UNITED STATES OF AMERICA
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, DEPARTMENT OF JUSTICE;
U.S. CITIZENSHIP AND IMMIGRATION SERVICES, DEPARTMENT OF HOMELAND SECURITY,

Joint Notice of Proposed Rulemaking	**: EOIR Docket No. 18-0002**
Procedures for Asylum and Withholding of	**: 8 CFR Parts 208 and 235**
Removal; Credible Fear and Reasonable	**: A.G. Order No. 4714-2020**
Fear Review	**: 8 CFR Parts 1003, 1208, and 1235**
	: RIN 1125-AA94

Submitted via Federal eRulemaking Portal: http://www.regulations.gov

COMMENTS OF WHITMAN-WALKER HEALTH

Whitman-Walker Health (WWH or Whitman-Walker) submits these comments in response to the joint notice of proposed rulemaking (Notice or Proposed Rule) "Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review" published by the Department of Homeland Security, (DHS) and the Department Of Justice, (DOJ) in the Federal Register at 85 F. R. 36264 on June 15, 2020.

Whitman-Walker Health strongly opposes the Proposed Rule because it is inconsistent with the Immigration and Nationality Act (INA), abrogates the United States' international treaty obligations, and will have particularly harsh effects on lesbian, gay, bisexual and transgender and queer (LGBTQ) persons fleeing persecution and torture. We recommend that DHS and DOJ rescind the Proposed Rule immediately.

EXPERTISE AND INTEREST OF WHITMAN-WALKER HEALTH

Whitman-Walker Health is a community-based, Federally Qualified Health Center offering primary medical care and HIV specialty care, community health services and legal services to residents of the greater Washington, DC metropolitan area. WWH has a special mission to the LGBTQ members of our community, as well as to all Washington-area residents of every gender and sexual orientation who are living with or otherwise affected by HIV. In

calendar year 2019, more than 20,700 individuals received health services from Whitman-Walker. In that year, 59% percent of our health care patients and clients who provided their sexual orientation identified as lesbian, gay, bisexual, or otherwise non-heterosexual, and 10% of our patients who provided their gender identity—more than 2,000 individuals—identified as transgender or genderqueer.

Since the mid-1980s, Whitman-Walker has had an in-house Legal Services Department. Our attorneys and legal assistants provide information, counseling, and representation to Whitman-Walker patients, and to others in the community who are LGBTQ or living with or affected by HIV, on a wide range of civil legal matters that relate directly or indirectly to health and wellness – including immigration and asylum cases. Our Legal Services Department, with the assistance of hundreds of volunteer attorneys throughout the area, has provided a wide range of immigration-related services to foreign-born LGBTQ individuals and families. Many come to the U.S. fleeing persecution in their countries of birth because of their sexual orientation or gender identity.

COMMENTS ON THE PROPOSED RULE

THE PROPOSED RULE IS A VIOLATION OF THE ADMINISTRATIVE PROCEDURES ACT.

The Proposed Rule is a drastic departure from the historical asylum standards and procedures. Such drastic changes to the rules governing the processes and standards for seeking asylum create immense reliance issues by asylum seekers and the organizations that serve them. However, the Departments seek to make these changes without the normal 60-day notice and comment period. This shortened comment period fails to serve its intended purpose under the Administrative Procedures Act, namely: "(1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give

affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review." *Capital Area Immigrants' Rights Coalition (CAIR) v. Trump*, No. 19-cv-2117, ECF No. 72, 24-25 (D.D.C. June 30, 2020) (internal citations omitted).

The decision to shorten the comment period is unlawful and fails to allow enough time for thorough consideration and analysis of the Proposed Rule's many changes. Unfortunately, these procedural shortcomings are simply the first in a number of unlawful characteristics in the Notice. Due to these procedural shortcomings, we are able to only provide comment on a limited portion of the Notice. We note for the sake of review that our inability to comment on every portion of the Notice does not represent assent to any particular change.

THE PROPOSED RULE'S REGULATIONS ALLOWING FINDINGS OF FRIVOLOUSNESS BY ASYLUM OFFICERS REMOVES DUE PROCESS PROTECTIONS.

The Proposed Rule contends to allow asylum officers to determine frivolousness based on the content of the asylum application alone or from the asylum interview. The information presented in an asylum application or asylum interview is inappropriate to support a finding of frivolousness because the due process protections of asylum interviews are insufficient. The asylum interview is a non-adversarial proceeding where there is no cross-examination of witnesses or respond to adverse facts, as there in an immigration proceeding.

