July 15, 2020

The Honorable Chad F. Wolf
Acting Secretary
U.S. Department of Homeland Security
Washington, D.C. 20528

The Honorable William Barr
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

Re: Comments to the Department of Justice and Department of Homeland Security's joint notice of *"Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review"*; 85 Fed. Reg. 36264 (June 15, 2020) (EOIR Docket No. 18-0002; A.G. Order No. 4714-2020).

Dear Attorney General Barr and Acting Secretary Wolf:

The National LGBT Bar Association ("National LGBT Bar") hereby submits comments on behalf of itself, its board of directors, its members, its affiliate state and local bar associations, and lesbian, gay, bisexual, transgender, and queer ("LGBTQ+") attorneys, law students, and legal professionals nationwide regarding the joint notice of proposed rulemaking by the U.S. Department of Justice ("DOJ") and the U.S. Department of Homeland Security ("DHS") (collectively, "the Agencies") regarding *"Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review"* ("Notice"), which was published in the Federal Register on June 15, 2020.

The extraordinary changes proposed by the Notice are fundamentally flawed and would eviscerate our current asylum system, closing the door on the vast majority of asylum seekers and threatening the safety of those who would otherwise be entitled to asylum under our current

jurisprudence. If this rule is finalized, decades of established legal precedent would be rolled back, obliterating protections for refugees and destroying the humanitarian values that have long been recognized as a key part of who we are as a country. Our regulations should preserve access to a fair and equitable process for all asylum seekers, including those fleeing persecution based on their gender identity or sexual orientation.

The U.S. has long heralded the ability of individuals to come to its shores in search of a better life and in search of refugee from persecution. In fact, the pedestal of one of our most hallowed monuments bears the inscription written by Emma Lazarus (emphasis added):

> Not like the brazen giant of Greek fame,
> With conquering limbs astride from land to land;
> Here at our sea-washed, sunset gates shall stand
> A mighty woman with a torch, whose flame
> Is the imprisoned lightning, ***and her name***
> ***Mother of Exiles. From her beacon-hand***
> ***Glows world-wide welcome;*** her mild eyes command
> The air-bridged harbor that twin cities frame.
> "Keep, ancient lands, your storied pomp!" cries she
> With silent lips. ***"Give me your tired, your poor,***
> ***Your huddled masses yearning to breathe free,***
> ***The wretched refuse of your teeming shore.***
> ***Send these, the homeless, tempest-tost to me,***
> I lift my lamp beside the golden door!"[1]

Nevertheless, the Notice strikes at the very heart of our age-old commitment to provide safe haven to people fleeing persecution. The Statue of Liberty must continue to stand as the "Mother of Exiles," providing "world-wide welcome" to those who fear persecution in their country of citizenship. But, if this proposed rule is finalized, the words of Emma Lazarus will ring hollow, and the welcome symbolized by the Statue of Liberty's torch will be callously extinguished.

Due to the prejudicial 30-day public comment period, the objections raised by the National LGBT Bar below do not address every problematic provision of the Notice. Yet, the following nine grounds manifestly require the Notice to be withdrawn and the proposed regulatory changes to be abandoned: (1) the Notice provides a wholly insufficient comment period; (2) the Notice fails to provide any rational basis for the radical changes proposed; (3) the proposed rule improperly narrows the definition of "particular social group," one of the five protected grounds for asylum; (4) the proposed rule improperly narrows what qualifies as a "political opinion," another of the five protected grounds for asylum: (5) the proposed rule attempts to

[1] Emma Lazarus, *The New Colossus*, (1883) Inscription carving. Statue of Liberty, New York, New York.

redefine what constitutes persecution; (6) the proposed rule denies asylum seekers a fair judicial process and their day in court; (7) the proposed rule sets forth for arbitrary factors designed solely to deny asylum to otherwise deserving applicants; (8) the proposed rule appears to arbitrarily impose these substantial changes on a retroactive basis; and (9) many provisions of the proposed rule fail to fall within the authorized scope of the underlying statutes and are, consequently, ultra vires.

As such, the National LGBT Bar joins a myriad of immigration and LGBTQ+ advocacy organizations, as well as a tens of thousands of individuals, in vociferously objecting to the changes now proposed by DOJ and DHS. The proposed rule would fundamentally alter both the asylum process and the legal standards utilized to judge asylum applications and inflict harm on all asylum seekers, including those who identify as LGBTQ+. These objections, combined with the many concerns raised by numerous other commenters, should compel the Agencies to withdraw the Notice and abandon efforts that would impose new, insurmountable barriers to unjustly close off existing avenues to safety for asylum seekers.

I. Asylum and LGBTQ+ Individuals

Our country's asylum process was specifically created as a path to safety for people harmed because of something about them that they cannot – or should not have to – change. Gender, sexual orientation, and gender identity, like race, religion, nationality, or political opinion, are fundamental and immutable aspects of one's personhood.[2] Victims of persecution based on such characteristics deserve a chance to seek protection through a U.S. asylum system that is just and fair. While serious problems exist within the current asylum process that make it unduly burdensome and inequitable to those fleeing persecution, this Notice greatly exacerbates those problems and would effectively thwart LGBTQ+ individuals from successfully obtaining asylum in the U.S.

An asylum process that welcomes and protects LGBTQ+ individuals is essential, even today. LGBTQ+ individuals remain particularly at risk in a shockingly large number of countries. Specifically, 72 countries continue to impose criminal penalties for private, same-sex sexual activity between consenting adults, and at least 15 countries specifically criminalize gender identity and expression for transgender people.[3] Most troubling, in 12 countries the "crime" of being LGBTQ+ is punishable by death.

