New York City Anti-Violence Project
116 Nassau Street, 3rd Floor
New York, New York 10038
212.714.1184 *voice* | 212.714.2627 *fax*
212.714.1141 *24-hour hotline*

Submitted via www.regulations.gov

July 14, 2020

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: RIN 1125-AA94 or EOIR Docket No. 18-0002, Public Comment Opposing Proposed Rules on Asylum, and Collection of Information OMB Control Number 1615-0067

The New York City Gay and Lesbian Anti-Violence Project (the Anti-Violence Project or AVP), through its pro bono counsel, Proskauer Rose LLP, submits this comment urging the Department of Justice and Department of Homeland Security to withdraw this Proposed Rule in its entirety. Asylum is a lifeline for tens of thousands of vulnerable refugees, and this Proposed Rule violates the United States' duties under domestic and international laws. Just as importantly, the Proposed Rule, which would eliminate asylum for the vast majority of asylum seekers, is morally wrong. If the Proposed Rule is published as written, the United States will cease to be a leader in providing humanitarian protection for the most vulnerable. We urge you not to allow that to happen.

The Anti-Violence Project empowers lesbian, gay, bisexual, transgender, queer (LGBTQ) and HIV-affected communities and allies to end all forms of violence through organizing and education, and supports survivors through counseling and advocacy. Since 1980, the Anti-Violence Project has demanded safety and justice for the LGBTQ and HIV-affected community. Throughout all five boroughs of New York City, we provide free, confidential counseling and free legal services to LGBTQ and HIV-affected survivors of all forms of violence, including hate violence, intimate partner violence, sexual violence, police violence, and HIV-related violence. Our free legal services include representation of LGBTQ and HIV-affected individuals in family court, housing court, civil court, and immigration matters. We also coordinate the National Coalition of Anti-Violence Programs, a national coalition of organizations working to create systemic and social change through data analysis, policy advocacy, education, and technical assistance.

The Anti-Violence Project's legal representation of LGBTQ and HIV-affected immigrants since 2013 has given us significant expertise and experience in asylum claims on

behalf of these communities. We have represented more than 100 asylum clients from more than 15 countries in affirmative proceedings before the asylum offices as well as in defensive proceedings before the immigration courts, Board of Immigration Appeals, and federal circuit courts, with a noticeable increase in cases since 2016. In addition to our asylum cases, the Anti-Violence Project's attorneys have handled more than 250 immigration matters since 2013, including Violence Against Women Act self-petitions, U nonimmigrant petitions, T nonimmigrant petitions, and adjustment of status, naturalization, and other affirmative applications. Many of the Anti-Violence Project's clients are particularly vulnerable immigrants at the intersection of multiple axes of oppression. A significant number of our immigration clients are transgender asylum seekers from Central America and Mexico. In providing these free legal services, the Anti-Violence Project partners with numerous private law firms who serve as pro bono counsel to our LGBTQ and HIV-affected immigrant clients.

Because of our deep expertise in the area of asylum law as applied to LGBTQ and HIV-affected immigrants, this public comment letter focuses on the aspects of the Proposed Rule that will most severely harm the LGBTQ and HIV-affected communities that we serve. Because the Proposed Rule covers so many topics and the comment period is only 30 days, we are not able to comment on every proposed change. However, the fact that we have not discussed a particular change to the law in no way means that we agree with it. We oppose the Proposed Rule in its entirety and call upon the agencies to withdraw it.

TABLE OF CONTENTS

I. We Object to the Agencies Only Allowing 30 Days to Comment on the Notice of Proposed Rulemaking (NPRM)

As discussed further below, the Proposed Rule would completely eviscerate asylum protections. These regulatory changes seek to rewrite the laws adopted by Congress and would be the most sweeping changes to asylum since the 1996 overhaul of the Immigration and Nationality Act, Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA). The NPRM is over 160 pages long with more than 60 of those pages being the proposed regulations themselves – including dense, technical language and sweeping new restrictions that have the power to send the most vulnerable back to countries where they may face persecution, torture, or death. Any single section of the Proposed Rule, standing alone, would merit 60 days for the public to fully absorb the magnitude of the proposed changes, perform research and analysis, and respond thoughtfully. Instead, the agencies have allowed a mere 30 days to respond to multiple, unrelated changes to the asylum rules, issued in a single, mammoth document, in violation of the Administrative Procedure Act.[1]

Under any circumstances, it would be wrong for the government to give such a short time period to comment on changes that are this extensive, but the challenges to respond to the NPRM now are magnified by the ongoing COVID-19 pandemic. The Anti-Violence Project's offices remain closed, and our staff continues to work from home despite the logistical difficulties we face in being unable to access the full resources that would have been available to us in our offices. Multiple members of our staff have survived COVID-19, and many have lost family members and loved ones to COVID-19. In addition, many of the Anti-Violence Project's community members and clients are at particularly high risk for complications from COVID-19. Our clients have been brutally impacted by the pandemic, and at least one of our clients has died from COVID-19 complications. Many of our clients are HIV-affected or otherwise immunocompromised, and many live in shelters or are street homeless and do not have the ability to quarantine or self-isolate. The extraordinary challenges caused by the pandemic make it particularly burdensome to respond to the NPRM within this unreasonably constricted timeframe.

For this procedural reason alone, we urge the administration to rescind the Proposed Rule. If it wishes to reissue the proposed regulations, it should grant the public at least 60 days to have adequate time to provide comprehensive comments.

II. We Strongly Object to the Substance of the Proposed Rule and Urge the Administration to Rescind It in Its Entirety

Although we object to the agencies' unfair 30-day timeframe in which to submit a comment to the Proposed Rule, we submit this comment nevertheless because we feel compelled to object to the proposed regulations which would gut asylum protections. Overall, the Proposed Rule would result in virtually all asylum applications being denied, by removing due process

[1] Administrative Procedure Act, Pub. L. 79-404, 60 Stat. 237 (1946). *See*, *e.g.*, *Cap. Area Immigrants' Rts. Coal. et al. v. Donald J. Trump et al.*, No. 19-2117, 2020 WL 3542481 (D.D.C. June 30, 2020) (vacating the interim final rule, 84 Fed. Reg. 33829 (July 16, 2019), on the basis that the government unlawfully promulgated the rule without complying with the Administrative Procedure Act's notice-and-comment requirements).

protections, imposing new bars, heightening legal standards, changing established legal precedent, and creating sweeping categories of mandatory discretionary denials. In a best case scenario, the result of these changes would be to leave a higher percentage of those fleeing harm in a permanent state of limbo, if they are able to meet the higher legal standard to qualify for withholding of removal under INA § 241(b)(3). Because those who qualify for withholding of removal have no ability to petition for derivative beneficiaries, these rules would result in permanent family separations.

As noted above, we have not covered every topic that we would like to address because of the constricted timeframe in which to respond. We believe the Proposed Rule should be rescinded in its entirety and, if it is implemented over our objection, at a minimum it should not be applied retroactively. Hundreds of thousands of pending asylum applications have a reliance interest in the state of the law as it currently stands. Particularly given the unreasonably short comment period, it would be unlawful and a grave mistake to render ineligible previously eligible applicants with almost no warning of the sweeping changes being implemented.

III. In Making It Virtually Impossible for LGBTQ and HIV-Affected Immigrants to Obtain Asylum, the Proposed Rule Revives the United States' Shameful Past of Discrimination Against LGBTQ and HIV-Affected Immigrants

As explained further below, the Proposed Rule will make it virtually impossible for most LGBTQ and HIV-affected immigrants to obtain asylum in the United States. In so doing, the Proposed Rule effectively reverts the United States to a shameful time in its history during which U.S. immigration laws expressly discriminated against LGBTQ and HIV-affected people.

LGBTQ people were first statutorily excluded from entering the United States by the Immigration Act of 1917, which prohibited the admission of "persons of constitutional psychopathic inferiority," a term that was applied to bar "homosexuals."[2] The Immigration and Nationality Act of 1952 repealed the 1917 Act, but continued to exclude "homosexuals" from entry by deeming them to be persons with "psychopathic personality." By 1965, the Act was amended to explicitly exclude persons "afflicted with . . . sexual deviation" from entering the United States.[3] The discriminatory practice of excluding LGBTQ immigrants on the basis that homosexuality was a "sexual deviancy" and "mental defect" persisted until 1990.[4]

Not only did the U.S. government historically exclude LGBTQ immigrants from entering the country based on their sexual orientation, but it also refused to recognize same-sex marital relationships as grounds for a family-based immigration petition. As recently as 1975, the U.S.

---

[2] Pub. L. 64-301, 39 Stat. 874 (1917).

[3] *Matter of Longstaff*, 716 F.2d 1439 (5th Cir. 1983) (affirming the denial of a gay man's naturalization application on the basis that he never should have been admitted to the United States in the first place because he was a "homosexual" and therefore considered to be an excludable "sexual deviate" under the INA); *see also* Shannon Minter, *Sodomy and Public Morality Offenses Under U.S. Immigration Law: Penalizing Lesbian and Gay Identity*, 26 CORNELL L. REV. 771, 771-73 (1993); Tracy J. Davis, *Opening the Doors of Immigration: Sexual Orientation and Asylum in the United States*, 6 HUM. RTS. BR. 19, 19 (1999).

[4] INA § 212(a)(4), Pub. L. No. 414, 66 Stat. 163, 182, *amended by* Act of Oct. 3, 1965, Pub L. No. 89-236, § 15(b), 79 Stat. 911, 919 (codified as amended at 8 U.S.C. § 1182(a)(4) (1988) (repealed 1990)).

Immigration and Naturalization Service used a repugnant, homophobic slur in an official immigration decision denying an American citizen's visa petition for his immigrant husband on the basis that no "bona fide marital relationship can exist between two faggots."[5] It was not until nearly 30 years later that the U.S. Citizenship and Immigration Services issued a written apology for using, in its own words, "deeply offensive and hateful language . . . that clearly contradicts [our] fundamental American values."[6] By that point, the petitioner had already been deceased for almost two years.

Although "sexual deviation" was no longer a codified ground for exclusion after 1990, and LGBTQ people were recognized as a "particular social group" under asylum law by 1994,[7] the U.S. government continued to enforce rules intended to deny the LGBTQ and HIV-affected community entry to the United States on a systemic level. For example, the passage of the National Institutes of Health Reauthorization Act of 1993[8] barred entry for individuals living with HIV. During the debate regarding amending the Act to specifically include HIV as "a communicable disease of public health significance" warranting a denial of entry, Senator Nickles, the amendment's sponsor, argued that the influx of immigrants with HIV would cause Americans to die "if they [*i.e.*, HIV-positive immigrants] [did] not change their social behavior," by which he meant their same-sex relationships.[9] The amendment sought not only to punish HIV-affected individuals in need of refuge on the basis that they would become burdens on the health and welfare systems, but also to stigmatize LGBTQ immigrants as a danger to public health.[10] At a time when many countries throughout the world from which HIV-affected immigrants were fleeing did not have the medical, social, or economic systems in place to ensure their safety and wellbeing, let alone the will to do so, the United States shamefully closed the door on those in need due to ignorance and prejudice against LGBTQ and HIV-affected people.[11] The HIV travel ban was not lifted until 2010.[12]

---

5 *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982), cert. denied, 458 U.S. 1111 (1982) (upholding the denial of "immediate relative" marriage status between two men, phrased in the original INS decision as "You have failed to establish that a bona fide marital relationship can exist between two faggots."); *see also* Brian McGloin, *Diverse Families with Parallel Needs: A Proposal for Same-Sex Immigration Benefits*, 30 CAL. W. INT'L L. J. 159, 159-60 (1999).

