her transgender identity honestly and openly, and to challenge the abuse she suffered by police, were expressions of political opinion that challenged pervasive, oppressive social norms in Zimbabwe, but not government control. Moreover, the fact that she had no way of knowing whether the “thugs” were acting on behalf of others or themselves rightly was not legally relevant to whether she had a well-founded fear of persecution based on her expression of political opinion as well as her membership in the PSG of LGBTQ people.⁶³

The NPRM also seems to propose a distinction between unprotected expressive challenges to “culture” and protected challenges to state power. The distinction is confusing at best but unjustified legally at root. It seems inevitably likely to result in adjudicators failing to recognize LGBTQ activism as political speech, despite the fact that LGBTQ activism has long been recognized as protected political activity in the United States.⁶⁴ It has been recognized in our asylum law as well, as illustrated by the case of Lambda Legal client Alla Pitcherskaia, a Russian lesbian who protested against her government’s mistreatment of LGBTQ people and forced her to undergo electroshock “therapy” as punishment.⁶⁵ Years before the PSG of LGBTQ people was recognized, this horrific punishment for expressing one’s political opinion was recognized as persecution and grounds for asylum.

As Alla’s and Rikki’s cases illustrate, it would be erroneous for the Agencies to empower adjudicators to deem persecution based on LGBTQ advocacy or simply living openly as an LGBTQ person — when this activity is undertaken abroad rather than within the United States — merely “generalized disapproval” of LGBTQ people, and to deny these applicants because their “expressive behavior” was not directed at changing who holds the reins of state power. The

⁶¹ Michael K. Lavers, *Transgender activist from Zimbabwe receives asylum in US*, Washington Blade (May 7, 2019), <https://www.washingtonblade.com/2019/05/07/transgender-activist-from-zimbabwe-receives-asylum-in-us/>.

⁶² *Id.*

⁶³ Roughly six months after receiving asylum in the United States, Rikki won her court case and was awarded damages of approximately \$1,100 in U.S. currency for the abusive treatment by the police. *Id.*

⁶⁴ See, e.g., *Henkle v. Gregory*, 150 F. Supp.2d 1067 (D. Nev. 2001); *Gay Law Students Ass’n v. Pacific Tel. & Tel. Co.*, 24 Cal. 3d 458 (1979).

⁶⁵ *Pitcherskaia v. I.N.S.*, 118 F.3d 641, 648 (9th Cir. 1997).

point is not academic. In these cases, LGBTQ/H activists would be returned to countries where they face extreme danger.

E. Without Proper Justification, the Proposed Rule Imposes Unlawful Limitations and Heightened Evidentiary Standards, Which Will Distort and Bias the Asylum Claims Consideration Process.

1. The Proposed Rule wrongfully prohibits submission of relevant evidence important for substantiating LGBTQ/H claims.

The NPRM proposes to bar consideration of evidence based on “cultural stereotypes,” a term which is undefined. This is highly problematic because so many LGBTQ/H asylum applications do present evidence of cultural attitudes toward LGBTQ/H people in their country of origin. This evidence is relevant and it has been widely accepted as reliable. The Proposed Rule offers no basis for excluding this important evidence, or any cogent guidance for how to prevent acceptable evidence of relevant cultural attitudes towards LGBTQ/H people from including some information that might be considered improper cultural stereotypes. This issue can be especially critical because the LGBTQ/H asylum seeker must establish that their PSG satisfies the definitions of particularity and social distinction. This provision of the Proposed Rule could be taken as preventing submission of crucial country conditions evidence necessary for many LGBTQ/H asylum seekers both to establish their claim and to show why they cannot safely relocate to another part of their country.⁶⁶

2. The Proposed Rule wrongfully forces adjudicators to consider factors as grounds for denying asylum which are irrelevant to a person’s need for protection and the merits of their case.