Even in countries that do not impose formal criminal sanctions, dangerous discrimination and persecution by government actors continue to exist, creating situations where an LGBTQ+ individual routinely fears for their life and safety. Often, their government is unable or

[2] In fact, the United States Supreme Court has recognized that sexual orientation is an immutable trait. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2596 (2015).

[3] *See* Human Dignity Trust, *Map of Countries That Criminalise LGBT People* (last accessed July 7, 2020) https://www.humandignitytrust.org/lgbt-the-law/map-of-criminalisation.

unwilling to protect vulnerable LGBTQ+ individuals. For example, in numerous countries, law enforcement officers ignore or dismiss complaints of violence against LGBTQ+ individuals. Worse yet, law enforcement officers in many countries blatantly instigate, participate in, or are complicit in the abuse and violence inflicted upon LGBTQ+ individuals. Because of their position of power, these law enforcement officers are able to persecute LGBTQ+ individuals with impunity.

LGBTQ+ individuals understandably attempt to flee this violence and persecution, traveling to other countries in search of safety. With the expanding legal protections now being provided to LGBTQ+ individuals at the Federal level[4] and in a majority of states and localities, the U.S. is one of the countries where these persecuted LGBTQ+ individuals seek protection via the asylum process. Access to asylum must be preserved for these LGBTQ+ survivors as well as other survivors of violence and persecution.

However, many of the proposed changes would be particularly detrimental to LGBTQ+ individuals who are fleeing persecution and seeking asylum. Throughout these comments, the National LGBT Bar has highlighted only a few of the numerous ways the rule, if finalized, would inflict harm upon and discriminate against LGBTQ+ asylum seekers. Here are how the proposed rules would specifically harm LGBTQ+ asylum seekers: (1) Narrowing the definition for "particular social group" may mistakenly eliminate the protections that have been long offered to LGBTQ+ and HIV positive individuals; (2) Holding that an asylum seeker forever waives their claims to a protected status unless they immediately disclose it within the asylum application will harm LGBTQ+ individuals who may just be coming to terms with their sexual orientation or gender identity; (3) Requiring that a "political opinion" claim only concern the political control of a government will deny asylum to LGBTQ+ activists who are subjected to violence and persecution because they advocate for equality on the basis of sexual orientation and gender identity; (4) Radically revising the definition of "persecution" to require "exigent" and "extreme" harm disregards the threats of violence and severe "intermittent" harassment that LGBTQ+ asylum seekers have documented in numerous past asylum cases; (5) Denying asylum if the persecutory laws or policies are only enforced "infrequently" will return LGBTQ+ asylum seekers to countries that put LGBTQ+ individuals to death simply based on their sexual orientation or gender identity; (6) Expanding the circumstances where a judge can pretermit an application for lack of "sufficient" evidence will result in the denial of asylum to those LGBTQ+ individuals (especially those without legal representation) who have learned to survive in their home countries by hiding their LGTQ+ status from both governmental officers and any unfamiliar persons; (7) Altering the definition of "resettlement" would deny asylum to an LGBTQ+ applicant because they did not "resettle" in a third country, even when that third country was unsafe for LGBTQ+ individuals; and (8) Barring asylum to those who submit their applications more than one year after arriving in the U.S. disregards complexities of the coming out process and the valid fears an asylum seeker may have about immediately revealing their

[4] *See Bostock v. Clayton County*, No. 17-1618, 2020 WL 3146686 (U.S. June 15, 2020); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

sexual orientation or gender identity to a government official. Unfortunately, these are only a sampling of the negative effects that the proposed rule would have on LGBTQ+ asylum seekers.

The U.S. asylum process was created to protect and support asylum seekers, including those who identify as LGBTQ+. As summarized above and described in more detail below, the proposed rule neither protects nor supports those LGBTQ+ individuals fleeing persecution and seeking asylum in our country. Instead, the proposal creates a multitude of new bars to asylum that would be devastating to those children, men, women, and non-binary individuals who are seeking asylum. The changes contained in the Notice would result in thousands upon thousands of LGBTQ+ asylum seekers being returned to countries that would not only inflict harm upon them but also place their lives in grave danger. To be clear, eviscerating the asylum system as contemplated by this proposed rule will result in the persecution, torture, maiming, and even killing of LGBTQ+ individuals who would have otherwise qualified for asylum under our current system.

II. National LGBT Bar's Detailed Objections to the Proposed Rule

A. Insufficient Comment Period

Court decisions have long directed Federal agencies to ensure that the public has a meaningful opportunity to participate in the regulatory comment process. In fact, "[n]otice and comment rulemaking evokes the spirit of democracy and civic republicanism, acting as a mechanism for adding legitimacy to governmental regulation due to the transparency of the agency action and the involvement of the public as a check before a rule may be promulgated."[5] Here, the opportunity is far from meaningful given the truncated comment period.

Instead of the standard comment period of 60 or 90 days, the Notice only provides 30 days for interested parties to review the rules and submit comments. While this might be sufficient where only minor or inconsequential changes are being proposed, that is not the case here. First, the Notice contains changes that are sweeping in scope, proposing a radical alteration of the asylum process. Second, any modification of the asylum process comes with immeasurably high stakes; a regulatory change that would result in the denial of a valid asylum claim likely will return that persecuted individual back into the hands of their persecutors. An abbreviated, 30-day comment period creates a recipe for ill-informed decision-making, because the public has not been given adequate time to provide fulsome, extensively-researched comments on the innumerable changes being proposed within this Notice. Furthermore, the Notice provides no justification for such a truncated comment period. This is because no such justification exists; there are no exigent circumstances calling for the immediate promulgation of these rules.