6 Letter from León Rodriguez, Director, U.S. Citizenship & Immigr. Servs., to Anthony C. Sullivan (Aug. 27, 2014).

7 *See Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819 (BIA 1994).

8 INA § 212(a)(1)(A)(i), *amended by* Act of June 10, 1993, Pub. L. No. 103-43 (codified as amended at 8 U.S.C. § 1182(a)(1)(A)(i) (1993)).

9 139 CONG. REC. 3, 3011 (1993).

10 *See* Amy L. Fairchild & Eileen A. Tynan, *Policies of Containment: Immigration in the Era of AIDS*, 84 AM. J. PUB. HEALTH 2011, 2011-12 (1994).

11 *See* Jeff Gow, *The HIV/Aids Epidemic In Africa: Implications U.S. Policy*, 21 HEALTH AFF. 57, 57-69 (2002); *see also Boer-Sedano v. Gonzales*, 418 F.3d 1082, 1090 (9th Cir. 2005); *Karouni v. Gonzales*, 399 F.3d 1163, 1169 (9th Cir. 2005).

12 42 C.F.R. § 34.2(b)(6) (2008) (*amended by* 74 Fed. Reg. 56547 (Nov. 2, 2009)) (removing HIV from the list of communicable diseases barring immigrants from entry).

While the Proposed Rule does not make explicit mention of LGBTQ and HIV-affected immigrants, in creating numerous barriers that would directly and disproportionately harm this population of asylum seekers, the Proposed Rule in effect returns the United States to its deplorable and inhumane past practice of targeting LGBTQ and HIV-affected immigrants for exclusion.

IV. The Proposed Rule Wrongfully Destroys Protections for LGBTQ and HIV-Affected Asylum-Seekers, a Population Particularly in Need of Refuge Due to Pervasive Anti-LGBTQ Violence in Many Countries Around the World

As the Human Dignity Trust reports, more than 70 countries around the world criminalize LGBTQ identity, with penalties ranging from imprisonment to death sentences. In at least a dozen countries, being LGBTQ is a crime punishable by the death penalty.[13] The U.S. Department of State's most recent Country Reports on Human Rights Practices corroborate these facts, finding that LGBTQ identity is criminalized in 68 countries.[14] In 60 of those same 68 countries, the U.S. Department of State Country Reports also document that violence and/or discrimination are occurring against LGBTQ people above and beyond the criminalization of their LGBTQ identity. The clear conclusion to be drawn here is that there is a strong correlation between the criminalization of LGBTQ people and other forms of violence against them.

LGBTQ and HIV-affected individuals around the world are particularly vulnerable to abuse. Beyond explicit criminality, innumerable political and social factors foster cultures of prejudice and violence toward LGBTQ and HIV-affected individuals globally. Across the world, governments continue to be complicit in, or outright endorse, systematic discrimination and violence against LGBTQ and HIV-affected communities. Police officers turn a blind eye to blatant physical abuses and other hate crimes,[15] and far too often are themselves perpetrators of violence.[16] Not infrequently, law enforcement officials threaten and extort LGBTQ victims with

---

[13] Human Dignity Trust, *Map of Countries that Criminalise LGBT People*, https://www.humandignitytrust.org/lgbt-the-law/map-of-criminalisation/ (last visited July 13, 2020).

[14] *See generally* U.S. Dep't State, *2019 Country Reports on Human Rights Practices* (Mar. 11, 2020), https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/.

[15] Human Rights Watch, *"We'll Show You You're a Woman": Violence and Discrimination against Black Lesbians and Transgender Men in South Africa*, 48-52 (2011), https://www.hrw.org/sites/default/files/reports/southafrica1211.pdf; *see also* Human Rights Watch, *Not Safe at Home: Violence and Discrimination against LGBT People in Jamaica*, 27-32 (2014), https://www.hrw.org/report/2014/10/21/not-safe-home/violence-and-discrimination-against-lgbt-people-jamaica ("Human Rights Watch interviewed LGBT people who said that when they tried to report a crime, police made derogatory comments and failed or refused to take a report. […] The fact that police themselves are sometimes perpetrators of violence and extortion against LGBT people makes LGBT victims even more unlikely to seek police assistance.").

[16] Human Rights Watch, *Not Safe at Home*, *supra*, n.15, 33-38 ("Human Rights Watch interviewed a foot patrol officer in Montego Bay who said LGBT people were criminals, and deserved the violence they experienced."); *see* M.V. Lee Badgett, et al., *The Relationship between LGBT Inclusion and Economic Development: An Analysis of Emerging Economies*, UCLA SCH. L. WILLIAMS INST., 21 (2014) ("Even in those countries without explicitly anti-homosexual laws, there are reports of police arresting and detaining LGBT people under 'public decency' laws or similar provisions that can be applied with little discretion. There are also reports of police officers extorting bribes by threatening to arrest LGBT persons or to 'out' them to their employers or family members. With few lawyers willing to represent them within a biased legal system, LGBT people are left with little

the understanding that the disclosure of the victim's sexual orientation or gender identity would be a social, if not literal, death sentence.[17] Worse still, there are many instances of police officers verbally, physically, and sexually abusing LGBTQ individuals.[18]

As a result, it comes as no surprise that these vulnerable communities report high levels of mistrust toward the police[19] – agents of the government that should protect LGBTQ and HIV-affected communities but instead often prey on their vulnerabilities instead. Anti-LGBTQ behavior is not solely the product of an individual actor's personal animus, but is also a direct result of the exploitation of power when the state itself sanctions such actions and permits this culture to fester. Hate violence against LGBTQ victims has a poorly documented and shamefully low prosecution rate in many countries such as Jamaica[20] and Russia,[21] and the homophobic statements of political officials around the world essentially amount to government approval of discrimination and violence. For example, a former Prime Minister of Jamaica once stated in an interview that "the encouragement or recognition of the appropriateness of the homosexual lifestyle is going to undermine the effectiveness of [the] family […] and, in that

---

choice than to submit to extortion." (citations omitted)); *see also* Alexis Akwagyiram, *A Police Raid, Viral Videos and the Broken Lives of Nigerian Gay Law Suspects*, THOMSON REUTERS (Feb. 24, 2020), https://www.reuters.com/article/us-nigeria-lgbt-widerimage/a-police-raid-viral-videos-and-the-broken-lives-of-nigerian-gay-law-suspects-idUSKCN20I105; Human Rights Watch, *Nigeria: Harsh Law's Severe Impact on LGBT Community* (Oct. 20, 2016), https://www.hrw.org/news/2016/10/20/nigeria-harsh-laws-severe-impact-lgbt-community# (in Nigeria, the Same Sex Marriage Prohibition Act of 2013 instigated "widespread extortion, mob violence, arbitrary arrest, torture in detention, and physical and sexual violence" at the hands of the police and members of the public).

17 M.V. Lee Badgett, et al., *The Relationship between LGBT Inclusion and Economic Development*, *supra*, n.16; Human Rights Watch, *Nigeria: Harsh Law's Severe Impact on LGBT Community*, *supra*, n.16.

18 Human Rights Watch, *Not Safe at Home*, *supra*, n.15; *see also* Jeremy D. Kidd & Tarynn M. Witten, *Transgender and Transsexual Identities: The Next Strange Fruit – Hate Crimes, Violence and Genocide Against the Global Trans-Communities*, 6 J. HATE STUDS. 31, 45 (2008), https://tandis.odihr.pl/handle/20.500.12389/21379 (describing a systematic campaign by the Nepalese police to target and harass transgender individuals and HIV prevention outreach workers, many of whom were arrested, detained, denied legal counsel, and charged with being a "public nuisance").

19 *Ibid.*; Koanna Perry & Paul Franey, *Policing Hate Crime against LGBTI Persons: Training for a Professional Police Response*, COUNCIL EUR., 68 (2017), https://edoc.coe.int/en/lgbt/7405-policing-hate-crime-against-lgbti-persons-training-for-a-professional-police-response.html ("In many countries, transgender persons . . . often face discrimination by police officers, which can erode trust and make it harder for them to report crimes of which they are the victim.").

20 Human Rights Watch, *Not Safe at Home*, *supra*, n.15, 10.

21 Human Rights Watch*, License to Harm: Violence and Harassment against LGBT People and Activists in Russia*, 61 (2014), https://www.hrw.org/report/2014/12/15/license-harm/violence-and-harassment-against-lgbt-people-and-activists-russia (a 28-year-old gay man from Russia brutalized in a homophobic assault was told by a police officer that he "would have done the same thing [*i.e.*, commit homophobic violence]," which convinced the victim that "the prosecution would go nowhere"); *Human Rights Violations of Lesbian, Gay, Bisexual, and Transgender (LGBT) People in Guatemala: A Shadow Report*, GEO. WASH. SCH. L. INT'L HUM. RTS. CLINIC, et al., Submission to 104th Sess., U.N. HUM. RTS. COMM'N, 20 ("In Guatemala, there is a culture of impunity in which courts fail to hold perpetrators accountable for crimes committed on the basis of sexual orientation and/or gender identity, thus violating the rights of these individuals to a fair trial. As indicated, official records as well as accounts by human rights defenders and community members suggest that there have been few, if any prosecutions brought for homophobic or transphobic offences." (citation omitted)).

process, undermine the basic fabric of society."[22] The state police commissioner of Lago, Nigeria, similarly stated, "It is the duty of everybody, not only the police, to ensure that such antisocial behavior, such social vices, such crimes [*i.e.*, same sex sexual relations], are checked so that we can create communities that protect our children from such deviant behavior."[23] Offensive language like this, particularly when it comes from state authorities, instigates fear, hatred, and violence toward the LGBTQ community.

The failure of governments to protect their LGBTQ communities extends far beyond their incentivizing, and refusing to stop, overt homophobic and transphobic violence. Many of the ways in which LGBTQ individuals become vulnerable and ripe for abuse are predicated on economic inequality. LGBTQ people are more likely to be forced into poverty, unemployment, homelessness, and engagement in informal economies due to pervasive societal discrimination and governmental unwillingness to dedicate much-needed resources to their communities.[24]

In addition, LGBTQ and HIV-affected people are frequently denied access to education and healthcare – two key indicators of social and economic stability.[25] The inaccessibility of health care in particular is exacerbated by the widespread lack of confidentiality surrounding sexual orientation and HIV status on the part of medical providers in many countries.[26] In Uganda and Zimbabwe, for example, organizations providing health services to the LGBTQ and HIV-affected community are often raided, with the result that confidential data is exposed in the media, putting clients at risk of violence.[27] When LGBTQ and HIV-affected individuals rightly fear that their private health information could be publicized and expose them to hate violence, there is a massive disincentive to seek information about safer sex and medical treatment. The barriers to healthcare are especially devastating for HIV-affected individuals, particularly those who are arrested for being LGBTQ and then are denied HIV treatment while incarcerated.[28] Fearmongering surrounding HIV/AIDS and its associated stigma for the LGBTQ community generally leads to lower standards and outcomes of care – for example, accounts of LGBTQ patients in Zimbabwe indicated that healthcare workers were "afraid to touch" LGBTQ

---

[22] *Human Rights Violations of Lesbian, Gay, Bisexual, and Transgender (LGBT) People in Jamaica: A Shadow Report*, GEO. WASH. SCH. L. INT'L HUM. RTS. CLINIC, et al., Submission to 103rd Sess., U.N. HUM. RTS. COMM'N, 6 (2011).

[23] Akwagyiram, *supra*, n.16.

[24] *See generally Discrimination and Violence Against Individuals Based on Their Sexual Orientation and Gender Identity: Report of the Office of the United Nations High Commissioner for Human Rights*, 29th Sess., UNOHC, A/HRC/29/23, 12 (Mar. 5, 2015).

