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RE: ASISTA Comment in Response to *Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review*; RIN 1615-AC42 / 1125-AA94 / EOIR Docket No. 18-0002/ A.G. Order No. 4714-2020

Dear Assistant Director Reid, Chief Dunn, and USCIS Desk Officer:

On behalf of ASISTA, I am submitting comments in response to the Executive Office for Immigration Review (EOIR), Department of Justice (DOJ); U.S. Citizenship and Immigration Services (USCIS), Department of Homeland Security (DHS)'s joint notice entitled "Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review" ("proposed rule") published in the Federal Register on June 15, 2020.¹ We wish to express our strong opposition to the proposed changes to the asylum process and eligibility requirements. The proposed rule needlessly and unjustly eliminates protections for the vast majority of asylum seekers, including survivors of gender-based violence.

¹ RIN 1125-AA94, EOIR Docket No. 18-0002 "Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review 85 FR 36264 (June 15, 2020)(hereinafter "Proposed Rule"), available at <https://www.federalregister.gov/documents/2020/06/15/2020-12575/procedures-for-asylum-and-withholding-of-removal-credible-fear-and-reasonable-fear-review>

ASISTA’s mission is to advance the dignity, rights, and liberty of immigrant survivors of violence. For over 15 years, ASISTA has been a leader on policy advocacy to strengthen protections for immigrant survivors of domestic violence, sexual assault, human trafficking and other crimes created by the Violence Against Women Act (VAWA) and the Trafficking Victims Protection Act (TVPA). We assist advocates and attorneys across the United States in their work on behalf of immigrant survivors of violence. We submit this comment based on these guiding principles and our extensive experience.

I. DHS and DOJ (“the Departments”) have provided insufficient opportunity to comment

The National Governors Association, along with organizations like the National League of Cities, and the United States Conference of Mayors, wrote to President Trump requesting a formal pause, beginning on March 11, for all open public comment periods concerning both active rulemakings and nonrulemaking notices across every federal department or agency.² They cited that “the extreme impact on normal working and living conditions will impair the ability of not only state and local officials, but also the general public, issue experts and others to provide thoughtful and meaningful participation and involvement in potential federal government actions that directly affect millions of people.”³

Similar letters were also sent to the Office of Management and Budget from Members of the House and Senate.⁴ These sign-on letters requested that the agency freeze the formal federal rulemaking process and administrative actions unrelated to the COVID-19 pandemic response, and extend public comment periods. As fourteen House Committee Chairs correctly noted, “The right of the American people to meet with federal agencies and comment on proposed actions is invariably affected by the ongoing pandemic.”⁵

The proposed rule is extremely problematic in both substance and in form. Executive Order 12866 provides that agencies “should afford the public a *meaningful opportunity* to comment on any proposed regulation, which in most cases should include a comment period of *not less than* 60 days.”⁶ The Departments have placed unjustified administrative and personal burdens on

² See Letter from the National Governors Association, National Conference of State Legislatures, The Council of State Governments, National Association of Counties, National League of Cities, The United States Conference of Mayors, and other state and local government associations (March 20, 2020), at <https://www.nga.org/letters-nga/state-and-local-government-organizations-seek-pause-on-public-comments-on-rulemaking-processes/>.

³ *Id.*

⁴ Letter from Representatives to Office of Management and Budget (April 1, 2020), available at <https://edlabor.house.gov/imo/media/doc/Committee%20Chairs%20Letter%20re%20Comment%20Period%20Extension.pdf>; Letter from Senators to Office of Management and Budget (April 8, 2020), available at <https://www.tomudall.senate.gov/imo/media/doc/4.8.20%20United%20States%20Senate%20Letter%20to%20OMB%20Acting%20Director%20Vought%20FINAL%5b1%5d.pdf>.

⁵ Letter from Representatives to Office of Management and Budget (April 1, 2020), available at <https://edlabor.house.gov/imo/media/doc/Committee%20Chairs%20Letter%20re%20Comment%20Period%20Extension.pdf>.