[5] Donald J. Kochan, *The Commenting Power: Agency Accountability Through Public Participation*, 70 OKLA. L. REV. 601 (2018), https://digitalcommons.law.ou.edu/olr/vol70/iss3/2.

Even in normal circumstances, it would be prejudicial to give the public such a condensed time period to comment on changes that are this extensive, but the difficulties to adequately respond to the Notice are substantially magnified because the changes are proposed in the middle of a devastating pandemic that has shut down much of our country. The Notice dramatically rewrites asylum law, overturns decades of precedent, and does so via a massive document, containing hundreds of cross-references and case citations. When a rule literally affects whether people will be tortured or even killed, the rule demands the most careful research, analysis, and public consultation. Thirty days is a woefully insufficient amount of time for the American public to review and respond to this multitude of complex proposed changes, especially during a nationwide health crisis.

The Agencies' failure to provide an adequate period of comment for such sweeping changes violates the purpose of the Administrative Procedure Act and unnecessarily deprives the American public of its right to provide meaningful, researched comments about this Notice. In fact, had the Notice provided more time for comment, the National LGBT Bar and countless other commenters could have provided more specificity and highlighted additional legal and social science research supporting the objections that are raised below. As such, the National LGBT Bar is prejudiced by the inadequacy of the current 30-day comment period.

B. Failure to Provide Reasonable Basis for Proposed Change

Under the Administrative Procedure Act, "[w]hen an administrative agency sets policy, it must provide a reasoned explanation for its action."[6] Although upending the current asylum process, the Notice fails to clearly lay out any detailed reasoning for the radical changes being proposed. While not explicitly stated, a careful reading of the Notice indicates that increasing "efficiency" and reducing "fraud" may be two motivating factors for the Agencies, given the number of times those words (or their derivatives) appear in the Notice. Neither reason is sufficient, especially when the Notice fails to acknowledge these as the underlying rationale.

As an initial matter, the purpose of the U.S. asylum process is to protect individuals who are being persecuted. It is not to see how quickly applications can be rejected. To focus on efficiency rather than the humanitarian objectives underlying the statutory scheme (as further described below) rejects the objectives of the asylum process as set forth by Congress. Further, while the Notice repeatedly references fraudulent applications, it fails to provide any factual analysis of wholesale fraud within the asylum process. Instead, it cites a small number of individual cases where fraud was uncovered but does not provide any findings or statistics showing widespread or unrestrained fraud within the process. Although an agency must "examine the relevant data and articulate a satisfactory explanation for its action,"[7] the Notice

[6] *Judulang v. Holder*, 565 U.S. 42, 45 (2011).
[7] *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

provides no justification and provides not support via research or factual analysis. As such, the Notice lacks the required legal and factual grounding to support the changes it proposes.

C. Improperly Narrows Definition of "Particular Social Group"

Asylum seekers endure an intensive, arduous process of proving they legally qualify for asylum. These individuals must demonstrate that they have a well-founded fear of persecution in their country of citizenship, and that their own government is either persecuting them or cannot or will not protect them from persecution by non-state actors. Since 1980, the persecution must be based on one or more of five "protected grounds" as set forth by the United Nations Refugee Convention: race, religion, nationality, political opinion, or membership in a particular social group.

The rule attempts to radically alter two of the five protected grounds, first by unreasonably redefining the concepts of "particular social group." For decades, both Federal courts and the U.S. Board of Immigration Appeals (BIA) have held that membership in a "particular social group" includes those who are LGBTQ+ or HIV positive.[8] Without substantial alterations, the dramatic changes made to the concept of "particular social group" will likely be misinterpreted to severely limit or even negate the protections the courts and BIA have long offered to LGBTQ+ and HIV positive individuals, despite the fact that both LGBTQ+ identity and HIV positive status are "beyond the power of an individual to change" and are "fundamental" to a person's "identity or conscience."[9]

Under the proposed rule, asylum on the basis of gender would be categorically banned as a "particular social group." Gender-based violence exists in many countries and should continue to be considered a protected ground as part of membership in a "particular social group." Since at least 1985, the BIA has found that the "particular social group" ground for asylum protects individuals persecuted on account of a fundamental characteristic, including one's sex.[10] In 1996, in a case involving genital mutilation and forced marriage, the BIA specifically recognized gender-based violence as persecution sufficient to warrant asylum.[11] Thus, for over thirty years, the law has acknowledged that an individual may be granted asylum due to persecution based on their gender. Despite this settled law, the proposed rule now wholly disallows asylum on the basis of gender. In addition to being wrong, immoral, and harmful to

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[8] *See, e.g., Avendano–Hernandez v. Lynch*, 800 F.3d 1072, 1082 (9th Cir. 2015) (finding that transgender people are members of a particular social group); *Nabulwala v. Gonzales*, 481 F.3d 1115, 1118 (8th Cir. 2007) (finding that lesbians are members of a particular social group); *Karouni v. Gonzales*, 399 F.3d 1163, 1172 (9th Cir. 2005) (finding that "all alien homosexuals" are members of a particular social group); *Amanfi v. Ashcroft*, 328 F.3d 719, 721 (3d Cir. 2003) (finding that men who are imputed to be gay are members of a particular social group); *Matter of Toboso–Alfonso*, 20 I&N Dec. 819, 822 (BIA 1990) (finding that gay men are members of a particular social group).

[9] *Matter of Acosta*, 19 I&N Dec. at 233-35 (BIA 1985).

[10] *See id*.