[25] Off. Disease Prev. & Health Prom., *Lesbian, Gay, Bisexual, and Transgender Health*, https://www.healthypeople.gov/2020/topics-objectives/topic/lesbian-gay-bisexual-and-transgender-health (last visited July 13, 2020).

[26] Human Rights Watch, *Hated to Death: Homophobia, Violence, and Jamaica's HIV/AIDS Epidemic*, 39-44 (2004), https://www.hrw.org/report/2004/11/15/hated-death/homophobia-violence-and-jamaicas-hiv/aids-epidemic.

[27] Fiona Clark, *Discrimination against LGBT People Triggers Health Concerns*, 383 THE LANCET 500, 501-502 (Feb. 8, 2014), https://doi.org/10.1016/S0140-6736(14)60169-0.

[28] *Id.* at 502 (in 2005, one of 11 gay men arrested in Cameroon under laws criminalizing same-sex relationships was imprisoned for 10 months, but died just after his release due to a complete absence of HIV treatment in prison).

patients.[29] In many countries, clinics discourage or outright deny treatment to LGBTQ individuals, such as in Namibia, Uganda, Nigeria, and Senegal.[30] The combination of inadequate resources, and poor experiences when accessing the few resources available, exacerbates the conditions conducive to violence.

The Anti-Violence Project's legal advocacy on behalf of LGBTQ and HIV-affected immigrants has shown time and time again how life-saving a grant of asylum can be. After they have been granted asylum, our clients are immensely grateful to be able to live in safety, without fearing retribution simply for being who they are. They are able to build lives in the United States where they are free to be their true selves, to experience a sense of community and belonging, to form relationships and families – all of which would never have been possible in their countries of origin.

V. The Proposed Rule Impermissibly Narrows the Definition of "Persecution" and Fails to Recognize that Criminalization of LGBTQ Identity is Inherently Persecutory (8 CFR § 208.1(e); 8 CFR § 1208.1(e))

The most fundamental aspect of asylum law is the obligation of countries to protect individuals with well-founded fears of persecution from being returned to harm.[31] The Proposed Rule would, for the first time, provide a regulatory definition of persecution – a definition that would unduly restrict what qualifies as persecution. The Proposed Rule impermissibly narrows the definition of persecution in that 1) it wrongly asserts that persecutory laws do not in and of themselves give rise to a well-founded fear of persecution; 2) it places an impossible and dangerous burden on asylum seekers to prove that persecutory laws would be applied to them personally; and 3) it fails to require adjudicators to consider cumulative harm and endeavors to disqualify applicants who have suffered multiple "minor" beatings or multiple short detentions.

With the exceptions of forced abortion and involuntary sterilization, federal regulations do not explicitly list those circumstances which constitute "persecution."[32] Instead, courts have long-established the definition of persecution as "the infliction of suffering or harm" upon

---

[29] Jennifer Hunt, et al., *'They will be afraid to touch you': LGBTI People and Sex Workers' Experiences of Accessing Healthcare in Zimbabwe – an In-depth Qualitative Study*, 2 BMJ GLOB. HEALTH 2, 6 (2017), https://gh.bmj.com/content/2/2/e000168.

[30] *See, e.g.*, Cecilia Strand, *State-sanctioned Discrimination and Media Discourses on Homosexuality in Namibia*, 3 J. AFR. MEDIA STUD. 57, 61, 68 (2011), https://doi.org/10.1386/jams.3.1.57_1; Tonia Poteat, et al., *HIV Risk among MSM in Senegal: A Qualitative Rapid Assessment of the Impact of Enforcing Laws that Criminalize Same Sex Practices*, 6 PLOS ONE 1, 3 (2011), https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0028760 (following imprisonment of HIV prevention workers serving LGBTQ patients in Senegal for "acts against nature," healthcare workers feared providing care and LGBTQ individuals feared seeking care for HIV); Clark, *supra*, n.27, 501.

[31] *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 428 (1987).

[32] 8 U.S.C. § 1101(a)(42) ("For purposes of determinations under this chapter, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion[.]").

"groups or individuals because of a difference that the persecutor will not tolerate."[33] Courts have recognized as persecution a wide range of harms that have been inflicted upon LGBTQ and HIV-affected asylum seekers, including but not limited to, being 1) forced to undergo electric shock therapy or other "conversion therapy" programs to "cure" homosexuality or gender nonconformity;[34] 2) sexually assaulted, raped, harassed, kidnapped, or threatened with arrest, death, and being "outed" at the hands of the police or civilians;[35] 3) denied access to medical treatment for HIV/AIDS;[36] 4) attacked, stabbed, or shot by mobs, police, or vigilante groups;[37] and 5) ostracized, bullied, beaten, and verbally abused by family and community members.[38]

The Proposed Rule should be rescinded because it unreasonably heightens the standard for persecution by requiring "extreme" harm that "constitute[s] an exigent threat" while unfairly excluding from the definition of persecution a "nonexhaustive" list of harms such as "intermittent harassment" and "brief detentions." In so doing, the Proposed Rule seeks to exclude from the definition of "persecution" many of the ways in which LGBTQ and HIV-affected people commonly experience persecution.

A. Laws Criminalizing LGBTQ Identity Give Rise to a Well-Founded Fear of Persecution

In stating that "[p]ersecution does not encompass . . . all treatment that the United States regards as unfair, offensive, unjust, or even unlawful or unconstitutional," the Proposed Rule inhumanely suggests that asylum seekers should be allowed to endure violence and harm that would not be tolerated in the United States. To the contrary, treatment that the United States regards as unjust, unlawful, or unconstitutional should certainly be a guiding factor in our

---

33 *Hernandez-Montiel v. I.N.S.*, 225 F.3d 1084, 1097 (9th Cir. 2000).

34 *Pitcherskaia v. I.N.S.*, 118 F.3d 641, 647 (9th Cir. 1997) (lesbian forced to undergo electro shock therapy to change her sexual orientation had suffered persecution); *see generally Hernandez-Montiel*, 225 F.3d 1084 (gay man with female sexual identity who was forcibly enrolled in counseling programs to cure his sexual orientation and alter his gender expression had suffered persecution).

35 *Hernandez-Montiel*, 225 F.3d at 1097 (gay man with a female sexual identity who was detained, strip-searched, and sexually assaulted by police had suffered persecution); *Avendano-Hernandez v. Lynch*, 800 F.3d 1072, 1079 (9th Cir. 2015) (transgender woman who was raped, forced to perform oral sex, beaten severely, and threatened had suffered torture); *Reyes-Reyes v. Ashcroft*, 384 F.3d 782, 785 (9th Cir. 2004) (gay man with female sexual identity who was kidnapped, raped, and beaten by civilians had suffered torture); *Boer-Sedano*, 418 F.3d at 1088 (gay man living with AIDS who was forced to perform oral sex on a police officer who threatened to kill him and to reveal his sexual orientation to others had suffered persecution).

36 *Karouni*, 399 F.3d at 1169 (gay man living with AIDS had a well-founded fear of persecution where doctors would deny him medical treatment on the basis that AIDS is "a stamp of verification of homosexuality, and . . . the deserved punishment from God").

37 *Bromfield v. Mukasey*, 543 F.3d 1071, 1078 (9th Cir. 2008) (the pattern and practice of violence and brutality against gay men in Jamaica constitutes persecution).

38 *Doe v. Holder*, 736 F.3d 871, 879 (9th Cir. 2013) (gay man suffered persecution where classmates bullied, mocked, pushed, hit, and beat him); *Boer-Sedano*, 418 F.3d at 1089 (gay man living with AIDS who was ostracized by his family and called homophobic slurs by coworkers had suffered persecution).

understanding and definition of what constitutes persecution.[39] If Americans should not suffer such harm, neither should immigrants.

1. *The United States Supreme Court Has Declared Unconstitutional Laws that Criminalize Same-Sex Relationships*

The United States Supreme Court has recognized that LGBTQ people have a fundamental right to engage in intimate relationships in accordance with their sexual orientation without fear of being criminalized on account of those relationships. Indeed, in *Lawrence v. Texas*, the U.S. Supreme Court declared unconstitutional historic anti-sodomy laws that had the effect of criminalizing consensual same-sex relationships[40] because the Court found that consensual same-sex sexual conduct is within the realm of personal liberty upon which the government may not intrude."[41]

In overruling *Bowers v. Hardwick*, which previously upheld a Georgia statute that criminalized same-sex sexual conduct, the Court in *Lawrence* noted that the substantive legal discussion in *Bowers* wrongly began by framing the issue as whether LGBTQ individuals had a fundamental constitutional right "to engage in sodomy."[42] Specifically, the Court noted that the narrow focus on the right to engage in certain sexual conduct "demean[ed] the claim" the petitioners had put forward.[43] Although the discriminatory statutes before both the *Bowers* and *Lawrence* courts "purport[ed] to do no more than prohibit a particular sexual act," the Court recognized that such laws "have more far-reaching consequences, touching upon the most private human conduct, sexual behavior[.]"[44] The Court emphasized that it was "within the liberty" of LGBTQ people to choose and engage in a personal relationship "without being punished as criminals."[45] Laws criminalizing LGBTQ relationships infringe upon

---

[39] Indeed, Office of the United Nations High Commissioner's *Handbook* guides U.S. asylum officers to determine whether prosecution under a foreign law (e.g., an anti-homosexuality law) that does not conform with accepted human rights standards differs from lawful punishment in that country by using U.S. law "as a yardstick." Office of the United Nations High Commissioner, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugee*, at ¶¶ 59-60 (1979).

[40] *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) ("The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.").

[41] *Id.* at 567 ("This, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects. It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.").

[42] *Id.* at 566.

[43] *Id.* at 567.

[44] *Id.*

[45] *Id.*

constitutionally-protected, basic human dignities and the very existence of such laws is persecutory.[46]

Not only has the U.S. Supreme Court found that laws criminalizing LGBTQ identity are harmful and unconstitutional, but the Court has also recognized that the fundamental right to marriage applies equally to same-sex couples.[47] In so doing, the Court has acknowledged that LGBTQ people have an affirmative right to engage openly in same-sex relationships and to have those relationships treated with equal dignity by the government.

Because the highest court of the United States has recognized that LGBTQ Americans have these fundamental human rights, it is plainly discriminatory and unprincipled for the U.S. government to force LGBTQ asylum seekers to return to countries that criminalize and fail to accord equal dignity to LGBTQ relationships. It is simply immoral and unjust to allow immigrants to suffer human rights violations that we would not allow our own citizens to suffer.

2. *Laws Criminalizing LGBTQ Identity Are Persecutory Even in the Absence of Prosecution*

The very existence of laws criminalizing LGBTQ identity is persecutory and sufficient to establish a well-founded fear of persecution, regardless of how frequently individuals are prosecuted under the laws. Laws criminalizing LGBTQ identity are persecutory, even in the absence of prosecution, not only because the U.S. Supreme Court held that these laws are unconstitutional, but also because these laws 1) forcibly closet LGBTQ individuals, which in itself is a form of persecution; 2) enable government actors and civilians to harm LGBTQ people with impunity; and 3) prevent LGBTQ people from seeking protection from harm, particularly where the harm is on account of their LGBTQ identity. As explained above, more than 70 countries criminalize same-sex relationships and/or transgender status around the world, and in all of these countries LGBTQ people have suffered persecution on account of their sexual orientation and/or gender identity.[48]

a. Criminalizing LGBTQ Identity Forces LGBTQ People to Remain in the Closet to Avoid Harm, and Forced Closeting Itself Constitutes Persecution

The mere existence of laws criminalizing same-sex relationships and transgender status creates a well-founded fear of persecution because it drives LGBTQ immigrants into the closet – forcing them to hide their sexual orientation or gender identity because being "out" about their

---

[46] For the avoidance of doubt, we note that there is no substantive difference between laws criminalizing LGBTQ identity and laws criminalizing same-sex sexual conduct. *See Karouni*, 399 F.3d at 1172-73 (rejecting Attorney General's argument that the Lebanese government "arrest[ed] people because they have engaged in homosexual acts, but not[] . . . for merely being homosexual," and finding that there is "no appreciable difference between an individual . . . being persecuted for being a homosexual and being persecuted for engaging in homosexual acts").