The asylum system requires that applicants must warrant a favorable exercise of adjudicators’ discretion in addition to satisfying the legal standard. 9 U.S.C. § 1158(b)(1)(A); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 423 (1987). However, discretionary factors “should not be considered in a way that the practical effect is to deny relief in virtually all cases” because “the danger of persecution should generally outweigh all but the most egregious of adverse factors.” *In re Pula*, 19 I. & N. 467, 473–74 (B.I.A. 1987). But the NPRM’s proposals would have precisely this effect. Contrary to more than thirty years of case law, the Proposed Rule would replace long-established discretionary considerations (such as ties to the United States, living conditions, safety, potential for long-term residency in a third country, and general humanitarian considerations),⁶⁷ with a series of factors that would dramatically restrict adjudicators’ discretion. Most of these factors are irrelevant to the merits of claims and would serve only to cause rejection of worthy cases. By taking discretion from adjudicators — the ones best positioned and intended to evaluate the totality of each applicant’s record — the NPRM would

⁶⁶ As examples, see the State Department reports cited *supra* and incorporated by reference into this comment.

⁶⁷ See *In re Pula*, 19 I. & N. at 473–74.

improperly subordinate “the danger of persecution” to unsubstantiated interests in administrative efficiency. As detailed more fully here below, these provisions should be rescinded entirely.

a. Entry without inspection.

The Proposed Rule instructs adjudicators to deny asylum to any applicant who enters the United States without inspection. This is a direct violation of the INA, which provides that an applicant “who arrives in the United States (*whether or not at a designated port of arrival*), irrespective of such alien’s status, may apply for asylum.” 8 U.S.C. § 1158(a)(1) (emphasis added). This proposed “discretionary” factor also contradicts established caselaw. *In re Pula* provides that manner of entry is a factor that “should not be considered in such a way that the practical effect is to deny relief in virtually all cases.” *In re Pula*, 19 I. & N. at 473–74. Yet this appears to be precisely what the “practical effect” of the Proposed Rule would be.

In addition, the NPRM’s exception for entry without inspection “made in immediate flight from persecution or torture in a contiguous country” is unreasonably narrow. As one example why, forcing LGBTQ/H asylum seekers to wait in Mexico for permission to enter the United States is simply untenable given the pervasive anti-LGBTQ/H violence in these areas, which local law enforcement has proven unable or unwilling to prevent.⁶⁸

b. Failure to seek protection in country of transit.

The Proposed Rule would enforce multiple rules that limit asylum based on the route refugees take to travel to the United States. The rules would direct adjudicators to reject cases of those asylum seekers who passed through another country en route to the United States and did not seek protection there, or who stayed in another country for more than 14 days during their travels to this country. These rules are misguided for multiple reasons. First, even when other nations can process these asylum cases, which many cannot, these rules increase the danger for LGBTQ refugees. Many of the countries through which LGBTQ asylum seekers commonly pass when heading for the United States are as dangerous for them as their country of origin. For example, LGBTQ asylum seekers from South America often travel through multiple Central American nations on their way to the United States. As referenced above, however, the State Department

⁶⁸ For example, in 2018, armed men robbed and burned a shelter in Mexico for transgender people from Central America who were waiting for permission to enter the U.S. to file asylum claims. See Aviva Stahl, *Shelter for LGBT migrants in Tijuana robbed and set on fire*, Women’s Media Center (May 11, 2018), <https://www.womensmediacenter.com/news-features/shelter-for-lgbt-migrants-in-tijuana-robbed-and-set-on-fire>.

recently has reported that LGBTQ people in El Salvador⁶⁹ and Honduras,⁷⁰ and also in Guatemala,⁷¹ face social hostility,⁷² employment and education discrimination, extortion, police and immigration agent abuse,⁷³ “corrective” rape, and murder. Moreover, as both a legal and a practical matter, most LGBTQ refugees cannot file for asylum in these nations through which they are traveling, nor is the length of their stay in such countries relevant under United States law to whether they are deserving of asylum in this country.

c. Fraudulent documents.

