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

Office of Information and Regulatory Affairs,
Office of Management and Budget,
725 17th Street NW, Washington, DC 20503;
Attention: Desk Officer, U.S. Citizenship and Immigration Services, DHS

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

Dear Director Alder Reid, Desk Officer:

We submit the following comment urging the Department of Justice and Department of Homeland Security to withdraw the proposed Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review in their entirety. New York Lawyers for the Public Interest (NYLPI) is a community-driven civil rights organization located in New York City, specializing in the areas of disability rights, access to health care, and environmental justice. NYLPI has a long commitment to immigrant justice and to addressing the challenges faced by immigrant communities. Since 2016, NYLPI has provided direct immigration representation and social services support to immigrants, including asylum seekers, and helped immigrant New Yorkers gain access to better healthcare coverage that provides otherwise unattainable lifesaving treatments. As an organization, we continue to adapt and respond to the rapid pace of changing needs of our immigrant communities in New York City.
We oppose these proposed rules in their entirety. We also find unreasonable that the Department of Homeland Security has only given 30 days for interested parties to comment, when 60 days are typically granted. We focus this comment on the aspects of the proposed Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review (hereinafter, “the proposed rules”) that will have an outsized effect on our client populations. In particular, we are most concerned with the following aspects of the proposed rules:

1. The proposed “persecution” standard is too narrow and is incompatible with international law.
2. The exclusion of gender leaves behind vulnerable populations including LGBTQ and/or people living with HIV who should be eligible for asylum.
3. The proposed discretionary bars are frivolous, irrelevant, and allow for successful asylum claims to be knocked out on unfair grounds.
4. The proposed rule impermissibly heightens the legal standards for credible and reasonable fear interviews and will turn away refugees without providing them a full and proper hearing.

In summary, the proposed rules violate the United States’ obligations under domestic and international law and eliminate the United States as a leader in providing humanitarian protection for the most vulnerable. The proposed rule upends decades of legal precedent, rewrites laws passed by Congress, and blatantly violates U.S. treaty obligations by returning refugees with well-founded fears of persecution to countries where they face severe harm and even death. Thus, we call upon the administration to withdraw these proposed rules in their entirety. Please see further explanation why these proposed rules must be withdrawn.

THE PROPOSED “PERSECUTION” STANDARD IS TOO NARROW AND IS INCOMPATIBLE WITH INTERNATIONAL LAW.

Article 1A(2) of the 1951 Convention Relating to the Status of Refugees (hereinafter, “the Convention”) sets forth the elements that must be met for an asylum-seeker to qualify as a refugee under the Convention. The Convention states the term applies to any individual who:
As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

Fundamental to this definition is the obligation of countries to protect individuals with well-founded fears of persecution from being returned to harm. *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 428, (1987); *see also States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol* (showing that the United States is a signatory to the Protocol). Although the term “persecution” is not defined in the 1951 Convention or in any other international instrument, from Article 33 of the 1951 Convention, it can be inferred that a threat to life or physical freedom constitutes persecution, as well as other serious violations of human rights. The United States has signed on to the convention and has adopted the definition of asylum into our own immigration and nationality statute. Asylum status is a form of legal protection available to individuals who meet the definition of a refugee.

Through our experience representing immigrant New Yorkers, we have successfully advocated for individuals seeking asylum who demonstrated cumulative harm. Discrimination, in particular, can constitute persecution if it is linked to a protected right, such as freedom of religion, or if there has been a persistent pattern of discrimination that reaches a certain level of harm for the particular individual. Discriminatory measures which would not amount to persecution taken separately may, when aggregated, render the situation for the applicant intolerable. This would be considered persecution on “cumulative grounds.” When assessing whether particular treatment or measures amount to persecution, decision makers consider both subjective and objective factors. As for an applicant’s subjective fears, the adjudicator will assess factors that relate to the particular person including the opinions, feelings, and psychological make-up of the applicant. In each case,
adjudicators must determine in light of the specific individual circumstances whether or not the threshold of persecution is reached.