[47] *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015) ("The Court, in this decision, holds same-sex couples may exercise the fundamental right to marry in all States.").

[48] Human Dignity Trust, *Map of Countries that Criminalise LGBT People*, *supra*, n.13 (indicating 143 instances of anti-LGBTQ laws around the world).

true self-identities could result in being arrested and charged with a crime. Forced closeting is, in itself, a form of persecution.

It has long been established under U.S. and international law that a person cannot be expected or required to change or conceal immutable characteristics such as sexual orientation[49] or gender identity as a means of avoiding persecution. For example, in *Karouni v. Gonzales*, the Ninth Circuit Court of Appeals rejected the argument that a gay man can or should avoid persecution by trying to deny or change his sexual orientation. [50] Mr. Karouni was a gay man diagnosed with AIDS and a citizen of Lebanon, a country with laws criminalizing same-sex sexual conduct as well as transgender identity.[51]

In reversing the Immigration Judge's finding that Mr. Karouni did not have a well-founded fear of future persecution, the Ninth Circuit specifically found that immigration law does not require a gay man to "forsake the intimate contact and enduring personal bond that the Due Process Clause of the Fourteenth Amendment protects from impingement in this country and that [has] been accepted as an integral part of human freedom . . . ."[52] Because sexual orientation is a fundamental matter of identity, the court held that it could not "saddl[e]" a gay immigrant "with the Hobson's choice of returning to [his country of origin] and either (1) facing persecution for engaging in future homosexual acts or (2) living a life of celibacy" because "neither option is acceptable."[53]

Courts around the world have aligned with *Karouni* in holding that forcing LGBTQ people to live in the closet out of fear for their safety in the face of anti-LGBTQ violence and laws criminalizing LGBTQ identity is a human rights violation that rises to the level of persecution. As the United Kingdom's highest court has explained, "[t]he underlying rationale of the Convention [on the Status of Refugees] is . . . that people should be able to live freely,

---

49 *See Hernandez-Montiel*, 225 F.3d at 1093 (sexual orientation is "immutable" and "so fundamental to one's identity that a person should not be required to abandon" it).

50 *Karouni*, 399 F.3d 1163.

51 *See* U.S. Dep't State, *2019 Country Reports on Human Rights Practices: Lebanon* (Mar. 11, 2020), https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/lebanon/ ("Article 534 of the Lebanese Penal Code prohibits sexual relations 'contradicting the laws of nature' and effectively criminalizes consensual, same-sex sexual conduct among adults. The law was occasionally enforced in civilian and military courts, and it carries a penalty of up to one year in prison."); *see also* Human Dignity Trust, *Lebanon Country Profile*, https://www.humandignitytrust.org/country-profile/lebanon/ (last visited July 13, 2020) (Lebanon's Penal Code 1943, Article 534 (Sexual Intercourse Against Nature) prohibits "sexual intercourse against nature" with a penalty of up to one year imprisonment, a provision that has been applied to intercourse between men and between women. Lebanon's Penal Code 1943, Article 521 (Disguising as a Woman) criminalizes transgender gender identity by making it an offense punishable by up to six years imprisonment for a man to "disguise himself as a woman.").

52 *Karouni*, 399 F.3d at 1173 (citing *Lawrence v. Texas*, 539 U.S. at 577) (internal punctuation omitted).

53 *Id.*; *see also Razkane v. Holder*, 562 F.3d 1283, 1287 n.3 (10th Cir. 2009) (notion that gay man will not be persecuted because he can avoid being identified as gay by "suppress[ing] indicia of homosexuality . . . has been severely criticized"); *Maldonado v. Att'y Gen. of U.S.*, 188 F. App'x 101, 104 (3d Cir. 2006) (rejecting government's proposition that persecution of applicant was not on account of his membership in particular social group but "occurred instead because he engaged in an activity (leaving gay discos late at night) that he was free to modify").

without fearing that they may suffer harm . . . because they are . . . gay."[54] Likewise, the Federal Court of Canada,[55] the New Zealand Refugee Status Appeals Authority,[56] the High Court of Australia,[57] and the South African Constitutional Court[58] have all found that governments cannot expect LGBTQ people to conceal their sexual orientation or gender identity to protect themselves from persecution in the form of violence or prosecution under laws criminalizing LGBTQ identity.

Indeed, the U.S. government would become complicit in LGBTQ persecution if it were to deny asylum on the ground that LGBTQ immigrants can avoid persecution by hiding their sexual orientation and gender identity. Forced concealment of sexual orientation, gender identity, and analogous characteristics such as nationality and religion, is itself a human rights violation and is an impermissible demand because it compels LGBTQ people to endure further state-imposed persecution. As one court has explained, a government that requires an LGBTQ person to deny or hide their fundamental immutable characteristics to avoid persecution upon removal to their country of origin "is requiring of the refugee claimant the same submissive and compliant behavior, the same denial of a fundamental human right, which the agent of persecution in the country of origin seeks to achieve by persecutory conduct."[59]

b. Criminalizing LGBTQ Identity Permits and Incites Persecutors to Harm LGBTQ People with Impunity

Laws criminalizing LGBTQ identity further give rise to a well-founded fear of persecution because these laws permit and incite government actors and civilians to harm LGBTQ people with impunity. Even when the government does not frequently prosecute LGBTQ people under these criminal laws, the very existence of the laws enables police and homophobic vigilantes to target LGBTQ people for arrest and violence. Such laws send a clear message that LGBTQ people are outside of the protection of the law, leaving LGBTQ

---

54 *HJ (Iran) & HT (Cameroon) v. Sec'y State for Home Dep't*, [2010] UKSC 31, at ¶ 53.

55 *Sadeghi-Pari v. Canada (M.C.I.)*, 2004 F.C. 282, ¶ 29 (Can.) (expecting people to hide their same-sex relationships is "a serious interference with a basic human right" and therefore constitutes persecution).

56 *Refugee Appeal No. 74665/03*, N.Z. Refugee Status Appeals Auth., 7 July 2004, at ¶ 114 (rejecting the proposition that a government can "require the refugee claimant to forfeit or forego" his fundamental human right to live in accordance with his LGBTQ identity or "den[y] refugee status on the basis that he . . . could engage in self-denial").

57 *Appellant S395/2002 v. Minister for Immigr. & Multicultural Affs.*, (2003) 216 CLR 473, at ¶ 40 (Austl.) (reversing a lower court denial of asylum on the ground that a gay man could hide his sexual orientation to avoid persecution, finding that "persecution does not cease to be persecution . . . because those persecuted can eliminate the harm by taking avoiding action within the country of nationality").

58 *Nat'l Coal. for Gay & Lesbian Equal. v. Minister of Justice* (CCT11/98), 1999 (1) SA 6 (CC) ¶ 129 (S. Afr.) (governments cannot compel gay men to "deny a closely held personal characteristic" and try to render themselves invisible to protect themselves from prosecution or other harms"); *see also Cases C-199/12 to C-201/12, Minister voor Immigratie en Asiel v. X,Y, & Z*, Westlaw Celex No. 612CJ0199, at ¶¶ 70-71 (E.C.J. Nov. 7, 2013) ("an applicant for asylum cannot be expected to conceal his homosexuality in his country of origin in order to avoid persecution").

59 *Refugee Appeal No. 74665/03*, *supra*, n.56 (denying immigration relief on the ground that "the risk can or will be avoided" through concealment of the LGBTQ refugee's identity renders the decision-maker "complicit[] . . . in the refugee claimant's predicament").

individuals and communities vulnerable to violence from state actors and community members alike.

Numerous cases evidence this all-too-frequent fact pattern, but *Karouni* in particular is illustrative. As noted above, Mr. Karouni was a Lebanese gay man who feared persecution in part because homosexuality was criminalized under Islamic laws enforced in Lebanon by the Hizballah, an Islamic paramilitary organization.[60] Although Mr. Karouni himself had not been arrested or prosecuted, the Ninth Circuit Court of Appeals described circumstances indicating that the criminalization of same-sex relationships had created a "backdrop of systemic intolerance"[61] against which gay men like Mr. Karouni faced severe persecution. Mr. Karouni was "living in fear every moment of [his] life"[62] knowing that he could be arrested and prosecuted for being gay. Lebanese police forces had arrested dozens of gay men,[63] and Mr. Karouni had been interrogated by two armed men "dressed in militia garb" after they learned that Mr. Karouni had been involved in a same-sex relationship.[64] The man accused of being in a relationship with Mr. Karouni was arrested and beaten, and Mr. Karouni never saw him again thereafter.[65] Mr. Karouni fled the country knowing that he had been "outed" as a gay man to the Lebanese police.[66] Under these circumstances, it would be unreasonable to have expected Mr. Karouni or other LGBTQ asylum seekers like him to remain in their home country until they have proof positive that they personally are going to be arrested and charged with the crime of being LGBTQ – the law on the books itself is enough to cause extreme danger and harm.

The Anti-Violence Project and its pro bono lawyers have served over a hundred LGBTQ asylum seekers over the years who fled countries with laws criminalizing LGBTQ identity because those laws incited and enabled persecutors to harm our clients. From threats to "out" our clients as LGBTQ to the authorities, to violent attacks by homophobic community members seeking to take the penal laws into their own hands, LGBTQ people living under the constant fear of arrest, prosecution, and incarceration are highly vulnerable to additional forms of persecution. To take but three examples:

1. A lesbian client from Saudi Arabia, a country that criminalizes gender nonconformity and same-sex relationships, with the latter punishable by flogging and the death penalty.[67] Suspected of being a lesbian due to her masculine appearance, our client was attacked

---

60 *Karouni*, 399 F.3d at 1166 (9th Cir. 2005). LGBTQ people are also criminalized under Lebanon's Penal Code. *See supra*, n.51.

61 *Karouni*, 399 F.3d at 1167.

62 *Id.* at 1168.

63 *Id.* at 1167; *see also* Human Dignity Trust, *Lebanon Country Profile*, *supra*, n.51 (Lebanon's Penal Code 1943, Article 521 ("Disguising as a Woman") also criminalizes transgender gender identity by making it an offense punishable by up to six years imprisonment for a man to "disguise himself as a woman").

64 *Karouni*, 399 F.3d at 1168.

65 *Id*.

66 *Id.*

67 U.S. Dep't State, *2019 Country Reports on Human Rights Practices: Saudi Arabia* (Mar. 11, 2020), https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/saudi-arabia/ ("Under sharia as interpreted in the country, consensual same-sex sexual conduct is punishable by death or flogging, depending on the

by the Committee for the Promotion of Virtue and Prevention of Vice, a group of Muslim religious vigilantes who seek to report and punish violators of Sharia law. She was thereafter forcibly confined in a correctional institution for women believed to be lesbians or to have committed other violations of social and religious norms. Fearing that she would be forced into an arranged marriage to a man against her will, but knowing that if she refused the marriage the suspicions about her lesbianism would be confirmed and she would likely be arrested and sentenced to death, she fled to the United States.