With limited exceptions, the Proposed Rule instructs adjudicators to deny asylum if a refugee is considered to have presented fraudulent documents when entering the U.S. It ignores the fact that it can be impossible for people suddenly fleeing for their life to obtain proper official documents. Our courts have recognized this reality for decades, however, and our case law appropriately distinguishes between refugees who present false documents to escape persecution and those who present false documents to support a false claim. *See In re Pula*, 19 I. & N. at 474; *see also*

⁶⁹ Department of State, *2019 Country Reports on Human Rights Practices: El Salvador* § 6 <https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/el-salvador/> (“Media reported killings of LGBTI community members in October and November. On October 27, Anahy Rivas, a 27-year-old transwoman, was killed after being assaulted and dragged behind a car. Jade Diaz, a transwoman who disappeared on November 6, was assaulted prior to her killing. Her body was found submerged in a river. On November 16, Manuel Pineda, known as Victoria, was beaten to death and her body left naked in the street in Francisco Menendez, Ahuachapan Department. Uncensored photographs of the body were circulated on social media.”).

⁷⁰ Department of State, *2019 Country Reports on Human Rights Practices: Honduras* § 6 <https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/honduras/> (“[S]ocial discrimination against LGBTI persons persisted, as did physical violence. Local media and LGBTI human rights NGOs reported an increase in the number of killings of LGBTI persons during the year. Impunity for such crimes was a problem, as was the impunity rate for all types of crime. According to the Violence Observatory, of the 317 cases since 2009 of hate crimes and violence against members of the LGBTI population, 92 percent had gone unpunished.”).

⁷¹ Department of State, *2019 Country Reports on Human Rights Practices: Guatemala* § 6 <https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/guatemala/> (“According to LGBTI activists, gay and transgender individuals often experienced police abuse. The local NGO National Network for Sexual Diversity and HIV and the Lambda Association reported that as of October, a total of 20 LGBTI persons had been killed, including several transgender individuals the NGOs believed were targeted due to their sexual orientation. Several were killed in their homes or at LGBTI spaces in Guatemala City. LGBTI groups claimed women experienced specific forms of discrimination, such as forced marriages and forced pregnancies through ‘corrective rape,’ although these incidents were rarely, if ever, reported to authorities. In addition, transgender individuals faced severe discrimination.”).

⁷² Antonia Zapulla, *Forgotten twice: the untold story of LGBT refugees*, World Economic Forum (Jan. 19, 2018), <https://www.weforum.org/agenda/2018/01/forgotten-twice-lgbt-refugees/>.

⁷³ Jose A. Del Real, ‘*They Were Abusing Us the Whole Way*’: *A Tough Path for Gay and Trans Migrants*, The New York Times (July 11, 2018), <https://www.nytimes.com/2018/07/11/us/lgbt-migrants-abuse.html>.

Gulla v. Gonzales, 498 F.3d 911 (9th Cir. 2007) (“When 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.”) (quoting *Akinmade v. INS*, 196 F.3d 951, 955 (9th Cir. 1999)). The proposed new provision would impose burdens on refugees’ ability to seek safety and would cause rejection of many deserving asylum applicants without serving any legitimate government purpose.

d. One year of unlawful presence—no exceptions.

The Proposed Rule instructs adjudicators to categorically deny asylum for applicants who have accrued “more than one year of unlawful presence in the United States prior to filing an application for asylum.” This improperly defies the INA, which provides exceptions to the one-year filing deadline for changed or extraordinary circumstances. *See* 8 U.S.C. 1158(a)(2)(D). The Agencies lack authority to ignore the INA and issue one-year-deadline discretionary denials of applications when the applicant satisfies one of the statutory exceptions.

Deadline exceptions are particularly important to LGBTQ asylum seekers, many of whom, like Y.S. discussed above, struggle for years after arriving in the United States to understand and accept their identity. Many have been understandably terrified of coming out given the environment in which they grew up, and from which they have fled to escape targeted violence related to how others have perceived them. Many live with the effects of that trauma, including post-traumatic stress disorder, anxiety, or severe depression.

Some applicants, like the Pakistani student who contacted Lambda Legal from Oregon, enter the United States identifying as cisgender, begin to transition, and then develop a well-founded fear of persecution based on their true transgender identity. The process of transitioning can take years,⁷⁴ and obviously should be recognized as “changed circumstances” justifying an exception to the one-year bar. The same is true for refugees who discover they are HIV-positive after being in the United States.