⁶ [Emphasis added]. Executive Order 12866 58 Fed. Reg. 190 (September 30, 1993), available at <https://www.archives.gov/files/federal-register/executive-orders/pdf/12866.pdf>

interested stakeholders by providing a wholly inadequate timeframe in which to submit comments. The importance of a sufficient comment period is even more critical due to the extraordinary changes to working conditions caused by the COVID-19 pandemic. The demands of responding to sweeping changes to immigration policy while simultaneously engaging in child care and other caretaking responsibilities presents an enormous hardship to our organization and other stakeholders.

The proposed rule is over 40 pages long in the Federal Register and is extremely complex and detailed. In addition, it contains internal inconsistencies regarding relevant deadlines, adding to the confusion. For example, the proposed rule indicates that the deadline for comments for the information collection for the I-589: Application for Asylum and for Withholding of Removal under the Paperwork Reduction Act will be accepted until August 14, 2020⁷ while the deadline for the 40+ page comment is only 30 days.

For these procedural deficiencies alone, the Departments should rescind the proposed rule given the enormous burdens it places on those wishing to submit public comment. In the alternative, the Departments should give the public at least 60 continuous days to have sufficient time to provide more comprehensive comments. Given the extreme limitations the Departments have placed on the comment period, this comment reflects only a fraction of the substantive issues we would have liked to address in our response.

II. The Proposed Rule Erodes Asylum Protections And Creates Undue Burdens for Applicants, Including Those Fleeing Gender-based Violence.

Immigrant survivors of violence already face numerous barriers to applying for asylum, and the proposed rule will only create additional ones. For decades, the United States has been committed to protecting those who are fleeing persecution, including gender-based persecution. In particular, in 1968, the United States signed onto the 1967 Protocol Relating to the Status of Refugees,⁸ which incorporated the provisions of the United Nations Convention Relating to the Status of Refugees.⁹ The proposed rule's significant and arbitrary hurdles to protection are wholly incongruent with the letter and spirit of the Refugee Convention and the Immigration and Nationality Act¹⁰ to protect vulnerable refugees and asylum seekers fleeing persecution.

⁷ Proposed rule at 36290.

⁸ United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, [1968] 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 268.

⁹ Convention Relating to the Statute of Refugees, July 28, 1951, 140 U.N.T.S. 1954 (hereinafter "Refugee Convention").

¹⁰ See e.g. INA 208

A. The Proposed Rule Erodes Due Process for Asylum Applicants

1. The Proposed Rule Diminishes the Rights of Asylum Seekers to Full and Fair Consideration of their Case

We are deeply concerned with 8 CFR 1208.13(e) which would allow Immigration Judges (“IJs”) to pretermite and deny applications for asylum, withholding of removal under INA 241(b)(3) or protections under the Convention Against Torture (“CAT”) if the applicant has not established a prima facie claim for relief (upon motion by DHS or their own authority) without requiring live testimony from the applicant or any relevant witnesses.¹¹

The asylum form and process is extremely complex, especially to those applicants who have low English proficiency and do not have access to counsel. Asylum seekers who may have experienced domestic and child abuse, sexual assault, or human trafficking may overwhelmingly suffer Post-Traumatic-Stress-Disorder (PTSD) and trauma which can impact their ability to present their case on paper. Detention often exacerbates this trauma. According to the American Academy of Pediatrics, “[t]he act of detention or incarceration itself is associated with poorer health outcomes, higher rates of psychological distress, and suicidality making the situation for already vulnerable women and children even worse.”¹²

A recent national study found only 37 % of immigrants facing removal were represented by an attorney in cases in immigration court.¹³ Additionally, about 86% of immigrants in detention went unrepresented.¹⁴ It is exceedingly difficult for asylum seekers without counsel to navigate the enormous complexity of the U.S. asylum system. To permit judges to pretermite asylum applications, even with a brief 10-day window for notice, undermines due process and our

¹¹ Proposed Rule at 36302.