The administration is now proposing a deeply unreasonable and dangerously narrow standard for what constitutes “persecution.” For the first time there will be a regulatory definition of persecution. The proposed rules emphasize that the harm a person experiences must be “extreme” and that threats must be “exigent.” This narrow definition eliminates the possibility of demonstrating cumulative harm. As a result, applicants who have suffered multiple “minor” beatings or multiple short detentions would likely be disqualified under the proposed rules. We in fact had a client who demonstrated multiple minor beatings as part of the past harm he suffered as a child. He was granted asylum in part because the several beatings he endured by his stepfather were deemed persecution. The proposed rules’ use of “exigent threat” erases the experience of those surviving warfare, multiple unjustified detentions, or being the subject of laws that explicitly discriminate against them. Additionally, the proposed rules undermine international standards, ones the United States had chosen to follow. It’s untenable that the new rules should upend and re-write the obligations of the United States.

In our work, NYLPI has set forth persecution definitions that have been part of successful asylum claims that would not meet this new standard for persecution. These definitions have protected people who have fled their country of origin due to medical disability or because of their sexual and/or gender identities. Often these winning claims are based on applicants’ illustration of repeated harm, that in the aggregate sufficiently demonstrated past persecution. Now asylum claims that were once victorious would fail under this new standard. This new standard is wrong and would force meritorious asylum seekers to lose asylum and eliminate a pathway to living securely in the U.S.
These new proposals threaten people NYLPI serves in both our programs dedicated to undocumented immigrants: 1) a program for immigrants who are seriously ill, and 2) a program supporting undocumented immigrants who are transgender and/or HIV-positive. Our clients who are seriously ill often can demonstrate a fear of future harm based on medical disability. That medical disability is often due to country conditions that demonstrate pervasive discrimination and/or animus towards individuals with their medical condition. For instance, we have been able to win an asylum for a client who suffered from a failing heart and had a left ventricular assist device (LVAD). We were able to demonstrate the widespread discrimination that he would suffer if forced to return to his country of origin. The pervasive discrimination would have affected his ability to obtain the medical care he needed, and he would have died if forced to live there. His death would not necessarily have been immediate. Individuals with heart failure can live a long time without a transplant—sometimes years. One thing is certain: they will die if they do not receive a heart transplant, and they will suffer throughout. For our client, his fear of death was partly why he won asylum. Under this new standard, he might have lost his claim and would have been forced to die in his country of origin because a slow death due to heart failure might not meet the new definition of persecution.

Similarly, our clients who are HIV-positive have won asylum due to past and future persecution on account of widespread, pervasive harm they experienced in their countries of origin due to their HIV-positive status. The discrimination many of them faced was such that they could not survive in their countries of origin because they could not seek employment or seek medical services without being shunned and harassed. Again, this new persecution standard would deny HIV-positive individuals the ability to win asylum on the basis of such invidious discrimination because it would not meet the standard of exigency as described in the proposed regulations. This
new standard will make worthy asylum seekers suffer further harm, and discriminates against those who are HIV-positive and will undermine years of precedent compliance with international law.

THE EXCLUSION OF GENDER LEAVES BEHIND VULNERABLE POPULATIONS INCLUDING LGBTQ+ PEOPLE WHO SHOULD BE ELIGIBLE FOR ASYLUM.

The proposed rules explicitly foreclose what should be successful asylum claims based on gender. Gender-related claims may fall within any of the five protected grounds for asylum. Gender is recognized as a basis for asylum by both the United Nations High Commissioner for Refugees (UNHCR) and the immigration courts. The UNHCR Guidelines on Gender-Related Persecution provide detailed guidance on examining gender-related claims.¹ In the BIA case Matter of Kasinga² 21 I&N Dec. 357 (BIA 1996), the board established that individuals fleeing gender-based violence can form a particular social group and can seek asylum in the United States. The recognition of Matter of Kasinga opened the door for tens of thousands of women targeted for genital cutting. The proposed rules would turn this nation’s back on this historic legal win, and on thousands of survivors seeking asylum.