[11] *See Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996).

women, this change could also be misconstrued to bar claims based on gender identity and sexual orientation, thus denying LGBTQ+ individuals any ability to successfully seek asylum in this country.

As a complicating factor, the proposal also provides that the asylum applicant waives any claim based on a particular social group unless they define their particular social group in their initial asylum application or promptly in the record. This ignores the experiences of LGBTQ+ asylum seekers and the realities of the coming out process, which often occurs gradually. This provision would significantly disfavor those LGBTQ+ individuals seeking asylum who slowly come to terms with their true sexual orientation or gender identity.

D. Improperly Narrows Definition of "Political Opinion"

The proposed rule also seeks to dramatically narrow the definition of "political opinion," wherein an individual only qualifies for asylum if their political opinions are in "furtherance of a discrete cause related to *political control* of a state or unit thereof" (emphasis added).[12] This change upends well-established immigration law that permits asylum for LGBTQ+ individuals who have been persecuted because of their advocacy on LGBTQ+ equality issues.

Under this re-drafted provision, any type of LGBTQ+ advocacy or speech would not make the applicant eligible for asylum, unless the LGBTQ+ asylum-seeker was also persecuted for fighting the ruling party *specifically* for political control—instead of purely seeking societal and legal changes for LGBTQ+ individuals that are opposed by the government. Pursuant to this extreme re-definition, speech advocating for LGBTQ+ equality generally would not be viewed as "political opinion" for purposes of asylum protection, despite the fact that such conduct is clearly protected as political speech here in the U.S. LGBTQ+ activists who have been attacked for living openly or who are persecuted for publicly supporting equality for LGBTQ+ individuals would not be deemed to have a "legitimate" political opinion and would be unjustly denied relief, even when their advocacy is stridently opposed to the government.

Moreover, this change is not supported by the statute and ignores decades of precedent, which has broadly interpreted the scope of cognizable political opinions.[13] In attempting to justify this wholesale re-definition of "political opinion" the Notice blatantly mischaracterizes both BIA precedent and guidance provided by the United Nations High Commissioner for Refugees (UNHCR).

First, the Notices cites a 1996 BIA opinion, *Matter of S-P-*, in stating "BIA case law makes clear that a political opinion involves a cause against a state or a political entity rather than

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[12] Notice at 58; Proposed Rule 208.1(d), 1208.1(d).

[13] *See 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).

against a culture."[14] In addition to not actually supporting the proposed regulatory change, this is a twisting of the opinion. In that case, the BIA required an asylum applicant to demonstrate that his political views "were antithetical to those of the government" in order to make out a political opinion claim. Requiring that an opinion be "antithetical to those of the government" does not support the claim that such a political opinion must be in "furtherance of a discrete cause related to political control of a state or unit thereof." A political opinion can easily be "antithetical" to the government yet at the same time not be designed to wrest political power from that very government. LGBTQ+ rights movements around the world are evidence of this fact. For example, proponents of LGBTQ+ rights in Iran and Russia are no safer from persecution based on their political opinions because they are pleading for tolerance rather than attempting to overthrow their government.

The Notice goes on to cite the 2019 UNHCR Handbook as another basis for this regulatory change, but this analysis is even more blatantly misleading. The UNHCR Handbook, in fact, notes that in order to qualify for protection from persecution for holding a "political opinion" the applicant must hold "opinions *not tolerated* by the authorities, which are critical of their policies or methods" (emphasis added).[15] Again, a political opinion can easily be "critical" of the government's "policies or methods" and at the same not be intended to seize political control of the institutions of government. The key factor here is whether the government is persecuting the individual because it opposes their political opinion, not whether the political opinion seeks to topple the government or otherwise acquire its power.

E. Improperly Attempts to Redefine What Qualifies as Persecution

Even if these two radical changes to the concepts of "particular social group" and "political opinion" would not effectively preclude almost all LGBTQ+ asylum seekers from ever receiving protection in the U.S., the rule also redefines what constitutes persecution, alleging without any supporting evidence that this change is in line with Congressional intent.[16] Here, the Notice rewrites judicial precedent to require *actual harm* to have occurred, discounting threats of harm.

Imposing a higher standard of persecution than current law, the proposal requires that the threats be "exigent" and emphasizes that the harm must be "extreme." Although the Notice fails to define either "exigent" or "extreme", it does identify the types of harm that would not constitute persecution, including: "repeated threats with no actions taken to carry out the threats,"

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[14] *See* Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 36279 (June 15, 2020).

[15] *See* United Nations High Commission for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, (1992) at #80 p. 14.

[16] *See* Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 36281 (June 15, 2020).

"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."[17] The Notice ignores numerous court decisions—including opinions from at least 8 of the U.S. Circuit Courts—finding that threats can rise to the level of persecution where the threat is serious and credible.[18]

It is easy to imagine circumstances where repeated threats and/or brief detentions would be used to systematically persecute an LGBTQ+ individual. The unpredictability and randomness of brief detentions and intermittent harassment are deliberately used terrorize LGBTQ+ individuals and are powerfully effective because of the capriciousness of the persecutor's actions. Persecution does not only occur when it is routine, consistent, or methodical. Repeated threats of violence can effectively intimidate and terrorize, even if those threats do not regularly materialize into physical assaults. Under this proposed change, if an LGBTQ+ individual had repeatedly been threatened with serious harm, but the harm had not yet occurred, asylum would be denied, even if the individual reasonably feared for their safety. This result ignores over 20 years of decisions requiring adjudicators to look at the cumulative harm inflicted when deciding whether an asylum applicant has experienced persecution.