¹² American Academy of Pediatrics. *Letter to Secretary Jeh Johnson*, July 24, 2015, <https://www.aap.org/en-us/advocacy-and-policy/federal-advocacy/Documents/AAP%20Letter%20to%20Secretary%20Johnson%20Family%20Detention%20Final.pdf> *Detention of Asylum-Seeking Mothers in America Must End Now* (Oct. 28, 2015), <https://www.tahirih.org/wp-content/uploads/2015/10/Righting-the-Wrong-Why-Detention-of-Asylum-Seeking-Mothers-and-Children-Must-End-Now-Web-Copy.pdf>.

¹³ Ingrid Eagly, Esq. and Steven Shafer, Esq. “Access to Counsel in Immigration Court” American Immigration Council. (Sept. 28, 2016), available at:

<https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court>

¹⁴ *Id.* “Only 14 percent of detained immigrants acquired legal counsel, compared with two-thirds of non detained immigrants.”

obligations under U.S. and international law to provide asylum seekers with a full and fair hearing.¹⁵

2. The Proposed Rule Drastically Changes Determinations Regarding Frivolous Applications

The proposed rule's revisions to 8 CFR 208.20 and 8 CFR 1208.20 radically redefines the meaning of a "frivolous" asylum application.¹⁶ Existing law already possesses harsh consequences for filing a "frivolous" asylum application--not only is the application automatically denied, but the applicant is *permanently* ineligible for any immigration benefits under the INA.¹⁷ The Board of Immigration Appeals (BIA) case *Matter of Y-L* requires that a finding of frivolity be entered only if: 1) the applicant has received notice of the consequences of the finding; 2) the Judge has found the frivolity was knowing; 3) a material element of the claim was deliberately fabricated; and 4) the applicant has been given a sufficient opportunity to account for discrepancies or implausibilities in the claim.¹⁸

Given that the consequences of frivolous applications are so severe, it is essential that procedural safeguards are in place. However, the proposed rule diminishes the protections found in *Matter of Y-L* and adds confusing and vague grounds for findings of frivolous applications, including if an individual adjudicator deems the claim is "without merit" or "clearly foreclosed by applicable law;"¹⁹ and eliminates the requirement that asylum seekers have an opportunity to explain any discrepancy or inconsistency.

In this regard, the proposed rule sets up asylum applicants to fail. Given the exceedingly complicated and rapid evolving nature of U.S. asylum law, coupled with leaving so much up to the whim of individual adjudicators, the proposed rule raises considerable issues of due process.

B. The Proposed Rule Erodes Asylum Protections Based on Particular Social Group and Political Opinion

1. The Proposed Rule Eviscerates Asylum Claims based on "Particular Social Group"

Asylum applicants must show they have suffered persecution or possess a well-founded fear of persecution based on a protected characteristic, namely race, religion, nationality, membership in a particular social group, or political opinion.²⁰ The characteristic "particular social group" was

¹⁵ See *Matter of Fefe* 20 I&N Dec. 116, 118 (BIA 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 fairness to the parties and to the integrity of the asylum process itself.")

¹⁶ Proposed Rule at 36295 and 36303.

¹⁷ INA § 208(d)(6).

¹⁸ 24 I&N Dec. 151, 155 (BIA 2007).

¹⁹ Proposed Rule at 36295 and 36303.

²⁰ INA 101(a)(42)

addressed in the BIA case *Matter of Acosta*, holding “‘persecution on account of membership in a particular social group’ refers to persecution that is directed toward an individual who is a member of a group of persons, all of whom share a common, immutable characteristic. i.e., a characteristic that either is beyond the power of the individual members of the group to change or is so fundamental to their identities or consciences that it ought not be required to be changed.”²¹ For years, federal courts and the BIA have applied this criteria to determine whether proposed social groups were cognizable for asylum purposes. In recent years, however, the particular social group determination has become increasingly complex for asylum seekers, especially for those fleeing gender-based violence.

International guidelines hold that particular social group determinations “should be read in an evolutionary manner, open to the diverse and changing nature of groups in various societies and evolving international human rights norms.”²² United Nations High Commissioner on Refugees (UNHCR) Guidelines further posit that while a particular social group cannot be defined exclusively by the persecution that members of the group suffer, the actions of the persecutors may serve to identify or even cause the creation of a particular social group in society.