It would be both cruel and absurd for these refugees to receive discretionary denials because they did not claim asylum based on a true identity, due to which they have a well-founded fear of persecution, which they were incapable of expressing during their first year in the United States.

3. The Proposed Rule wrongfully drives the hearing process toward prepermission rather than accurate factfinding, which is especially concerning regarding LGBTQ/H asylum claims.

The Proposed Rule encourages prepermission of claims by permitting immigration judges to fast-track denials of applications for asylum, withholding of removal, or Convention Against Torture

⁷⁴ Stefan Vogler, *LGBTQ caravan migrants may have to prove their gender or sexual identity at US border*, *The Conversation* (Nov. 30, 2018), <https://theconversation.com/lgbtq-caravan-migrants-may-have-to-prove-their-gender-or-sexual-identity-at-us-border-107868>.

relief based solely on the I-589 application and the supporting evidence. 1208.13(e); Notice at 47–49. They will be able to take this approach on their own initiative or at the request of a DHS attorney, with applicants having limited opportunity to respond.

Were this proposal to be adopted, it would be a profound betrayal of the integrity of our asylum system. Because the Department of Justice has imposed performance quotas on immigration judges, tying their job security to how many claims they process,⁷⁵ these judges have been strongly, inappropriately incentivized to pretermite as many cases as possible.

This incentive system is improper because fair adjudication of refugees' claims takes time and each person is legally entitled to their day in court. *See In re Fefe*, 20 I & N. 116, 118 (B.I.A. 1989) (“In the ordinary course, however, we consider the full examination of an applicant to be an essential aspect of the asylum adjudication process for reasons related to the fairness and to the integrity of the asylum process itself.”). From often terrifying circumstances, refugees undertake long, dangerous journeys in search of safety in the United States. Our laws promise they will be heard with open ears when they arrive. Denying their human rights claims on the papers without hearing and true consideration defies our laws and our international commitments, and would result in unprecedented, unjustifiable refolement.

Moreover, pretermission will fall most heavily on unrepresented or detained claimants and will affect LGBTQ people disproportionately. As discussed above, LGBTQ individuals fleeing persecution often do not (1) immediately identify as LGBTQ, (2) feel safe disclosing that they are LGBTQ, or (3) understand that their LGBTQ status (and the related persecution from which they are trying to escape) provides a basis for seeking asylum. Indeed, for many LGBTQ refugees, it is only after learning more about both themselves and our legal system that they understand they have a claim. Dismissing these claims once they are properly understood and articulated, without any factual investigation, is unconscionable and unlawful.

4. The Proposed Rule proposes wrongfully to heighten the standards for reasonable and credible fear interviews, which will cause many LGBTQ/H applicants to be erroneously returned to life-threatening circumstances.

The Proposed Rule unlawfully heightens the statutory standards for establishing a credible or reasonable fear of persecution. As noted repeatedly above, many LGBTQ/H applicants are traumatized, exhausted, terrified, unaware of the legal process, and subject to language and cultural barriers when they arrive at the border. Many are living with physical and psychological effects of their trauma. No one in this condition is well situated to have thoughts collected and emotions managed, and to gather corroborating evidence, in order to effectively prepare for the highly fact-specific inquiries of the screening interview. Furthermore, as discussed above, LGBTQ asylum seekers face additional, unique obstacles regarding disclosure of their status.

⁷⁵ See U.S. Dep't of Justice, *Case Priorities and Immigration Court Performance Measures* (Jan. 17, 2018), <https://www.justice.gov/eoir/page/file/1026721/download>.

This proposed heightening of the legal standard would increase the already present risks of unwarranted refoulement to places where these applicants usually will face severe harm and even death. Lastly, the proposed rule changes will require that those who pass their initial screenings be referred into asylum/withholding only proceedings, denying them opportunities to apply for other survivor-based relief that they otherwise might pursue (such as for survivors of human trafficking or domestic violence). The NPRM offers no justification for denying LGBTQ asylum seekers access to these additional pathways to safety; indeed, the only motive appears to be the legally insufficient justification of administrative expediency.