For those still in the country of their citizenship who wished to escape persecution and successfully receive asylum in the U.S., they would have to "roll the dice" and hope the "intermittent" or "infrequent" threats of violence did not actually materialize into violent acts that maimed or killed them. The rule cannot cruelly require an LGBTQ+ asylum seeker to have been physically assaulted, tortured, or beaten before they meet high bar of the revised definition. While 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,"[19] the proposed rule would do just that given its severe alteration of the term "persecution."

Requiring asylum seekers suffer actual violence (instead of "mere" threats) in order to show they were persecuted is an absurd rule that also fails to comport with the underlying statute or its purpose. In addition to overturning longstanding case law, this change runs counter to the reasoning behind other basic protections offered by our legal system. For example, courts do not require a woman to have been physically beaten before granting a protective order. The courts understand that threats of abuse can be sufficiently terrorizing to warrant protection. Yet, the asylum process would not offer a similar level of protection to asylum seekers if this rule is finalized.

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[17] Proposed Rule §§ 208.1(e), 1208.1(e).

[18] *See Cedillos-Cedillos v. Barr*, 2020 WL 3476981 *2 (4th Cir., June 26, 2020); *Scarlett v. Barr*, 957 F.3d 316, 328 (9th Cir. 2020); *Juan Antonio v. Barr*, 959 F.3d 778 (6th Cir. 2020); *N.L.A. v. Holder*, 744 F.3d 425, 431 (7th Cir. 2014); *Javed v. Holder*, 715 F.3d 391, 395-96 (1st Cir. 2013); *Chavarria v. Gonzalez*, 446 F.3d 508, 518 (3d Cir. 2006); *Corado v. Ashcroft*, 384 F.3d 945 (8th Cir. 2004); *Vatulev v. Ashcroft*, 354 F.3d 1207 (10th Cir. 2003).

[19] *Juan Antonio v. Barr*, 959 F.3d 778, 794 (6th Cir. 2020).

The proposal also bars asylum if the persecutory laws or policies are only enforced "infrequently." As noted above, the criminal codes of 12 countries impose the death penalty on LGBTQ+ individuals, and many other countries' criminal codes permit the torture or imprisonment of LGBTQ+ individuals. Our asylum laws should not require asylum seekers to play "musical chairs" with their lives, where an individual must take a risk that they are "left standing" when the music stops, and the government "infrequently" decides to enforce the death penalty against them because they are LGBTQ+. A nation that prosecutes LGBTQ+ identity as a crime, is persecuting LGBTQ+ individuals, regardless of the frequency of such government actions.

F. Denies Asylum Seekers A Fair Process and Their Day in Court

The foundation of the American judicial system is the guarantee of due process. Recognizing that not all applicants have access to legal representation, those seeking asylum must be permitted to testify about their case. However, the changes contained in the Notice would eliminate many court appearances, drastically expanding the circumstance where summary pretermissions are acceptable and gutting essential due process protections now utilized by many asylum seekers. Instead of requiring a merits hearing for each case, the proposed rule allows immigration judges to merely rely on written applications to deny asylum or find them "frivolous" without a hearing to determine the facts, even in *pro se* cases.

While the Notice claims that there is "no reason" to treat asylum cases "differently" from other immigration cases for purposes of pretermission, this contradicts reality.[20] The stakes in asylum cases are exceptionally high; they are literally a matter of life-or-death for many LGBTQ+ asylum seekers. With lives and safety at risk, each case should be carefully considered, and each asylum seeker should have the ability to present their case in court, regardless of whether they have the substantial financial means to afford counsel or whether they are fortunate enough to obtain pro bono legal representation.

Under the proposed rule, an immigration judge could pretermit an application for asylum upon the judge's determination that the asylum seeker failed to establish a *prima facie* claim within the four corners of the I-589 application. This pretermission would occur without any live testimony from the applicant or any witnesses. The applicant would only be given ten-days' notice prior to dismissal of their application, which is hardly enough time to cure any defects especially when the applicant does not have counsel. This drastic change would deprive many applicants of the opportunity to fully supplement their I-589 application with evidence and live testimony through a typical asylum hearing.

By permitting decisions to be made without a hearing and simply on the application paperwork, the rule penalizes unrepresented asylum seekers, the majority of whom do not have the legal

[20] *See* Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 36277 (June 15, 2020).

skills, training, or education to effectively argue their cases, who do not understand the intricacies of U.S. asylum law, and who may fail to appreciate the need to provide extensive detail within the application. Data shows that asylum seekers who have legal counsel are five times more likely to win asylum than those without legal representation, yet an increasing number of asylum seekers are attempting to navigate the immigration court system without any legal representation.[21] The complexity of applying for asylum is daunting, and under the current system it is already almost impossible for the many who do not have legal representation. As any immigration attorney can attest, eligibility for asylum is a complicated legal question and requires great specificity in the factual record contained in the application. An asylum seeker, especially one without representation, needs the in-person hearing to ensure that all relevant information has been presented to the court.

Further, the asylum application itself is confusing and filled with legalese that is incomprehensible to most native-English speakers, much less those whose English skills are limited or where English is a second language. For those asylum seekers who do not fully understand the need for great specificity when presenting evidence of persecution and for those who are mistrustful of governments based on their past persecution, this change would be ruinous. This problem would be particularly acute for LGBTQ+ individuals, who have learned the painful lesson to "closet" their status as a mode of self-preservation and who may be reluctant to fully detail their sexual orientation or gender identity. Nevertheless, under this proposed change, a judge could simply declare that a poorly drafted or incomplete application does not contain "sufficient" evidence or "sufficiently" state a claim, without any further inquiry to determine if the requisite evidence actually exists. An in-person hearing provides for such opportunity and ensures all asylum seekers have the ability to "state their case" – a hallmark of our judicial system that this rule seeks to deny for asylum applicants.