The rule bans asylum on the basis of gender outright, which could be misinterpreted to also bar claims based on gender identity or sexual orientation. The proposed rules state that gender persecution is something that involves only “interpersonal disputes of which governmental authorities were unaware or uninvolved” or “private acts of which governmental authorities were unaware or uninvolved.” From all angles, these proposed rules shut down any avenue available for a survivor to assert a claim of experiencing persecution in the form of gender-based violence on account of membership in a social group, a fundamental and recognizable part of identity.

¹ UNHCR, Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, 7 May 2002, HCR/GIP/02/01, http://www.unhcr.org/refworld/docid/3d36f1e64.html
In attacking and narrowing the definition of what could be considered persecution because of one's political opinion, the new rules would eliminate the ability to claim persecution on the basis of standing up for cisgender and transgender women or for activism against gender-based violence or in support of gender equality. The proposed rules state these actions are not politics, and thus not political opinion. A categorical denial of all cases where gender is part of the nexus is antithetical to the case-by-case analysis required under asylum law.

Additionally, the proposed rules prohibit submission of evidence critical to supporting LGBTQ+ asylum claims. The rules would exclude the consideration of evidence based on “cultural stereotypes.” This would likely prevent LGBTQ and HIV-positive asylum seekers from submitting third party evidence by witnesses, family or friends that can attest to the harm an asylum seeker suffered. It could also prevent crucial country conditions evidence demonstrating pervasive anti-LGBTQ+ sentiment in their country of origin. Country conditions evidence is critical to establish why asylum seekers cannot safely relocate to another part of their country. As a result, LGBTQ and HIV-positive asylum seekers, who are often the victims of trauma and who have sometimes been cut off from their families and communities and have little access to evidence to prove their claims, will be hampered in demonstrating the merits of their claim. This evidence has long been accepted by adjudicators to support LGBTQ+ asylum claims.

Currently, NYLPI has a program dedicated to transgender people who are fleeing their country of origin. Each year, transgender migrants arrive at the United States’ southern border to seek asylum from regions where cultural stigma and increasing political and social unrest have made them targets for violence. For our clients, actions that they take as activists and proponents of transgender and/or LBTQ rights would no longer count as a basis for determining that they are experiencing persecution. Their actions as activists would garner negative attention and
mistreatment but would no longer be considered a basis of persecution under this new rule. That is simply unacceptable and why these new rules must not go into effect.

**THE PROPOSED DISCRETIONARY BARS ARE FRIVOLOUS, IRRELEVANT, AND ALLOW FOR SUCCESSFUL ASYLUM CLAIMS TO BE DISQUALIFIED ON UNFAIR GROUNDS.**

In order to win asylum, applicants must merit a favorable exercise of discretion. *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 423, (1987). For decades, the United States has recognized the unique situation of asylum seekers and found that “the danger of persecution should generally outweigh all but the most egregious of adverse factors.” *Matter of Pula*, 19 I&N Dec. 467, 474 (BIA 1987). The proposed rules would turn on its head years of jurisprudence and deny most asylum applications on discretionary grounds. It would severely limit an adjudicator’s ability to exercise discretion. It must be withdrawn.

These new discretionary factors will ensure that asylum seekers are ultimately denied, even if they manage to meet the incredibly high standard for asylum. Some of the worst discretionary bars include denying asylum if an applicant resided in any third country for 14 days, barring asylum claims for asylum seekers who used fraudulent documents, barring asylum to those applicants who entered without inspection, and eliminating asylum for those who fail to file an asylum application within one year of arrival without any exceptions.

The penalties for entering the country without inspection or entering at a port of entry but residing in a third country for 14 days or more are particularly cruel, given that the United States has a “metering” policy for asylum seekers. Through this policy, asylum seekers at ports of entry are often turned back and required to wait for months in Mexico just for the opportunity to be heard at a port of entry. The current practice of limiting the number of individuals permitted to access the asylum process means that once this new rule is in effect, they will ultimately be denied asylum for complying with the U.S. immigration policies. These proposed rules place asylum seekers in an
impossible position where they will be denied asylum if they wait on the “metering” lists at a port of entry but will also be denied asylum if they cross the border without inspection in order to make their requests for protection.