2. A gay client from Jamaica, a country that criminalizes LGBTQ people under "anti-buggery" laws that punish same-sex sexual conduct with up to ten years of imprisonment with hard labor.[68] Suffering severe economic deprivation due to rampant homophobia fueled by the anti-buggery laws, the client was living with a group of homeless LGBTQ people in the "Shoemaker's Gully," a sewage drain below street level in Kingston plagued by rats, feces, and garbage. Under the guise of enforcing the anti-buggery laws, Jamaican police frequently attacked the LGBTQ residents of the Gully with pepper spray and tear gas, burned their belongings, forcibly removed and beat them, and fired gunshots wounding and killing them.

3. A bisexual client from Uzbekistan, a country that criminalizes same-sex relationships between men with up to three years of imprisonment.[69] After having sexual relations with a man the client had met through a gay dating website, the client discovered that the man had been working undercover for the police and had secretly video-recorded their sexual acts. With the videotape as evidence of the client's "crime," the police violently beat the client and threatened to incarcerate him in a cell with other criminals who the police would encourage to attack and rape the client. In exchange for his freedom from arrest, the police extorted over $10,000 (USD) from the client in the course of just two months. Having run out of money and with nowhere to turn for protection, the client escaped the country fearing the police would carry out their threat of imprisonment when he could no longer pay the bribes they demanded.

In all of these examples, it is clear that abuse against LGBTQ people is intensified where laws criminalize LGBTQ identity. Where penal laws permitting prosecution of LGBTQ people exist, the "backdrop of systemic intolerance" is created for pervasive anti-LGBTQ violence. Harm at the hands of civilians goes unpunished, and government officials can justify persecutory actions on the basis of "lawfully policing" LGBTQ identity and same-sex relationships.

---

perceived seriousness of the case. It is illegal for men "to behave like women" or to wear women's clothes, and vice versa."); *see also* Human Dignity Trust, *Saudi Arabia Country Profile*, https://www.humandignitytrust.org/country-profile/saudi-arabia/ (last visited July 13, 2020).

[68] U.S. Dep't State, *2019 Country Reports on Human Rights Practices: Jamaica* (Mar. 11, 2020), https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/jamaica/. *See also* Human Dignity Trust, *Jamaica Country Profile*, https://www.humandignitytrust.org/country-profile/jamaica/ (last visited July 13, 2020).

[69] U.S. Dep't State, *2019 Country Reports on Human Rights Practices: Uzbekistan* (Mar. 11, 2020), https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/uzbekistan/. *See also* Human Dignity Trust, *Uzbekistan Country Profile*, https://www.humandignitytrust.org/country-profile/uzbekistan/ (last visited July 13, 2020).

c. Criminalizing LGBTQ Identity Prevents LGBTQ People from Safely Seeking Protection from Anti-LGBTQ Violence

Criminalizing LGBTQ people on the basis of sexual orientation or gender identity also amounts to persecution because it prevents LGBTQ people from safely seeking protection from harm, particularly where the harm is on account of their LGBTQ identity. LGBTQ people in countries that criminalize their LGBTQ identity are frequently subjected to homophobic and transphobic abuse, but it is difficult if not impossible to report this mistreatment because doing so could invite further harm under the very laws that have made them targets for abuse in the first place.

LGBTQ asylum seekers often do not report the hate crimes perpetrated against them because they fear that doing so will "out" them as LGBTQ to the authorities, which in turn could lead to their arrest and prosecution. Civilian perpetrators threaten to out LGBTQ victims to the authorities as a means of silencing their victims, and state perpetrators use their authority as government actors combined with the credible threat of arrest to foreclose any possibility of government protection. In these circumstances, it is clear that laws criminalizing LGBTQ identity make it futile at best, and dangerous at worst, for LGBTQ asylum seekers to report perpetrators to the police.

U.S. Circuit Courts have recognized that LGBTQ people are often unable to seek the protection of government authorities in the face of mistreatment. For example, in *Bringas-Rodriguez v. Sessions*, the Ninth Circuit found that a gay asylum applicant from Mexico had suffered past persecution at the hands of civilian actors that the government was unable or unwilling to control and, consequently, that the applicant "was not required to report his abuse to the authorities because ample evidence demonstrate[d] that reporting would have been futile and dangerous."[70] Similarly, in *Vitug v. Holder*, the petitioner successfully demonstrated that he was attacked multiple times over a period of years because he was gay and perceived to be effeminate.[71] In finding that the government was unwilling to control the attackers, the court credited the applicant's testimony that "police harass[ed] gay men and turn[ed] a blind eye to hate crimes committed against gay men" in the Philippines.[72] Notably, Mexico and the Philippines are not countries that criminalize LGBTQ identity, and yet the courts nevertheless found that LGBTQ asylum seekers from those countries could not safely call upon the police for protection from harm. Laws criminalizing LGBTQ identity only increase the danger for LGBTQ asylum seekers who attempt to report their persecutors, as doing so runs the risk that they will have to disclose their LGBTQ identity to justify their request for protection or that their persecutors will disclose it in retaliation.

The Anti-Violence Project and its pro bono lawyers have represented many LGBTQ asylum seekers from countries with laws criminalizing LGBTQ identity who suffered additional

---

70 *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1073-74 (9th Cir. 2017) (In his asylum application, the applicant volunteered the reason he believed he would be harmed if were returned to Mexico: "If I went to the police they wouldn't do anything. They will take a report and never follow-up on it or they would simply laugh at me and tell me that I got what I deserved because I am gay.").

71 *Vitug v. Holder*, 723 F.3d 1056, 1065 (9th Cir. 2013).

72 *Id.*

harm when trying to seek the protection of the authorities. For example, a gay client from Ghana, a country that punishes same-sex sexual conduct between men with imprisonment of up to three years,[73] was further harmed by police after reporting that he and his boyfriend were attacked and beaten by a homophobic mob. Covered in blood, the client asked the police to help him obtain emergency medical attention. Rather than call for an ambulance, the police interrogated the client about the mob's motive for the attack and, upon discovering that the client had been attacked due to his sexual orientation, the police not only refused to provide medical care but also threatened to arrest the client for being gay.

B. It is Dangerous and Unreasonable to Expect LGBTQ Asylum Seekers to Test and Prove that Laws Criminalizing LGBTQ Identity Would Be Applied to Them Personally

The Proposed Rule's expectation that asylum seekers will provide evidence that "persecutory laws or policies were, or would be, applied to an applicant personally" places an impossible and dangerous burden on LGBTQ asylum seekers. The existence of laws criminalizing LGBTQ identity creates the potential for invidious prosecution, thereby empowering state officials and private actors to perpetrate other forms of harm against LGBTQ people more easily, without fear of being held accountable for their actions. The Proposed Rule ignores the fact that persecutory laws effectively sanction the commission of other well-recognized forms of persecution such that it is not necessary for the state to enforce the persecutory law through prosecution to accomplish severe harm. Many LGBTQ people in countries that criminalize LGBTQ identity are not prosecuted, but nevertheless experience physical, emotional, and sexual abuse as well as severe economic deprivation through the denial of housing, employment, and access to education and healthcare, all of which constitute persecutory conduct that is inherently condoned and de facto sanctioned by the government in treating LGBTQ people as criminals.[74]

Moreover, the Proposed Rule is fundamentally at odds with the established principle that an asylum applicant's objective fear of persecution is measured by whether a reasonable person in the applicant's circumstances would fear persecution, which can be demonstrated by "credible, direct, and specific evidence in the record that would support a reasonable fear of persecution."[75] The Proposed Rule is also in tension with the U.S. Supreme Court's holding that a chance of persecution as low as 10% can result in a well-founded fear sufficient for asylum.[76]

---

[73] U.S. Dep't State, *2019 Country Reports on Human Rights Practices: Ghana* (Mar. 11, 2020), https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/ghana/. *See also* Human Dignity Trust, *Ghana Country Profile*, https://www.humandignitytrust.org/country-profile/ghana/ (last visited July 13, 2020).

[74] Criminalizing LGBTQ people frequently results in systemic discrimination, which rises to the level of persecution where it "lead[s] to consequences of a substantially prejudicial nature for the person concerned, e.g. serious restrictions on his right to earn his livelihood, his right to practice his religion, or his access to normally available educational facilities." Office of the United Nations High Commissioner, *Handbook on Procedures*, *supra*, n.39, at ¶¶ 54-55 (1979).

[75] *Knezevic v. Ashcroft*, 367 F.3d 1206, 1213 (9th Cir. 2004).

[76] *See I.N.S. v. Cardoza-Fonseca*, 480 U.S. at 440 ("There is simply no room in the United Nations' definition for concluding that because an applicant only has a 10% chance of being shot, tortured, or otherwise persecuted, that he or she has no 'well-founded fear' of the event happening.").

In not only ludicrous but also dangerous fashion, the Proposed Rule would require the applicant to provide "credible evidence" that the persecutory law would be personally applied to them. This requirement unreasonably suggests that LGBTQ asylum seekers should out themselves at the risk of being arrested to test whether the persecutory law would be personally applied. Under no circumstances should an LGBTQ person be required to wait until they are arrested and charged with the crime of being LGBTQ before they can flee and establish an asylum claim. Asking LGBTQ people to subject themselves to arrest and prosecution before they can escape and win asylum is like asking someone to remain in a burning house until he personally catches on fire before a firefighter will rescue him. It is enough that a reasonable person standing in the LGBTQ applicant's shoes would fear arrest or prosecution given the existence of the persecutory law. A 10% chance of arrest under the persecutory law is sufficient – it does not have to be a near certainty. Any rule to the contrary is clearly an incorrect formulation that undermines the goals of United States asylum law and will have devastating consequences for those seeking asylum in the United States due to persecutory laws abroad.[77]

The Proposed Rule is further unreasonable because the collection of "credible evidence" that an "infrequently enforced" persecutory law or policy will be enforced against the applicant personally is an unacceptably difficult and unnecessary obstacle for asylum applicants. For many LGBTQ asylum seekers, this evidentiary burden will be nearly impossible to meet because documentary evidence does not exist or would be dangerous to obtain. Evidence of the enforcement of laws that criminalize LGBTQ people is often unavailable because "enforcement" of these laws is carried out in ways that do not get officially recorded, as in the above-referenced examples in which police officers and civilians used the mere threat of arrest not only to extort, sexually abuse, and physically harm LGBTQ asylum seekers but also to prevent them from reporting any of these hate crimes.

One particularly stark example of this is Uganda's 2014 Anti-Homosexuality Act, which criminalized conduct that "promotes or in any way abets homosexuality" with a minimum five year prison sentence.[78] Although the law was later annulled due to procedural failures, police

---

[77] United States asylum law embraces the protections of the international 1951 Refugee Convention, which was adopted by a number of countries after World War II "[a]s a result of events occurring before [January 1], 1951." G.A. Res. 2198 (XXI), at 46 (July 28, 1951). In particular, the INA definition of a "refugee" tracks closely that of the Refugee Convention ("The term 'refugee' shall apply to any person who . . . 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[.]"). *Ibid.* at 3. The Refugee Convention recognizes that non-refoulement is the core principle underlying international cooperation with respect to refugees, and prohibits any contracting state from returning a refugee "in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." The heightened burden to show personal application of persecutory laws under the Proposed Rule will inevitably lead to meritorious claims of asylum being denied for lack of "credible evidence," which contravenes the spirit of the non-refoulement core principle of international asylum law.