F. Without Proper Explanation or Justification, the Proposed Rule Mistakenly Limits Applicants’ Ways of Showing the Inadequacy of Other Possible Locations.

1. The Proposed Rule imposes a standard for assessing the feasibility of internal relocation that will be impossible for most asylum applicants.

The Proposed Rule seeks to impose an arbitrary standard for assessing the reasonableness of internal relocation that few refugees, including LGBTQ/H asylum seekers, would be able to meet. Under existing regulations, adjudicators may consider numerous circumstances, 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.” 8 C.F.R. § 208.13(b)(3). Ignoring these enumerated factors, the Proposed Rule purports to “streamline” the internal relocation analysis with a new, greatly narrowed inquiry presented as a totality-of-the-circumstances test.

This proposed new test is illogical at best, and unjustified. For example, under the Proposed Rule, adjudicators must consider “the applicant’s demonstrated ability to relocate to the United States in order to apply for asylum.” Proposed Rule §§ 208.13(b)(3), 1208.13(b)(3); Notice at 66. The provision seems to imply that an asylum seeker’s ability to travel to the U.S. means it is reasonable to expect them to travel to a different location within their country of origin. But the second point does not follow from the first. The ability to travel does not itself create a safe destination. The proposed provision simply ignores the obvious fact that refugees flee their countries of origin because they have come to believe that their government will not protect them and that there is no safety to be had in their country. It is that conclusion that drives people to endure dangerous travel, language barriers, and loss of everything that has been familiar to seek safety in the U.S. Indeed, the misguided logic of the proposed provision — anyone who can get here safely can get somewhere else instead — could be used as easily to justify ending asylum altogether. That, plainly, would be both illogical and unlawful rulemaking for an asylum system grounded in statutes and treaties.

With similar lack of logic, and overlooking relevant information in the administration’s possession, the Proposed Rule also assumes that internal relocation is reasonable if the asylum seeker comes from a large country, or if the persecutor lacks “numerosity.” Proposed Rule §§

208.13(b)(3), 1208.13(b)(3), 1208.16(b)(3); Notice at 66. This ignores the requirement that asylum adjudications be performed on a case-by-case basis. Moreover, it is patently wrong in the context of LGBTQ/H asylum seekers who routinely face persecution nationwide in the largest countries in the world. Consider some of the country examples referenced above — Russia,⁷⁶ Nigeria,⁷⁷ Mexico,⁷⁸ Kenya,⁷⁹ Venezuela,⁸⁰ and Saudi Arabia.⁸¹ All are large countries with large populations and yet no safe havens for LGBTQ/H people due to criminal laws, persecutory governments, and governments unable or unwilling to prevent private actor violence.

Further, the Proposed Rule would require asylum seekers who have already survived persecution to prove that they cannot reasonably relocate if the persecutor is deemed “non-governmental.” 8 CFR § 208.13(3)(iv); 8 CFR § 1208.13(3)(iv). The Proposed Rule then severely limits the definition of government officials to exclude officials and actions performed “absent evidence that the government sponsored the persecution.” This ignores the realities confronting LGBTQ/H asylum seekers, who do not have the luxury of investigating whether a particular actor’s violent acts were “sponsored by the government” or not. It also ignores the fact that many nations exist with systemic anti-LGBTQ bias. When anti-LGBTQ violence is the norm, evidence of official government sponsorship of persecution is unlikely to exist. Again, consider the case of Rikki Nathanson, who was abused by police officers and later harassed and beaten by “thugs” of unknown identity and affiliation. Government policy was on her side at least with respect to the improper criminal prosecution and civil damages for the abusive treatment in police custody. But had she not been able to secure refuge in the United States, there is a real question whether she would have survived long enough to learn of that civil judgment. Likewise, the State Department reports of conditions in El Salvador, Honduras, and Jamaica confirm widespread, unaccountable violence both by and with impunity from law enforcement authorities.