For example, *Matter of Kasinga* was a key precedent decision establishing that women fleeing gender-based persecution (in that case female genital cutting) could be eligible for asylum.²³ Thereafter, many cases involving intimate partner violence have been brought under the particular social group framework, defined in some part by the abuse itself. In the 2014 case, *Matter of A-R-C-G-*, the BIA held that “married women in Guatemala who are unable to leave their relationship” can constitute a cognizable particular social group that forms the basis of a claim for asylum.²⁴ However, within the last several years these essential protections for asylum seekers seeking protection from gender-based violence have been eroded through decisions like *Matter of A-B-*²⁵ and efforts like the proposed rule.

The proposed rule also creates *ultra vires* guidance which outline “nonexhaustive bases that would generally be insufficient to establish a particular social group, including but not limited to “presence in a country with generalized violence or high crime rate” or “interpersonal disputes” or “private criminal acts” of which governmental authorities were not aware, except in rare circumstances.²⁶ For persecution based on gender-based violence, including interpersonal

²¹ *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985).

²² United Nations High Commissioner on Refugees (UNHCR) Guidelines On International Protection: “Membership of a particular social group” within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, May 7, 2002, available at <https://www.unhcr.org/en-us/publications/legal/3d58de2da/guidelines-international-protection-2-membership-particular-social-group.html>.

²³ See *Matter of Kasinga*, 21 I. & N. 357 (BIA 1996).

²⁴ 26 I&N Dec. 388 (BIA 2014)

²⁵ 27 I. & N. Dec. 316 (AG 2018),

²⁶ Proposed rule at 36279, 36291, 36300.

violence, this framework is deeply problematic. Considerable work has been done by advocates over decades to raise awareness that domestic and gender-based violence is more than a “private criminal matter.” Advocacy done nearly 40 years ago led to the passage of the Family Violence Prevention and Services Act in 1984, and later the critical protections found in the Violence Against Women Act (VAWA) in 1994. As a recent Congressional Research Service report indicates “The shortfalls of legal responses and the need for a change in attitudes toward violence against women were primary reasons cited for the passage of VAWA.”²⁷ To illustrate that point, Senator Joseph Biden, a chief architect of VAWA, wrote the following in 1993:

“Violence against women is far from the private matter those who minimize its importance would have us believe. It is a public tragedy of several dimensions. It is a serious public health problem: More than one million women a year seek medical assistance for injuries caused by violence at the hands of a male partner. It is a serious education problem: Approximately a half million high school girls will be raped before they graduate . And it is a serious criminal justice problem: In some jurisdictions, prosecutors refuse to bring acquaintance rape cases to court because convictions are virtually impossible to obtain.”²⁸

International bodies have also recognized that domestic violence is more than a private matter, and one that can arise from public conditions as well as societal and cultural norms. A 2010 UN Report noted:

“Violence against women throughout their life cycle is a manifestation of the historically unequal power relations between women and men. It is perpetuated by traditional and customary practices that accord women lower status in the family, workplace, community and society, and it is exacerbated by social pressures. These include the shame surrounding and hence difficulty of denouncing certain acts against women; women’s lack of access to legal information, aid or protection; a dearth of laws that effectively prohibit violence against women; [and] inadequate efforts on the part of public authorities to promote awareness of and enforce existing laws”²⁹

Thus, the proposed rule’s framing of family violence as an “interpersonal dispute” is exceedingly retrogressive, even when asylum applicants can document severe cases, or when abuse is ignored by authorities. In some countries, laws and protections against gender-based violence are

²⁷ Congressional Research Service. “The Violence Against Women Act (VAWA): Historical Overview, Funding, and Reauthorization” (April 23, 2019), available at <https://fas.org/sgp/crs/misc/R45410.pdf> at 2.