[78] Ugandan 2014 Anti-Homosexuality Act § 13(1)(e) ("A person who acts as an accomplice or attempts to promote or in any way abets homosexuality and related practices commits an offence and is liable, on conviction, to a fine or . . . imprisonment of a minimum of five years and a maximum of seven years or both fine and imprisonment."). *See also* U.S. Dep't State, *2019 Country Reports on Human Rights Practices: Uganda* (Mar. 11, 2020), https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/uganda/ (noting the

and civilians still enforce its provisions against LGBTQ Ugandans as though the law were valid. As a result, individuals accused of being LGBTQ are arrested even though no official documentation of the arrest on the basis of the Anti-Homosexuality Act exists. Despite the law's technical invalidity, its enforcement by police still has a tremendous chilling effect on LGBTQ people in Uganda, who frequently remain closeted in fear of police enforcing the Anti-Homosexuality Act against them or arresting them on other pretextual charges. A persecutory law does not have to be frequently enforced – nor does it even have to officially remain on the books – for it to have a tremendous chilling effect. In fact, many accused LGBTQ people in Uganda are so afraid of being harmed based on their actual or perceived sexual orientation that they are too scared to appear in court to defend themselves against the bogus charges. As this example demonstrates, in Uganda and other countries where laws exist that criminalize LGBTQ identity, it would be very risky and nearly impossible for LGBTQ asylum seekers to gather official "evidence" that demonstrates that "persecutory laws or policies were, or would be, applied to an applicant personally." The burden under the Proposed Rule to show that an anti-LGBTQ law will be personally applied should be eliminated.

C. Repeated Threats and "Intermittent" Harm Can and Do Establish a Well-Founded Fear of Persecution, and Should Be Considered Cumulatively

It is well-settled under existing case law that "persecution" for purposes of asylum claims means threats to life or freedom on the basis of a protected ground. The Proposed Rule seeks to upend years of legal precedent by categorically excluding "intermittent harassment, including brief detention, repeated threats with no effort to carry out the threats, or non-severe economic harm or property damage" as bases upon which an applicant can demonstrate that they have suffered persecution. This aspect of the Proposed Rule is damaging to all asylum seekers, and contravenes the very spirit and purpose of the U.S. asylum system.

The Proposed Rule should be rescinded because it fails to consider intermittent harm that cumulatively amounts to persecution. United States courts and international legal authorities have repeatedly held that an asylum "applicant may suffer persecution because of the cumulative impact of several incidents even where no single incident would constitute persecution on its own."[79] For example, in *Vitug v. Holder*, the Ninth Circuit found that it was more likely than not that Mr. Vitug, a gay man living with HIV, would be persecuted if removed to the Philippines because he had been beaten five times on the street, was unable to obtain employment because of his sexual orientation, and was harassed and threatened by police – multiple instances of physical harm and victimization that cumulatively rose to the level of persecution. As the court stated, "Where an asylum applicant suffers such harm on more than one occasion, and, as in this case, is victimized at different times over a period of years, the cumulative effect of the harms is severe

criminalization of same-sex relationships, and that government authorities perpetrated violence against LGBTQ people).

[79] *Baballah v. Ashcroft*, 367 F.3d 1067, 1076 (9th Cir. 2004); *see also* Office of the United Nations High Commissioner, *Handbook on Procedures, supra*, n.39, at ¶¶ 53 (1979) ("[A]n applicant may have been subjected to various measures not in themselves amounting to persecution (e.g. discrimination in different forms), in some cases combined with other adverse factors (e.g. general atmosphere of insecurity in the country of origin). In such situations, the various elements involved may, if taken together, produce an effect on the mind of the applicant that can reasonably justify a claim to well-founded fear of persecution on 'cumulative grounds'.")

enough that no reasonable fact-finder could conclude that it did not rise to the level of persecution."[80]

In our experience as asylum law practitioners, it is very common to see LGBTQ and HIV-affected clients suffer multiple "intermittent harms" over the course of time that cumulatively amount to persecution. For example, LGBTQ individuals in Jamaica are routinely subjected to extremely hostile treatment by civilians and police on the basis of their actual or perceived sexual orientation or gender identity. Those perceived to be members of the LGBTQ community are frequently denied employment and housing opportunities to the point of economic destitution and forced homelessness. This problem is particularly severe for LGBTQ youth, who are often unable to access education and shelter because they are repeatedly bullied and beaten by classmates as well as disowned by their family members. After being forced out of home and school, many LGBTQ youth end up living in the Gully with other homeless LGBTQ people, where they face daily abuse from the police and civilians in the form of violence and threats. While some of these instances taken individually may not represent a threat to life or freedom, their accumulation and aggregate effect on an asylum applicant across time certainly constitutes persecution.

In another one of our past cases, an asylum seeker living with HIV from a Northern Triangle country experienced extreme poverty over the course of his life due to discrimination based on his HIV status. He was forced to flee his home and relocate to different neighborhoods more than 10 times because each time his neighbors discovered his HIV status, they ostracized and threatened to harm him unless he moved out. As a result, he frequently suffered street homelessness. He was likewise repeatedly denied employment because employers mandated pre-hiring testing for HIV, which would inevitably reveal his HIV status and result in the employer's withdrawal of the job offer. He was also frequently denied medical care due to the severity of the prejudice against people living with HIV. Taken collectively, these experiences of extreme economic deprivation amount to persecution.

The Proposed Rule should also be rejected because it would categorically deny the meritorious asylum claims of those who were subject to brief but harsh detentions. Although brief detentions, without more, can be insufficient to establish persecution, it is also true that the character of an applicant's detention is relevant.[81] Take, for example, the case of a Ugandan client who was perceived to be gay based on his advocacy for LGBTQ rights and his friendships with members of the LGBTQ community. At first, the police frequently arrested and briefly detained him to interrogate him about his sexual orientation, demand that he disclose the identities of other LGBTQ community members, and threaten repeatedly that he would be harmed if he persisted in his LGBTQ rights advocacy. Because he continued to advocate for and maintain relationships with LGBTQ individuals despite the threats of the police, the Ugandan

---

[80] *Vitug*, 723 F.3d at 1065 (citation omitted).

[81] *See, e.g.*, *Ndom v. Ashcroft*, 384 F.3d 743, 752 (9th Cir. 2004) (finding persecution based on detention of 25 days where applicant was held in dark, crowded cells without formal charges and without any indication of when he would be released), *superseded on other grounds by statute*, REAL ID Act of 2005, Pub. L. 109-13, 119 Stat. 302; *Nguyen v. Holder*, 339 Fed. App'x 773, 774 (9th Cir. 2009) (citation omitted) ("The character of Nguyen's detention is also relevant. This court has repeatedly held that being subject to 'abusive detention, reeducation through labor, or criminal proceedings constitutes persecution.'").

security forces ultimately kidnapped him and one of his gay friends. Although the detention could be described as "brief" in that they were released in less than 48 hours, the physical violence and torture suffered by the client and his gay friend were so severe that the client was hospitalized and the friend died from his injuries before he could make it from the jail to the hospital. This harrowing case also exemplifies why "repeated threats with no effort to carry out the threats" should indeed be considered persecution – no asylum seeker should have to wait for threats of torture and death to be carried out before they can establish an asylum claim. As the Sixth Circuit has said, "it cannot be that an applicant must wait until she is dead" to show that she was persecuted and the government was unwilling or unable to protect her.[82]

In another case demonstrating why brief detentions can amount to persecution, our client, a transgender woman from a South American country, experienced extreme sexual abuse during a single detention in her country of origin. She was the victim of an anti-LGBTQ mob attack in which her attackers savagely beat her. After she escaped from the mob, she was cornered by police who arrested and detained her. They stripped her clothes from her before putting her naked in a cell with men. The officers told the men in the cell to "do whatever they wanted" to her. She was then raped multiple times by the other inmates. Although her detention was brief and she was released shortly thereafter, the harm she suffered during the detention was severe. She later recalled this experience as the worst harm she had ever suffered in her life, and was found to have been persecuted on the basis of this brief but extraordinarily brutal detention.

VI. The Proposed Rule Imposes an Absurd List of Anti-Asylum Measures Under the Guise of "Nexus" (8 CFR § 208.1(f); 8 CFR § 1208.1(f))

Some of the most restrictive aspects of the Proposed Rule are laid out in the section titled "Nexus." Although courts have long held that each asylum application should be adjudicated on a case-by-case basis, the Proposed Rule would allow blanket denials of claims that have long been found to meet the standard for asylum. In an utterly illogical fashion, the Proposed Rule declares that there are "eight situations in which alleged acts of persecution would not be on account of one of the five protected grounds," and that therefore asylum claims based on these situations should be denied. This section of the proposed regulation is essentially an anti-asylum wish list, directing adjudicators to deny most claims.

A. LGBTQ and HIV-Affected People Frequently Suffer Interpersonal Animus and Retribution on Account of Their Membership in a Particular Social Group

The first of the situations in which nexus could not be established under the Proposed Rule is "interpersonal animus or retribution." It is entirely nonsensical to assert that personal animus or retribution can never be on account of an asylum applicant's protected characteristic. To state the obvious, personal animus is the motivation for almost all persecution. Presumably, if a persecutor did not have personal animus against someone, they would not subject them to persecution. Our experience shows that almost all LGBTQ asylum seekers routinely face violence from homophobic and transphobic individuals who perpetrate harm due to their personal animus toward LGBTQ people. As but one example, one of our past clients, a transgender woman from Central America, was disowned by her parents during her childhood

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

because they refused to accept her female gender identity. They abused her because they thought her gender expression was too feminine for a "son" and ultimately forced her to live on the street, where she was repeatedly and incessantly raped and beaten by men in her town who targeted her for this abuse because they perceived her to be gay and transgender. That the abuse was driven by personal animus toward LGBTQ people does not negate the nexus between the persecution and the protected characteristic.

B. It is Baseless and Unduly Burdensome to Require Proof that a Persecutor Has Persecuted Other Members of the Same Particular Social Group

The Proposed Rule further claims that there can be no nexus to a protected characteristic if the persecutor who has displayed "interpersonal animus" toward the asylum applicant "has not targeted or manifested an animus against other members of [the] particular social group in addition to" the applicant. There is no basis in law to require a survivor of persecution show that others have been persecuted in order to obtain a grant of asylum. That a single LGBTQ individual has been persecuted can warrant asylum for that individual, regardless of whether other LGBTQ people have also been persecuted by the exact same persecutor. There are many cases in which LGBTQ asylum seekers have been severely persecuted by family members, classmates, neighbors, and other individuals who may not even be aware of or have access to other LGBTQ individuals whom they can persecute.

As a practical matter, this portion of the Proposed Rule creates an evidentiary hurdle so high that it would effectively operate as a bar to asylum. There are many situations in which an asylum seeker does not even know the identity and past history of their persecutor, much less the identities of the persecutor's other victims and whether those victims are also members of the same particular social group. Take, for example, a gay asylum client who was kidnapped at gunpoint by several police officers who immediately blind-folded him and then drove him around in their car for hours while beating him, interrogating him about his sexual orientation and HIV status, and verbally abusing him with homophobic slurs. Along the way, they kidnapped a second individual – who could be heard but not seen by the blind-folded client. In such circumstances, it is clear that the persecutors' actions were on account of the client's sexual orientation and HIV status, but there would be no way for the client to know or prove that these persecutors had targeted other victims for the same reason – he could not even see the second victim, let alone know if the victim was also LGBTQ or HIV-affected, and he barely saw the persecutors either.

C. It is Absurd to Predetermine that There Can Be No Nexus When the Persecution Takes the Form of "Criminal Activity"

The Proposed Rule also asserts that there is no nexus to the applicant's protected characteristic when the harm suffered is "criminal activity." However, virtually all harm that rises to the level of persecution could be characterized as "criminal activity," because in virtually every country beatings, rape, and threatened murder is criminalized activity. This blanket rule essentially eliminates the ability to grant asylum based on private actor harm.