Meanwhile, the NPRM *excludes* forms of evidence important for showing why internal relocation would be unreasonable. Notice at 65, Proposed Rule §§ 208.1(g); 1208.1(g). As noted above, it is unclear how the Agencies intend both asylum applicants and immigration judges to distinguish impermissible evidence of “cultural stereotypes” from permitted evidence of pervasive cultural bias in a country. Without proper explanation, guidance or consideration of the impacts on our asylum system, the NPRM proposes substantial changes to the well-established methods of establishing and testing country conditions, using country conditions reports, social science, and other types of probative evidence. For LGBTQ/H refugees fleeing private actor persecution, these proposed changes create an unjustifiably daunting scenario. The NPRM

⁷⁶ State Department, *2019 Country Reports: Russia, supra*; Human Rights Watch, *License to Harm, supra*.

⁷⁷ State Department, *2019 Country Reports: Nigeria, supra*.

⁷⁸ State Department, *2019 Country Reports: Mexico, supra*.

⁷⁹ State Department, *2019 Country Reports: Kenya, supra*.

⁸⁰ State Department, *2019 Country Reports: Venezuela, supra*.

⁸¹ State Department, *2019 Country Reports: Saudi Arabia, supra*.

seems to demand that they prove why no other part of the country was safe, *without* relying on evidence of cultural norms and persistent abuse, *and* without referencing much of their own experience. It is hard to imagine how the Agencies envision applicants meeting this burden. The Proposed Rule certainly does not provide either explanation or adequate justification.

2. The Proposed Rule’s gross expansion of the firm resettlement bar is not justified and would return many LGBTQ/H asylum seekers erroneously to extremely dangerous circumstances.

The Proposed Rule would grossly and impermissibly expand the statutory “firm resettlement” bar. 8 U.S.C. 1158(b)(2)(A)(vi). Changing a definition that the government acknowledges has been the same for nearly 30 years, the Proposed Rule provides that the following two circumstances would cause categorical bars to asylum eligibility:

a. The possibility of residing in a pass-through country.

If an applicant *could* have stayed in a country of transit, even if there is no pathway to permanent status, and even if he or she did not apply for any status at all. Proposed Rule 208.15(a)(1); Notice at 79. This provision notably lacks an exception for when the pass-through country is unsafe for LGBTQ/H people.

b. Voluntary residence in another country for one year or more without persecution.

If an applicant resided voluntarily in another country for a year or more, and did not continue to suffer persecution, the refugee will be deemed firmly settled and ineligible to pursue asylum in the United States, whether or not that country offered any immigration status (permanent or otherwise). Proposed Rule 208.15(a)(2); Notice at 79. This provision also notably lacks any exception for when asylum seekers are unable to leave the third country when they wish, or when they believe the third country has become unsafe for them.

With respect to both provisions, once the government or an adjudicator raises the issue of firm resettlement, the burden will shift to the applicant to prove that they could not obtain an immigration status of some kind in the third country. This shift to the applicant will happen without the government or adjudicator needing to present any evidence that firm resettlement is possible. If finalized, this proposal would require LGBTQ/H asylum seekers to educate themselves about country conditions and the legal system of countries with which they are entirely unfamiliar, with which they do not share a common language, and which they were intending simply to pass through. While this obviously would be an unreasonable burden for all asylum seekers, it will likely be an impossible burden for those who are unrepresented and/or have been detained. And, it will result in massive numbers of wrongful asylum denials.

G. Without Proper Explanation or Justification, the Proposed Rule Would Make Convention Against Torture Relief Essentially Unavailable for Most LGBTQ/H People.