²⁸ Senator Joseph Biden, “Violence Against Women: The Congressional Response,” *American Psychologist*, vol. 48, no.10 (October 1993),

²⁹ United Nations Secretariat Department of Economic and Social Affairs, *The World’s Women 2010*, at 127, available at https://unstats.un.org/unsd/demographic/products/Worldswomen/WW_full%20report_BW.pdf

extremely limited,³⁰ or else police or prosecutors may fail to take action to protect survivors. The new standards around particular social groups in the proposed rule seek to disqualify asylum seekers fleeing gender-based or gang-related violence entirely. The proposed rule does nothing to define what “rare circumstances” it would consider these bases to be valid for particular social group purposes. Indeed, it is unknown whether applicants could even avail themselves of this exception, as they risk their cases being deemed “frivolous” or pretermitted as explained above. One of the most egregious aspects of the proposed rule is that it would require an asylum seeker to state all of the particular social groups that may apply before the immigration judge, without the ability to raise them later, even if there is an issue of ineffective assistance of counsel. Creating these arbitrary barriers to particular social group framing is unnecessary, unjust and will needlessly harm asylum seekers fleeing gender-based violence.

2. The Proposed Rule Contravenes Established Definitions of “Political Opinion”

The proposed rule states that political opinion claims can only be based on “furtherance of a discrete cause related to political control of a state or a unit thereof.”³¹ The proposed rule goes on to say that will not consider claims based on political opinions defined solely by “generalized disapproval of, disagreement with, or opposition to criminal, terrorist, guerillas, gang or other non state organizations” unless their “expressive behavior” is “related to efforts by the state to control such organizations or behavior that is antithetical to or otherwise opposes the ruling legal entity of the state or a legal sub-unit of the state.”³² However, the proposed rule ignores that many asylum seekers seek protection in the United States, precisely because the government of their country is unable or unwilling to control non-state actors such as international criminal organizations.

The proposed rule’s narrow definition contradicts existing case law, and will place bona fide asylum seekers at risk. For example, women holding feminist political opinions against the pervasiveness of sexual assault or activism surrounding LGBTQI+ rights—conduct that is clearly understood as political in the United States. We remain deeply concerned that this restrictive definition would exclude those persecuted for those fighting for equal rights for women and LGBTQI+ individuals in matters such as education and employment, rights involving marriage and property inheritance, and civil rights issues like advancing non-discrimination policies.

³⁰ Paula Tavares & Quentin Wodon. “Ending Violence Against Women and Girls: Global and Regional Trends in Women’s Legal Protections Against Domestic Violence and Sexual Harassment.” (February 2018), available at <http://pubdocs.worldbank.org/en/140781519943384134/EndingViolenceAgainstWomenandGirlsGBVLawsFeb2018.pdf>

³¹ Proposed rule at 36291, 8 CFR 208.1(e); 8 CFR 1208.1(e)

³² *Id.*

C. The Proposed Rule’s Provisions on Nexus Are Unjustly Restrictive

The proposed rule outlines a list of eight specific types of claims that categorically preclude a finding of nexus. Courts have long held that asylum applications should be adjudicated on a case-by-case basis.³³ However the proposed rule would allow sweeping denials of claims, including those based on: 1) personal animus or retribution;” 2) “interpersonal animus;” 3) “generalized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerilla, or other non-state organizations absent expressive behavior in furtherance of a discrete cause against such organizations related to control of a state or expressive behavior that is antithetical to the state or a legal unit of the state;” 4) “resistance to recruitment or coercion by guerilla, criminal, gang, terrorist, or other non-state organizations”; 5) “the targeting of the applicant for criminal activity for financial gain based on wealth or affluence or perceptions of wealth or affluence;” 6) “criminal activity;” 7) “perceived, past or present, gang affiliation;” and 8) “gender.”³⁴

These provisions create additional confusion and hardship. It is impossible to parse out how persecution or a well founded fear of persecution *could not* somehow involve personal animus retribution for a particular action or characteristic in an asylum claim. Or how acts of persecution like rape, beatings, assaults, and death threats could not somehow also be considered criminal activity. The proposed rule seemingly conflates nexus with the definition of the protected grounds. The nexus element of asylum claims is whether a person is persecuted “on account of” their group—not the group itself. We are deeply concerned that the proposed rule would effectively preclude asylum claims on the basis of gender-related harm. A categorical denial of all cases where gender is part of the nexus undermines established precedent to evaluate asylum claims on a case-by-case basis. Furthermore, the Departments provide no justification for including gender under these nexus provisions.