We oppose this portion of the Proposed Rule because it would unfairly bar asylum claims from LGBTQ and HIV-affected clients who suffer persecution in the form of criminal activity at

the hands of civilians that the government is unwilling or unable to control. It is unfair and absurd to prejudge that all anti-LGBTQ hate crimes perpetrated by civilians have no nexus to the victim's membership in a particular social group. Civilians frequently target LGBTQ people with crimes because they know LGBTQ individuals are easier to victimize than their heterosexual and cisgender counterparts, particularly where the police refuse to protect LGBTQ people from criminals or LGBTQ identity is itself criminalized. For example, consider the case of a gay client whose small business was burglarized by criminals who, in addition to stealing all the valuable possessions inside the store, vandalized the store by scrawling homophobic graffiti on the walls and left behind a threatening note referencing the client's sexual orientation. On these facts, there is clearly a nexus between the criminal activity and the client's protected characteristic.

D. Nexus Based on "Gender" Should Not Be Categorically Excluded

The Proposed Rule's inclusion of "gender" as a nexus exclusion is particularly troubling. The NPRM does not explain why gender is listed under "nexus" rather than under "particular social group" – perhaps because it is clear that gender is indeed a particular social group in that it satisfies the three-prong test of immutability, particularity, and social distinction accepted by the courts and as codified by the Proposed Rule itself.

While the Proposed Rule certainly does not deny that LGBTQ and HIV-affected people constitute protected particular social groups, there is a real risk that adjudicators will misconstrue the nexus-based-on-gender bar to preclude all asylum claims based on gender identity and sexual orientation. This is an impermissible attack that could effectively end all LGBTQ asylum, an effect that runs contrary not only to established Board and Circuit Court precedent but also violates the United States' non-refoulement obligations under international law.[83] The result would be devastating for LGBTQ refugees who, as discussed above, face severe persecution around the world. Furthermore, a categorical denial of cases where gender is part of the nexus is antithetical to the case-by-case analysis required under asylum law. For these reasons, this portion of the Proposed Rule should be rescinded along with the rest of it.

VII. The Proposed Rule Unfairly Expects Asylum Seekers to State an Exact and Unchanging Particular Social Group, a Standard that Fails to Account for the Complex Coming Out and Transitioning Processes of LGBTQ Immigrants (8 CFR § 208.1(c); 8 CFR § 1208.1(c))

While the Proposed Rule does not change the well-established principle that LGBTQ and HIV-affected individuals are part of a particular social group,[84] the Proposed Rule unfairly

---

83 *See* 1951 Refugee Convention, *supra*, n.77.

84 *See, e.g.*, *Toboso-Alfonso*, 20 I. & N. Dec. 819 (creating pathway to asylum based on sexual orientation by establishing sexual orientation as "membership in a particular social group"); *Hernandez-Montiel*, 225 F.3d at 1094-95 (finding that a gay man "with a female sexual identity" who suffered persecution in Mexico was eligible for asylum based on membership in particular social group); *Amanfi v. Ashcroft*, 328 F.3d 719, 730 (3d Cir. 2003) (finding that an asylum claim may be based on persecution on account of imputed membership into the LGBTQ community); *Reyes-Reyes*, 384 F.3d at 785 (reaffirming that a "gay man with a female sexual identity" belongs to a particular social group); *Karouni*, 399 F.3d at 1172 (holding that "all alien homosexuals are members of a 'particular social group'"); *Boer-Sedano*, 418 F.3d at 1089 ("[T]he record compels the conclusion that Boer-Sedano

requires asylum applicants to state with exactness before the immigration judge every particular social group of which they are a member or forever lose the opportunity to present the particular social group, even if the applicant has appeared *pro se* or has received ineffective assistance of counsel.

An asylum seeker's life should not be dependent on their ability to expertly craft arguments in the English language in a way that satisfies highly technical legal requirements. To the contrary, the asylum officer or immigration judge has a duty to help develop the record. It would be unconscionable to send an applicant back to persecution for failure to adequately craft particular social group language. Applying this Proposed Rule to asylum seekers, including unrepresented individuals, would raise serious due process issues.

With respect to LGBTQ asylum seekers, it can be particularly challenging to correctly frame the applicable particular social group, which makes it all the more unreasonable to expect LGBTQ asylum applicants to do so without the assistance of counsel and without the ability to later amend the particular social group that was previously stated. Furthermore, the requirement to state an unalterable particular social group fails to take into account the reality that, for many people, "coming out" as lesbian, gay, or bisexual, or transitioning one's gender, is a process that can be complex, highly individualized, and evolving over time.

The journey of coming to terms with one's own gender identity and sexual orientation is not instantaneous, and is often greatly shaped by one's sense of safety, cultural norms, and trust in one's personal relationships, government, and environment.[85] This journey is colloquially referred to as "coming out," which according to the Human Rights Campaign is defined as "the process in which a person first acknowledges, accepts, and appreciates their sexual orientation or gender identity and begins to share that with others."[86] For those who do not identify with their assigned or presumed sex at birth, they may also go through a process of "gender transition," a term that "describes both a shift over time from occupying the social role of one gender to that of another and to the medical procedures that sometimes accompany that shift."[87] The gender transition process can involve a number of significant changes in the way a person perceives

---

is a member of the social group consisting of homosexual men in Mexico and that he was persecuted on account of this status."); *Manani v. Filip*, 552 F.3d 894, 903 (8th Cir. 2009) (implicitly accepting that HIV-positive people may form a particular social group for purposes of granting asylum); *C.f. Avendano-Hernandez*, 800 F.3d 1072 ("In light of Avendano-Hernandez's past torture, and unrebutted country conditions evidence showing that such violence continues to plague transgender women in Mexico . . . [w]e grant Avendano-Hernandez's petition[.]"); *Velasquez-Banegas v. Lynch*, 846 F.3d 258, 262 (7th Cir. 2017) (rejecting the immigration judge's assessment that applicant would be protected if removed by associating with people who already knew he was HIV-positive; recognizing the validity of an asylum claim based on the imputation of a gay identity to an unmarried, HIV-positive, heterosexual, cisgender man ("The law does not require people to hide characteristics like religion or sexual orientation, and medical conditions, such as being HIV positive . . . [T]he law does not take a life of stealth as its starting point.")).

85 Ariel Shidlo & Joanne Ahola, *Mental health challenges of LGBT forced migrants*, 42 FMR 9, 9-10 (2013).

86 Human Rights Campaign, *Glossary of Terms*, https://www.hrc.org/resources/glossary-of-terms (last visited July 13, 2020); *see also* Vivienne C. Cass, *Homosexual Identity Formation: A Theoretical Model*, 4(3) J. HOMOSEXUALITY 219 (1979) (describing the challenges one may face when progressing through the various stages of forming one's identity as gay or lesbian in social contexts that stigmatize homosexuality).

87 Lambda Legal, *Glossary of LGBTQ Terms*, https://www.lambdalegal.org/know-your-rights/article/youth-glossary-lgbtq-terms (last visited July 13, 2020).

themselves and how they choose to present themselves to society, which "may or may not include medical or legal aspects such as taking hormones, having surgeries, or changing identity documents to reflect one's gender identity."[88]

In describing LGBTQ immigrants' evolving understanding of their identities when acclimating to new countries and cultures, the Ontario Council of Agencies Serving Immigrants (OCASI) explains that "[s]ome LGBT refugees experience a 'coming out' process once they have reached the relative safety of the country of asylum. This can be a confusing time. A linear trajectory of 'coming out' – progressing from hiding, shame and confusion to full expression, acceptance and a unified identity – is largely illusory. Individual experiences are complex and varied."[89] Expecting an LGBTQ immigrant to provide a singular, cohesive, and complete narrative defining their gender identity and sexual orientation at the time of filing their Form I-589, particularly when they are not represented by counsel, fails "to distinguish the differing social contexts which confront" LGBTQ immigrants and to honor the "fundamental purpose" of asylum law – "the protection of individuals fleeing persecution."[90]

OCASI further emphasizes that understandings of oneself may evolve as the individual reconciles the internalized homophobia and transphobia of their country of origin with their developing grasp of the attitudes of their host country: "[c]ertain cultures may not conceptualize sexuality and gender as 'identities' in the same way that [the host country's] culture does. The expectation of producing a particular narrative to legitimize claims of identity and persecution can cause stress for claimants."[91] This is certainly true for the LGBTQ community broadly, but especially and uniquely so for transgender and gender non-conforming individuals.

It can be particularly difficult for transgender and gender non-conforming asylum seekers to frame their particular social group in a legally cognizable way when they do not identify within a "widely understood or accepted category" of identity.[92] As one legal scholar has explained, gender and sexuality classifications in U.S. asylum adjudications often have a certain

---

88 *Id.*

89 Sarah Hall & Rohan Sajnani, *Mental Health Challenges for LGBT Asylum Seekers in Canada*, OCASI, 4 (2015); *see also* Shildo & Ahola, *supra*, n.85, 9-10 ("In the absence of a safe environment, many LGBT individuals are not able to work through the internal processes necessary to allow them to integrate the multiple aspects of their sexuality. Instead, these processes may slow down or become 'frozen' until they reach the relative safety of a new host country. Because the coming-out process *may only begin to unfreeze many years after arrival in the host country*, some individuals may have difficulty convincing adjudicators that they are LGBT." (emphasis added)).

90 Arwen Swink, *Queer Refuge: A Review of the Role of Country Condition Analysis in Asylum Adjudications for Members of Sexual Minorities*, 29 HASTINGS INT'L & COMPAR. L. R. 251, 252, 266 (2006).

91 Hall & Sajnani, *supra*, n.89; *see* Ruth Pearce, *Understanding Trans Health: Discourse, Power and Possibility* n.1 (*Travesti* in Latin America, *hijra* and *kothi* in South Asia, *tom*, *dee*, and *khatoey* in Thailand, *mak nyah* in Malaysia, *fa'afafine* in Samoan societies, and *two-spirit* in some Native American cultures all carry their own social, religious, and cultural understandings and stigmas that may be radically at odds with those in the United States); Ellen A. Jenkins, *Taking the Square Peg Out of the Round Hole: Addressing the Misclassification of Transgendered Asylum Seekers*, 40 GOLDEN GATE UNIV. L. R. 67, 88 ("Many countries have no concept of 'transgender,' resulting in the perception that all gender non-conforming behavior is synonymous with homosexuality.").

92 Connor Cory, *The LGBTQ Asylum Seeker: Particular Social Groups and Authentic Queer Identities*, 20 GEO. J. GENDER & L. 577, 601 (2019).

rigidity and narrowness that necessarily misunderstands or misrepresents the applicant's actual identity: "For purposes of obtaining asylum, many transgender individuals are forced to embrace membership in the social group 'homosexual' even though this accepted social group does not always match a transgender applicant's sexual orientation."[93] Even for experienced legal practitioners, framing an asylum seeker's particular social group in a way that adjudicators will understand can be challenging when clients in the process of coming out are still "questioning their gender" or when clients "identify as neither male nor female"[94] or as "non-binary."[95]

Expecting LGBTQ applicants to correctly frame their particular social group at the time of filing their initial asylum application is also unreasonable given the complexity of "considering identity from two distinct perspectives: (1) that of the [applicant] and (2) that of the society in question."[96] It is very common for LGBTQ applicants to understand their sexual orientation and gender identity differently from the way they are perceived by their persecutors, such that their asylum claims can be based on actual membership in one or more particular social groups and imputed membership in yet another particular social group. Especially for LGBTQ applicants who are unrepresented by counsel, it is unfair to expect that they would not only be able to "articulate [their own] identity" but also "convey[] how [they are] likely to be viewed in their country of origin, whether that view coincides with their authentic identity or not."[97]

It is particularly unfair to demand that LGBTQ asylum seekers, especially *pro se* applicants, correctly and thoroughly detail a cognizable particular social group at the outset of their case when they may have just fled brutal anti-LGBTQ persecution at the hands of their government. Due to internalized homophobia or intense fear resulting from extreme past persecution, it is often difficult for LGBTQ asylum seekers to reveal their LGBTQ identity to anyone – let alone to a judge or lawyer. As practitioners, we have seen many clients who are not able to share their true identities until a deep level of trust has been established between the legal representative and the client. For example, a client may present and openly identify as a gay man, but in actuality may be transgender, a fact that they may not feel comfortable or safe enough to reveal to their attorney until a relationship of trust has been built over time.