Compounding this serious concern, the proposed rule also dramatically lowers the bar for findings of frivolous applications by eliminating the requirement that the fabrication be "deliberate" and "material." This means a wide array of LGBTQ+ asylum seekers could be subject to summary denials, including if the adjudicator simply determines the claim is without merit. Findings of frivolous applications have grave consequences. Once a judge determines an application is "frivolous" the individual is banned from any other applicable immigration relief.

Finally, allowing decisions solely on the papers would encourage judges to dismiss cases in order to clear their docket, especially given that the current immigration system is overloaded and understaffed. Recently, the Department of Justice has imposed performance quotas on immigration judges; their job security is explicitly tied to how many claims they process.[22]

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[21] *See* TRAC Immigration, *Continued Rise in Asylum Denial Rates: Impact of Representation and Nationality*, https://trac.syr.edu/immigration/reports/448/ (2016).

[22] *See* DOJ, *Case Priorities and Immigration Court Performance Measures*, Jan. 17, 2018, https://www.justice.gov/eoir/page/file/1026721/download.

Judges concerned about their livelihood would be incentivized by the proposed rule to focus on "efficiency" and could quickly eliminate their case backlogs by denying applicants without holding hearings on the merits. Again, such actions would impose grave harms on asylum seekers, particularly those without legal representation.

G. New Discretionary Factors are Wholly Arbitrary

The proposed rule also sets out 12 discretionary factors that adjudicators *must* consider before granting asylum; 9 of these 12 factors can be disregarded only in a very limited number of "extraordinary circumstances".[23] These arbitrary bars to asylum have little or no connection to the process and would force adjudicators to give negative weight to irrelevant factors. While the granting of asylum is a discretionary benefit under the Immigration and Nationality Act, it is well-established that a negative discretionary factor must be significantly egregious before a claim may be denied. In direct opposition to the BIA's findings in *In re Pula,*[24] most of these factors have nothing to do with the merits of a claim and would result in broad denials to LGBTQ+ applicants with clearly meritorious cases.

The proposed rule lays out two new categories of discretionary factors: one which is presumptively "significantly adverse" to an exercise of discretion and another which totally precludes a grant of asylum. These newly proposed discretionary factors create draconian consequences for those individuals who lack actual knowledge of U.S. law and who do not have legal representation before they even travel to the U.S. In fact, these discretionary factors appear to be callously drafted to create traps for the most vulnerable members of our global society—those fleeing persecution. These factors are irrelevant to a person's need for protection and should not be used as a basis to deny asylum. However, under these proposed rules, adjudicators would be required to consider and give negative weight to cases where any one of these discretionary factors is present.

A particularly arbitrary trap is found in the proposed requirement that would bar asylum to anyone who passes through more than one country before arriving in the U.S. This absurd requirement is arbitrary and capricious. The fact that an asylum seeker's flight had layovers in other countries has no basis on whether the individual has faced persecution in their country of citizenship. Furthermore, not only are direct or single layover flights to the U.S. cost prohibitive

[23] Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 36283-36284 (June 15, 2020) ("The adjudicator *must* consider all three factors, if relevant, *during every asylum adjudication*.")(emphasis added) and ("If the adjudicator determines that any of these nine circumstances apply during the course of the discretionary review, the adjudicator may nevertheless favorably exercise discretion *in extraordinary circumstances*, such as those involving national security or foreign policy considerations, or if the alien demonstrates, by clear and convincing evidence, that the denial of asylum would result in an exceptional and extremely unusual hardship to the alien.")(emphasis added).

[24] In this case, the BIA noted that because "the danger of persecution should generally outweigh all but the most egregious of adverse factors," discretionary factors "should not be considered in a way that the practical effect is to deny relief in virtually all cases." *In re Pula*, 19 I. & N. 467, 473–74 (B.I.A. 1987).

for many asylum seekers, it may be impossible to secure a such flights from some countries, even if the individual possessed the significant financial resources to incur those costs. This requirement will deny asylum applicants protection simply because they were not able to navigate the "correct" escape route from persecution as they journeyed to the United States.

Further, the amendments to the definition of "resettlement" would bar asylum for an LGBTQ+ asylum seekers who was in a third country at any point in time, regardless of whether the individual had actual knowledge that they could resettle in that country and regardless of whether that country was actually safe for LGBTQ+ individuals. Currently a narrow exception, the firm resettlement bar as rewritten would now apply to a majority of asylum applicants. This requirement appears to be another attempt to "trip up" those seeking asylum, expecting that they have a firm grasp on the minutiae of U.S. asylum law even before they arrive in our country.

Most notably, the Agencies severely overstep in attempting to alter the definition of "resettlement," as this new definition fails to comply with the statute or Congressional intent. Even the Notice obliquely recognizes this, by admitting that the definition "has remained the same for nearly 30 years."[25] The statute bars asylum where the alien was "*firmly* resettled in another country prior to arriving in the United States" (emphasis added).[26] The proposed rule totally disregards the adverb "firmly," wrongly treating the word as surplusage. One of the most elementary cannons of statutory construction, followed by every court in this nation, requires courts to give each word and clause of a statute operative effect.[27] As the U.S. Supreme Court has noted, a "statute should be construed so that . . . no part will be inoperative or superfluous, void or insignificant."[28] Yet, that is what the proposed rule plainly does here; it voids the modifier "firmly".