D. The Proposed Rule’s Provisions on Discretion Are Unjustly Restrictive

It is well-established that asylum seekers must demonstrate that they must show they merit a favorable exercise of discretion. In *Matter of Pula*, the BIA emphasized that the discretionary determination in an asylum case requires an examination of “the totality of the circumstances,” and that within this analysis, “the danger of persecution should generally outweigh all but the most egregious of adverse factors.”³⁵

³³ See e.g. *Matter of Acosta*, 19 I&N Dec. at 232-33

³⁴ 8 CFR 208.1(f); 8 CFR 1208.1(f)

³⁵ 19 I&N Dec. 467 (BIA 1987)

The proposed rule creates two sets of factors to consider when assessing discretion: “significantly adverse discretionary factors” and factors that preclude entirely a grant of asylum.³⁶

In the first category, the proposed rule lists three factors as significant adverse discretionary factors including: 1) unlawful entry or attempted unlawful entry, unless the applicant is in immediate flight from persecution or torture in a contiguous country; 2) failure to apply for protection from persecution or torture in at least one country through which the applicant transited, and 3) the use of fraudulent documents to enter the United States, unless the person arrived in the United States without transiting through another country. These three factors penalize asylum seekers who have found a way to escape persecution in their countries, undermining *Matter of Pula* as well as Article 33 of the Refugee Convention, which prohibits the return of a person to a territory where they may face persecution.

Even more problematic is the second list of factors which preclude an adjudicator from favorability exercising discretion. These *de facto* bars would eliminate access to asylum for asylum seekers who:

1. spent more than 14 days in any one country immediately prior to her arrival in the United States or en route to the United States, with limited exceptions;
2. transited through more than one country en route to the United States, again with limited exceptions;
3. would otherwise be subject to one of the criminal conviction-based asylum bars at 8 C.F.R. § 208.13(c) but for the reversal, vacatur, expungement, or modification of the conviction or sentence unless found not guilty;
4. accrued more than one year of unlawful presence prior to applying for asylum;
5. failed to timely file or request an extension of the time to file any required income tax returns,
6. failed to satisfy any outstanding tax obligations, or has failed to report income that would result in a tax liability;
7. has had two or more asylum applications denied for any reason;
8. has withdrawn a prior asylum application with prejudice or been found to have abandoned a prior asylum application;
9. failed to attend an asylum interview, with limited exceptions;
10. did not file a motion to reopen a final order of removal to seek asylum based on changed country conditions within one year of those changes.³⁷

These changes would seemingly negatively impact most asylum seekers who travel through Mexico where the administration actively blocks asylum seekers from entering the United States,

³⁶ 8 CFR 208.13 and 8 CFR 1208.12.

³⁷ 8 CFR 208.13(d)(2) and 8 CFR 1208.12(d)(2)

forcing them to wait for months to request protection at ports of entry, very often at great personal risk. The proposed rule places these asylum seekers in an impossible position.

In addition, we fail to see how payment of taxes is at all relevant to asylum claims. Through recently published regulations, DHS has imposed further limitations on asylum seekers' ability to obtain work authorization at all, and for those who do qualify, would make them wait for at least a year after filing for asylum to qualify for "asylum pending" work authorization.³⁸ Again and again, the Departments set up asylum applicants to fail.

Conclusion

There are myriad issues of concern to our organization that we simply do not have the time nor capacity to address in this comment including but not limited to internal relocation provisions, changes to the definition of persecution, egregious changes to the credible fear review process, confidentiality concerns, consideration of Convention Against Torture claims, among others. We deeply oppose the proposed rule, as it is an unlawful and unjustified attack on asylum seekers, with a significant and unique impact on survivors of gender-based violence. We call on the Departments to promptly withdraw the proposed rule in its entirety.

Respectfully submitted,

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ASISTA

³⁸ See 8 CFR 208.7(a)(1)(ii)