The Proposed Rule would amend the regulations implementing the Convention Against Torture (“CAT”), severely limiting CAT relief. Under the Proposed Rule, in order to show that a public official inflicted, instigated, consented to, or acquiesced to torture, an applicant must show that the public official was acting “under color of law.” Notice at 83. Moreover, under the Proposed Rule, a public official will not be found to have acquiesced to torture unless the applicant shows that the public official deliberately avoided learning the truth and was “charged with preventing the activity as part of his or her legal duties and has failed to intervene.” These are prejudicial requirements that would require an applicant to submit evidence of (1) whether a public official was on the job during the persecution; (2) the public official’s mental state; and (3) the public official’s job description. Any one of these could create an impossible barrier for a CAT applicant. But together, they would effectively close off CAT relief in most instances, contrary to the clear intent of Congress when it provided for CAT relief.

II. The Proposed Rule is Inconsistent With the Administrative Procedure Act Because It Is Ambiguous, Needlessly Confusing, and Issued Without Adequate Public Response Time.

A. It is Unclear Whether the Proposed Rule Would Operate Retroactively.

It is not at all clear whether the Proposed Rule is intended to apply retroactively. The costs and benefits section of the NPRM refers to an “expected decrease” in asylum grants but does not say whether the thousands of pending cases are intended to be subject to the new rules or merely a benchmark from which to measure the “expected decrease.” Notice at 92-93. Likewise, only the frivolousness provisions are specified as becoming active after the Proposed Rule’s effective date; the Notice does not state whether the rest of the Proposed Rule is to apply to pending cases.

Whatever is intended, retroactive effect would be unlawful and a serious error. The hundreds of thousands of pending applications implicate a reliance interest in the state of the law as it stands now and has been for many years. This reliance interest is further prejudiced by the unreasonably brief, 30-day comment period the Agencies have allowed, such that in one swoop, previously eligible applicants may find themselves ineligible with virtually no warning. Given the sweeping scope of the Proposed Rule, and the short timeframe, retroactive application would be both unreasonable and unconscionable.

B. The Truncated, 30-Day Period for Public Comments is Grossly Inadequate Given the Immense Scope of the Proposed Changes.

As discussed above, the NPRM proposes immense, transformative changes to our asylum system, with catastrophic consequences for countless refugees if these changes are finalized. In a wholly improper inverse relationship with the scale of the proposed changes, the Agencies have



provided a manifestly insufficient 30-day timeframe for responses to these proposals. Given the scope of the Proposed Rule, published in the midst of an international pandemic no less, this truncated comment period fails to serve its purpose under the Administrative Procedures Act, which is: “(1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review.” *Capital Area Immigrants’ Rights Coalition (CAIR) v. Trump*, No. 19-cv-2117, ECF No. 72, 24-25 (D.D.C. June 30, 2020) (internal citations omitted).

Proposing to overhaul the entire U.S. asylum system including by overriding decades of case law — where the consequences are dire for desperate refugees the U.S. is obligated to protect — is hardly the open, reasoned process required by the Administrative Procedure Act. For this reason alone, the Agencies should withdraw the Proposed Rule. Were the Agencies to reissue similar proposals, the public should have at least the standard comment period of 60 days to provide comprehensive feedback. Because this comment period was inappropriately truncated given the sweep and detailed nature of the proposed changes, this comment has not attempted to point out and address all errors and insufficiencies. Lack of discussion of any particular provision should not be taken as agreement with same.

III. Conclusion

For the foregoing reasons, Lambda Legal opposes the Proposed Rule. If finalized, it would improperly interfere with the ability of many LGBTQ/H refugees to substantiate their legitimate asylum claims, contrary to governing law. In this context of asylum, the Proposed Rule’s disregard of the applicable legal standards is not simply a matter of arbitrary and capricious action taken with inadequate justification and in excess of the Agencies’ authority. In this context, it will cause people with valid asylum claims to be returned to life-endangering situations. This result would defy the will of Congress, our government’s international law commitments, and the compassionate values that have animated our nation’s asylum system for generations. As if that were not enough, the thirty-day public comment period is obviously insufficient given the scope of the proposed changes. In sum, the Proposed Rule was not prepared and issued in compliance with governing law, including the Administrative Procedure Act. It should be withdrawn.

Thank you for the opportunity to submit this comment. Please do not hesitate to contact the undersigned at jpizer@lambdalegal.org or (213) 590-5903 with any questions or for further information.

Respectfully submitted,

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