The adverb "firmly" indicates there is little possibility of movement; that something is fixed and securely in place.[29] Thus, in the context of resettlement, the statute requires there must be a positive action on the part of the asylum applicant to have deliberately settled in the third country. Under the statute, resettlement must be more than a mere possibility and does not occur when one merely passes through a country or is in the country for a brief period. By using the adverb "firmly," the statute requires a purposeful decision and clear intent on the part of the applicant. The plain wording of the statute does not support the change proposed in subsection (a) of the definition, which finds firm settlement occurs if the alien "could have resided" in the third country.

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[25] *See* Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 36285 (June 15, 2020).
[26] 8 U.S.C. § 1158(b)(2)(A)(vi) (2020).
[27] *See Duncan v. Walker*, 533 U.S. 167, 174 (2001).
[28] *Hibbs v. Winn*, 542 U.S. 88, 101 (2004).
[29] See Cambridge English Dictionary, https://dictionary.cambridge.org/us/dictionary/english/firmly ("in a way that will not become loose" and "strongly and tightly).

To create even greater barriers to a successful asylum claim, the proposed rule also shifts the burden of proof once the issue of resettlement has been raised by the government or the adjudicator. Currently, where firm resettlement is raised as a bar to asylum, the burden rests on the government to prove that an offer of permanent status exists. If the government meets that burden, the asylum seeker can rebut the evidence by showing that they did not receive an offer of firm resettlement or did not qualify for such status. Under the Notice, where the government or adjudicator raises the issue of firm resettlement – which does not require the government to concomitantly present any proof that firm resettlement is probable or even possible – the burden of proof then immediately shifts to the applicant to demonstrate that they *could not obtain* some type of immigration status in the third country. This burden shifting is unwarranted. In the case of *pro se* applicants, it would move the burden of researching comparative asylum law coverage from professional Immigration and Customs Enforcement attorneys, who deal with such issues for a living, to asylum seekers with widely varying levels of education, language proficiency, and sophistication.

Here again, the proposed change requires someone experiencing persecution to navigate the "correct" escape route as they traveled to the United States. This intentionally ignores the realities of the process one goes through while leaving a home country in order to seek asylum. It would require the applicant to determine, prior to fleeing persecution in their country of origin, whether any other country they may pass through on their journey to the United States could *potentially* grant them immigration status. The potential language barriers and differing legal structures that are likely to exist are just two impediments that make this an unreasonable and unnecessary requirement at the outset.

LGBTQ+ asylum seekers would have the added burden of determining how the third country treated LGBTQ+ individuals and if the country's laws permitted discrimination on the basis of sexual orientation or gender identity. The Agencies apparently would require LGBTQ+ individuals under the stress of persecution to pause and take time to research and understand the immigration laws of a third pass-through country as well as whether that pass-through country's laws and culture sanctioned or encouraged bigotry and violence against those who identify as LGBTQ+. Under the proposal, all of this would have to occur *before* the LGBTQ+ individual actually fled persecution and violence in their country of citizenship. This expectation is outrageous and cruel. For an LGBTQ+ asylum seeker facing the stresses of persecution and fearing for their life and safety, this would be an insurmountable burden to impose prior to them fleeing their country of origin.

H. Imposes Changes Retroactively

The rule also appears to apply retroactively to the almost 350,000 pending asylum cases, where asylum seekers have already applied for asylum and are awaiting a hearing or interview to

present their cases.[30] Changing the rules "in the middle of the game" for these individuals is not only unfair and unjust, but it is also unlawful, as these asylum seekers have a reliance interest in the current state of the law. Any proposed changes to the asylum process must clearly indicate that they are not to be applied retroactively.

I. Many Proposed Provisions are Ultra Vires

Many of the changes proposed by the Notice fail to fall within the authorized scope of the relevant statutes or treaties, and some changes even contradict and violate existing law, including the Immigration and Nationality Act; the Refugee Act; and the 1967 Status of Refugees Protocol ratified by Congress in 1968. Numerous portions of the Notice also patently misinterpret the underlying statutes, based both on the statutes' plain textual language and also based on their legislative intent and history. As such, the National LGBT Bar strenuously objects to these ultra vires proposals. The Agencies have no power to make changes which would defy the laws enacted by Congress and which controvert existing statutory language. In addition to the numerous ultra vires issues the National LGBT Bar raises in the comments above, we provide several additional examples here.

First, the Notice proposes to bar asylum to individuals who submit their applications more than one year after arriving in the U.S. This provision ignores how LGBTQ+ experience the coming out process and would disproportionately disadvantage LGBTQ+ asylum seekers. First, accepting one's sexual orientation or gender identity is a multi-step process, often occurring gradually over a period of months or even years. To expect an individual's coming out process to fit neatly into a set one-year timeframe is nonsensical and belies reality. This is especially true for younger LGBTQ+ asylum seekers who may initially come to the U.S. to attend high school or college and who come to terms with their sexual orientation or gender identity during that time period. Second, many LGBTQ+ individuals fleeing persecution based on their identity are fearful and mistrustful of government officials based on their past experiences of persecution and harassment. Expecting these LGBTQ+ individuals to immediately trust a government official, even a U.S. government official, is unrealistic, especially when these individuals have been persecuted by others with governmental authority in their country of origin. For these reasons, LGBTQ+ asylum seekers may be initially unable or reluctant to disclose their sexual orientation or gender identity to the government within this one-year timeframe.