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

The Proposed Rule would redefine "political opinion" in contravention of existing law. 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." The Proposed Rule's

---

93 Jenkins, *supra*, n.91, 68 ("From a judicial perspective, transgender individuals can present blurred social and biological paradigms, often resulting in an erroneous adjudication contrary to the applicant's identity."); Swink, *supra*, n.90, 253.

94 Cory, *supra*, n.92, 599.

95 Nat'l Ctr. for Transgender Equal., *Understanding Non-Binary People: How to Be Respectful and Supportive*, https://transequality.org/issues/resources/understanding-non-binary-people-how-to-be-respectful-and-supportive (last visited July 13, 2020).

96 Cory, *supra*, n.92, 601.

97 *Id.* at 601-602.

redefinition of political opinion is so narrow that many meritorious political opinion claims will be denied, even where the applicant has clearly been persecuted on the basis of political beliefs, simply because those beliefs did not involve a "discrete cause related to political control of a state."

LGBTQ human rights advocacy clearly constitutes a political opinion under the INA, particularly in countries with anti-LGBTQ laws, but is almost never in "furtherance of a discrete cause related to political control of a state." Courts have repeatedly instructed that "political opinion" can include a broad range of activities and beliefs.[98] In addition to organized political activity, "political opinion" can include protests of economic injustice,[99] actions against corruption,[100] and membership in advocacy groups, such as religious organizations.[101] Participation in organized political activities or a political party is not a prerequisite to a finding of a political opinion.[102]

Take, for example, the case of an LGBTQ rights advocate in Uganda. The ruling political power in Uganda fiercely opposes LGBTQ rights. "Homosexuality" is punished as a crime, and reports indicate government officials have sought to make it punishable by death.[103] Public advocacy in support of LGBTQ rights, in opposition to the Ugandan government's political position and criminal law, is an expression of political opinion precisely because it is by definition subversive toward the current political regime.[104] Yet, under the Proposed Rule, an

---

98 *Njuguna v. Ashcroft*, 374 F.3d 765, 770 (9th Cir. 2004) (citation omitted) ("[T]o qualify for asylum based on a well-founded fear of persecution the fear of persecution must be on account of one of the statutory grounds . . . . An asylum applicant may establish political opinion as the basis for persecution in three ways: 1) affirmative political beliefs; 2) political neutrality where such is hazardous; and 3) an imputed political opinion.").

99 *Lina Liu v. Holder*, 571 Fed. App'x 629, 631 (9th Cir. 2014) ("[T]he activities engaged in by Liu that resulted in her arrest and persecution – protesting government eviction policies and organizing large congregations to do so – were expressions of political opinion, even if the grievances protested were economic in nature.").

100 *See Chunhua Jin v. Barr*, 774 Fed. App'x 688, 689-90 (2d Cir. 2019) (finding that conduct in organizing a strike against rent increases could be viewed as a political challenge to the local government's authority).

101 *Cordero-Trejo v. I.N.S.*, 40 F.3d 482, 487-89, n.5 (1st Cir. 1994) (finding that the pattern and practice of persecution of a religious group and its members on account of imputed political opinion as demonstrated by contemporaneous news and reports could be sufficient to support a claim for asylum).

102 *Meza-Menay v. I.N.S.*, 139 F.3d 759, 763 (9th Cir. 1998) ("an asylum petitioner may hold a political opinion within the meaning of the INA even if the petitioner did not participate in organized political activities").

103 Nita Bhalla, *Attacks on LGBT+ Ugandans Seen Rising After Minister Proposes Death for Gay Sex*, REUTERS NEWS (Oct. 22, 2019), https://www.reuters.com/article/us-uganda-lgbt-crime/attacks-on-lgbt-ugandans-seen-rising-after-minister-proposes-death-for-gay-sex-idUSKBN1X127D ("Uganda has seen a rise in attacks on LGBT+ people since a minister proposed bringing back the death penalty for gay sex, campaigners said on Tuesday, warning anti-gay rhetoric was fueling homophobia.").

104 Living in defiance of an unjust or inhumane law can be a political act, "particularly in countries where such non-conformity is viewed as challenging government policy or where it is perceived as threatening prevailing social norms and values." U.N., *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, ¶¶ 40, 50 (HCR/GIP/12/09) (Oct. 23, 2012), http://www.unhcr.org/509136ca9.pdf.

adjudicator would deny the political opinion claim of an LGBTQ individual or ally in Uganda who is persecuted for espousing political beliefs in support of LGBTQ civil liberties on the basis that the advocacy would not have been in "furtherance of a discrete cause related to political control" of Uganda. This result is clearly at odds with the goals of U.S. asylum law. Support for LGBTQ people and their rights, particularly in political contexts where LGBTQ identity is criminalized, is clearly a political opinion under the INA, and the Proposed Rule's attempt to undermine this principle is illegitimate and unacceptable.

IX. The Proposed Rule Unlawfully Imposes Anti-Asylum Measures Under the Guise of "Discretion" (8 CFR § 208.13; 8 CFR § 1208.13)

In addition to meeting the legal standard, asylum seekers must merit a favorable exercise of discretion.[105] Because "the danger of persecution should generally outweigh all but the most egregious of adverse factors," discretionary factors "should not be considered in such a way that the practical effect is to deny relief in virtually all cases."[106] The Proposed Rule would turn on its head decades of jurisprudence to deny most asylum applications on discretionary grounds and to severely limit the actual discretion adjudicators exercise, and therefore must be rescinded.

The Proposed Rule makes many of these "discretionary" bars practically mandatory, allowing for the possibility of a positive exercise of discretion only in narrow circumstances for reasons of national security or foreign policy interests, or if the asylum seeker can show by a preponderance of the evidence that they would suffer exceptional and extremely unusual hardship if denied asylum. Even this extremely limited exception only applies to some of the "discretionary" factors. The combination of the heightened evidentiary standard and the intentionally onerous legal standard will mean that virtually no asylum seeker will be able to qualify for asylum as a matter of discretion.

While we object to all twelve of the discretionary grounds for denial enumerated in the Proposed Rule, we are especially appalled by the Rule's attempt to circumvent the clear authority of the INA by permitting discretionary denials where applicants have filed for asylum after having been in the United States for more than one year without lawful status. In so doing, the Proposed Rule directly contradicts the plain language of INA § 208(a)(2)(d), which explicitly allows exceptions to the one year filing deadline for asylum based on changed or extraordinary circumstances.[107] The administration cannot rewrite the INA to eliminate these vital exceptions to the one-year-filing deadline in the guise of "discretion."

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 from filing for asylum

---

105 *Cardoza-Fonseca*, 480 U.S. at 423.

106 *Matter of Pula*, 19 I. & N. Dec. 467, 473-74 (B.I.A. 1987).

107 8 U.S.C. § 1158(a)(2)(D); 8 C.F.R. § 1208.4(a)(4)(i)(B); U.S. Citizenship & Immigr. Servs., *RAIO Affirmative Asylum Procedures Manual* (Nov. 2013), 72 (applicants who file for asylum outside of one year since their last arrival to the United States are not barred from applying for asylum where they have established "changed circumstances that materially affect [their] eligibility for asylum or extraordinary circumstances directly related to the delay in filing").

within one year of arriving in the United States due to extraordinary circumstances, including mental health issues such as post-traumatic stress disorder often as a result of the persecution they have fled.

LGBTQ and HIV-affected asylum seekers frequently qualify for the changed circumstances or extraordinary circumstances exceptions to the one-year filing deadline for a variety of reasons that are material to their asylum claim and increase their fear of being forced to return to their country of origin. U.S. Citizenship and Immigration Services (USCIS) has recognized that both "coming out" as LGBTQ and taking recent steps in "transitioning from the gender assigned at birth to the gender with which the applicant identifies" may qualify an applicant for an exception to the one-year filing deadline based on changed circumstances.[108] USCIS has also recognized that changed country conditions, such as an instance in which "a fundamentalist government [has] just come to power and instituted criminal sanctions for consensual homosexual activity," as well as a "recent HIV diagnosis" could constitute changed circumstances.[109] Events such as recent "marriage to a same sex partner" or "recently getting into mental health care" can also be changed circumstances justifying an exception to the filing deadline.[110]

USCIS has also acknowledged a variety of extraordinary circumstances exceptions to the filing deadline specific to LGBTQ and HIV-affected asylum seekers, including "hospitalization" and "serious illness" as a result of HIV, as well as extreme depression, post-traumatic stress disorder, or other mental health issues relating to internalized homophobia and transphobia or to past abuses suffered, all of "which make it difficult to file within a year of entry into the United States."[111] In all of these circumstances, it would be fundamentally unfair as well as a violation of the INA to deny on the basis of "discretion" an asylum applicant who qualifies for an exception to the one-year filing deadline.

X. Conclusion

The Proposed Rule represents a radical rewriting of the U.S. asylum system. Each section of these monumental proposed changes merits a full 60-day comment period for the public to prepare comments adequately. The Proposed Rule would eviscerate asylum protections that have been in place in the United States for decades, and would shamefully close the door on LGBTQ and HIV-affected people fleeing danger who have looked to the United States as a

---

108 U.S. Citizenship & Immigr. Servs., *RAIO Directorate – Officer Training: Guidance for Adjudicating Lesbian, Gay, Bisexual, Transgender, and Intersex (LGBTI) Refugee and Asylum Claims Training Module*, 61-62 (2011).

109 *Id.*

110 Cory, *supra*, n.92, 580 n.20.

111 U.S. Citizenship & Immigr. Servs., *LGBTI Refugee and Asylum Claims Training Module*, *supra*, n.108, 62-63. *See also* Shildo & Ahola, *supra*, n.85, 10 ("For many LGBT forced migrants, the notion that they would receive help from government authorities on the grounds that they have suffered persecution based on SOGI [sexual orientation and gender identity] is difficult to grasp *until they have been outside their country of origin for an extended period*. Complex PTSD makes it difficult for migrants to recount a history of traumatic events and it may take many years for the shame and fear to diminish sufficiently to allow a forced migrant to be able to seek help." (emphasis added)).

beacon of hope, civil liberties, safety, and freedom. The vast majority of all asylum seekers, not just those who are LGBTQ and HIV-affected, are likely to be denied asylum under the Proposed Rule even if they have well-founded fears of persecution. For all of the reasons stated above, and for the additional reasons provided by our sister organizations who are united with us in the fight for immigrant justice, we call upon the administration to withdraw the Proposed Rule in its entirety.

Sincerely,

Virginia M. Goggin
Director of Legal Services

New York City Anti-Violence Project
116 Nassau Street, 3rd Floor
New York, New York 10038
(212) 714-1184 *voice*
(212) 714-2627 *fax*
vgoggin@avp.org

The Anti-Violence Project wishes to acknowledge pro bono counsel Erin Meyer, associate Bryant Wright, pro bono paralegal Alexander Volpicello, project assistant Victoria Klevan, and pro bono intern Jennifer Qu of Proskauer Rose LLP for their assistance in drafting this letter and representing LGBTQ and HIV-affected asylum seekers referred through the Anti-Violence Project's free legal services program.