The proposed rule unlawfully contradicts the plain language of the INA § 208(a)(2)(d), which explicitly allows for exceptions to the one-year filing deadline for asylum based on changed or extraordinary circumstances. The proposed rule seeks to eliminate the possibility for an applicant who has been in the United States for more than one year without lawful status to be eligible. This rule change ignores the fact that some individuals are in the United States for many years with no need to seek asylum until there is a changed circumstance in their country of origin or personal circumstances. Likewise, many asylum seekers are prevented by extraordinary circumstances, including mental health issues such as post-traumatic stress disorder as a result of the persecution they have fled, from filing for asylum within one year of arriving in the United States. The administration should not eliminate these vital exceptions to the one-year filing deadline in the guise of “discretion.”

Under the proposed rules, all our clients would be ineligible for asylum because they would not overcome these discretionary bars. Individuals who are incredibly sick and will die if forced to return to their countries of origin would now be doomed to be ineligible for asylum and potentially ineligible for lesser forms of relief. Similarly, our transgender and/or HIV-positive asylum seekers would no longer be able to seek protection from countries with gross LGBTQ human rights violations and/or rampant discrimination based on a positive HIV status. For example, our transgender and/or HIV-positive clients often must travel through more than one country to apply for asylum in the U.S. These transit countries are often unsafe places for transgender and/or HIV-positive people to transit through. In particular, many of our clients are seeking protections from
countries in Central America and are forced to transit through other Central American countries with equally unsafe country conditions and that lack functioning asylum systems.

**THE PROPOSED RULE IMPERMISSIBLY HEIGHTENS THE LEGAL STANDARDS FOR CREDIBLE AND REASONABLE FEAR INTERVIEWS AND WOULD TURN AWAY REFUGEES WITHOUT PROVIDING THEM A FULL AND PROPER HEARING.**

The proposed rule would also make it significantly more difficult for asylum seekers subject to expedited removal to have their requests for asylum fully considered by an immigration judge. When Congress added expedited removal to the INA, it intentionally set a low standard for the credible fear interview (“significant possibility”) so that refugees are not deported and are protected from severe harm. Under this rule, the government redefines the broad “significant possibility” standard to mean “a substantial and realistic possibility of succeeding.” This definition contradicts the clear language of “significant possibility” that Congress set forth at INA § 235(b)(1)(B)(v) and must therefore fail, because it is *ultra vires*.

The proposed rule would also greatly increase the burden on those who would be eligible for withholding of removal or protection under the Convention Against Torture to pass an initial interview and pursue their claims before an immigration judge. Under the proposed rule, asylum seekers who would be subject to a bar on asylum would have to meet this significantly heightened requirement to even be permitted to have their cases heard before an immigration judge. With these provisions in the proposed rules, the government would essentially eliminate the “significant possibility” legal standard adopted by Congress in the INA and replace it with a higher “reasonable possibility” standard, which is far more difficult for asylum seekers to meet.

All our clients seeking asylum went through a credible fear interview. They are clients who are either transgender persons or living with HIV. Under this new standard they could be deemed to fail to demonstrate a substantial and realistic possibility of succeeding and be deported back to their country of origin, where the conditions are such that they will most likely suffer serious harm and
perhaps death. Congress never intended for meritorious asylum seeker to have to make out an asylum claim at the credible/reasonable fear interview. This change must be withdrawn

In sum, these proposed rules are violative of domestic and international legal standards and will eliminate asylum for those seeking entry at the southern border. These proposed rules will deny protection to vulnerable asylum seekers fleeing persecution and will increase the risk that transgender and/or HIV-positive people will be returned to countries where their lives are in peril. We, therefore, strongly urge the Department of Justice and Department of Homeland Security to withdraw the proposed Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, in their entirety.

Sincerely,

/s/

Ylcana Roman, Esq.
Senior staff attorney
yroman@nylpi.org

Will Sheenan, Esq.
Legal intern
wsheenan@nylpi.org