This one-year requirement also explicitly violates the Immigration and Nationality Act's provisions, which clearly provide exceptions to the one-year filing deadline.[31] The proposed

[30] As of September 2019, there were 339,836 affirmative asylum cases pending. *See* U.S. Customs & Immigration Services, *Asylum Office Workload*, (September 2019). https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/PEDAffirmativeAsylumStatisticsFY2019.pdf.

[31] *See* 8 U.S.C. § 1158(a)(2)(D) (2020).

rule's provisions disregard the plain language of the statute, which permits the consideration of an application involving "either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application".[32] Changed circumstances would include a situation where an individual has just begun to identify as LGBTQ+ and accept their own sexual orientation or gender identity. Yet, the proposal fails to incorporate these exceptions and, as such, is an ultra vires act by the Agencies.

Further, under the Immigration and Nationality Act, asylum seekers may claim asylum *wherever* they find themselves, even if their location is not at a port of entry.[33] Yet, the proposal instructs adjudicators to deny an applicant asylum if they enter the United States without inspection, which occurs only at ports of entry. This is an attempt by the Agencies to eliminate what is known as "defensive asylum." However, the Immigration and Nationality Act provision at issue here is not written as permissive text providing the Agencies leeway; it is a mandatory requirement that any alien who arrives in the United States "whether or not at a designated port of arrival" may seek asylum.[34] Any attempt to narrow this provision is in clear violation of the statute and would not withstand judicial scrutiny.

Finally, the Notice misrepresents the Congressional intent that underlies its creation of the asylum process. The Notice opens by declaring that "the laws and policies surrounding asylum are an assertion of a government's right and duty *to protect its own resources and citizens*" (emphasis added).[35] As support of this preposterous proposition on which the entire proposed rule stands, the Notice cites a 1972 Supreme Court case.[36] Unfortunately for the Agencies, this case is far from on point. In addition to being decided *years before* the Refugee Act of 1980 was adopted, the Supreme Court case only involved the denial of a non-immigrant visa. The case had *nothing* to do with asylum and did not even consider any asylum-related issues. Further, the theoretical underpinnings for our conventional immigration system for foreign visitors dramatically differ from the rational for an asylum process meant to assist the persecuted. This case cannot be used to justify callous and cruel regulations that would brutally obliterate our current asylum process.

In addition to misinterpreting plain statutory text, the Notice fails to acknowledge the clearly stated Congressional intent behind the Refugee Act of 1980. One only has to look at the statute itself to see that Congress explicitly "declares that it is the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands. The

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[32] *Id*.
[33] *See* 8 U.S.C. § 1158(a)(1) (2020).
[34] *Id.*
[35] Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 36265 (June 15, 2020).
[36] *See Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972).

objectives of this Act are to provide a permanent and systematic procedures for the admission to this country of refugees."[37]

The purpose of the asylum process enacted by Congress was not to protect U.S. resources or American citizens. It was to help save persons who were facing "persecution in their homelands." The U.S. was to be a refuge for those who could not find refuge in their countries of citizenship. As the U.S. Supreme Court has noted, "If one thing is clear from the legislative history of the new definition of 'refugee,' and indeed the entire 1980 Act [*i.e.*, the Refugee Act of 1980], it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees, 19 U.S.T. 6223, T.I.A.S. No. 6577, to which the United States acceded in 1968."[38] The Status of Refugees Protocol does not regard asylum as a way to protect a country's resources or citizens.

Although the Notice engages in obfuscation on this matter, it is plainly evident that Congress did not assert American protectionism when it created the current asylum process. Instead it unambiguously based the process on compassion, grounded in the promotion of human welfare—also known as humanitarianism. To ignore clearly stated Congressional intent and attempt to justify the proposed rule on such fallacious grounds is further evidence of the ultra vires nature of these severe provisions.

III. Conclusion

In conclusion, the radical proposals contained in the Notice are unwarranted, arbitrary, and unfair, especially in light of the fact that such changes do not advance any governmental interest and provide no benefit--real or imagined--to the general public or even to American "resources." The Notice erects new barriers at every stage of the asylum process. These barriers are designed to be impossible to meet for the vast majority of LGBTQ+ asylum applicants, which will result in tens of thousands of asylum seekers being returned to face harm in their country of origin. As such, the Notice specifically disregards the legitimate need to protect those seeking asylum and conspicuously fails to articulate and substantiate any valid public policy objective for profoundly altering the current asylum program.

Accordingly, the National LGBT Bar, on behalf of its board of directors, its members, its affiliate state and local bar associations, and LGBTQ+ attorneys, law students, and legal professionals residing throughout this nation, unequivocally demand that the Agencies to withdraw the Notice, thereby preserving a functioning asylum system in the U.S. The monumental concerns raised by the National LGBT Bar and so many other organizations and individuals with vast experience with and expertise in the U.S. asylum system cannot go unnoticed by the Agencies or the American public.

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[37] Refugee Act of 1980, P.L. 96-212; 8 U.S.C. § 1521 note.
[38] *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436-37 (1987).

Our country should be committed to humanity, freedom, and compassion for those fleeing persecution based on their sexual orientation or gender identity, and our government should continue to offer refuge to the persecuted. However, under the provisions of this Notice, nearly all LGBTQ+ people seeking such refuge would be turned cruelly and inhumanely away. The American people will not allow this to happen, and any attempted dismantling of our asylum system, as this proposal envisions, will not stand.

The National LGBT Bar, together with all of America, will ensure that "world-wide welcome" continues to glow from America's "beacon-hand" and that the words of Emma Lazarus continue to have meaning, especially for those who arrive on our shores fleeing horrific persecution.

Sincerely,

Wesley D. Bizzell, Esq.
President
National LGBT Bar Association