The Proposed Rule would, in practical terms, redefine the meaning of a "frivolous" asylum application. Under the proposed rule, an asylum seeker could be charged with filing a "frivolous" application if the adjudicator determines that it lacks "merit" or is "foreclosed by existing law." (Notice at 43). This broad standard is contradicted by 8 C.F.R. 1003.102(j)(1),

which specifically states that a filing is not frivolous if the applicant has "a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law, and is not interposed for any improper purpose." Under the Proposed Rule, an applicant seeking to challenge the institutionalization of the Department's interpretation of the law must risk a finding that would forever bar any immigration relief if that appeal is unsuccessful. In effect, the Proposed Rule eliminates the opportunity to challenge the lawfulness of the Department's policies, removing essential due process protections.

The Proposed Rule seeks to empower immigration judges and asylum officers to terminate an asylum applicant on the basis of frivolousness. (Notice at 35). The asylum officer should not be allowed to determine frivolousness because the applicant may not examine evidence or question witnesses as they may in formal immigration proceedings. Doing so without establishing appropriate procedural safeguards is likely to impede and further slow the asylum system through innumerable appeals that will likely result under the standards articulated in the Proposed Rule.

Under the existing legal standards, the presence of false information in an asylum application is a consideration that is balanced by other considerations, for example, the exigent circumstances of entry or the becoming the victim of fraudulent "notarios" who prey on vulnerable asylum seekers.[1] Under the Proposed Rule, an applicant who is a victim of notario fraud will be determined to have filed a frivolous application and be subjected to one of the harshest bars in immigration law (*see* INA § 208(d)(6)), and rendered ineligible for any form of

[1] *See In re Pula,* 19 I. & N. at 474; *see also Gulla v. Gonzales*, 498 F.3d 911 (9th Cir. 2007) ("When a petitioner who fears deportation to his country of origin uses false documentation or makes false statements to gain entry to a safe haven, that deception "does not detract from but supports his claim of fear of persecution.") (quoting *Akinmade v. INS,* 196 F.3d 951, 955 (9th Cir. 1999)).

immigration relief in the future. The Proposed Rule's standard would reject applicants and bar future relief for failure to articulate persecution exactly as required by law, a likely event for unrepresented applicants who are unaware of the words and phrases that express legally cognizable persecution under the standards articulated in the Proposed Rule.

THE PROPOSED RULE IS INCONSISTENT WITH THE IMMIGRATION AND NATURALIZATION ACT

The Proposed Rule's expansion of adverse factors considered in the discretionary determination by asylum officers to deny asylum applications contravenes the protections to asylum enshrined within the INA and is contrary to long established case law that all but the most significant factors are outweighed by the fear of persecution. The Proposed Rule would encourage asylum officers to deny asylum for many reasons, some of which contravene the INA: unlawful entry, spending 14 or more days in another country, transiting another country, accumulating more than one-year of presence in the United States before filing for asylum, use of fraudulent documents, and having withdrawn an asylum claim in the past. (Notice at 72).

Congress has enshrined protections for asylum seekers through the INA. The INA provides that an applicant "who arrives in the United States *(whether or not at a designated port of arrival),* irrespective of such alien's status, may apply for asylum." 8 U.S.C. § 1158(a)(1) (emphasis added). The INA also requires exceptions to the one-year filing deadline for changed and extraordinary circumstances. *See* 8 U.S.C. 1158(a)(2)(D). Exceptions to one-year filing deadlines are particularly important for LGBTQ and HIV-positive asylum seekers for reasons that are discussed below. The Proposed Rule's guidelines for asylum officers contradict the specific circumstances Congress has identified when a noncitizen may be deemed ineligible for asylum based on his or her relationship with a third country in 8 U.S.C. § 1158(b)(2)(A).

THE PROPOSED RULE RUNS CONTRARY TO THE UNITED STATES' NON-REFOULEMENT OBLIGATIONS UNDER DOMESTIC AND INTERNATIONAL TREATIES.

The U.S. codified its international human rights obligations as a party to the Refugee Convention and the Convention Against Torture to ensure that the alien's life or freedom would not be threatened in the Refugee Act of 1980. 8 U.S.C. § 1158 (a)(1), GA res. 39/46, annex, 39 UN GAOR Supp. (No. 51) at 197, UN Doc. A/39/51 (1984); 1465 UNTS 85. These international agreements came together in the aftermath of World War II in hopes of preventing another global travesty by ensuring that individuals fleeing crises and persecution are met with fair and safe procedures to seek asylum. The United States is required to refrain from returning refugees to places where their lives or freedom would be threatened on account of their protected status.

The Proposed Rule runs afoul of humanitarian law and international treaty obligation by severely limiting the Protected Social Groups (PSG) established by law and litigation. (Notice at 54). Courts and the United States Citizenship and Immigration Services have held that independent bases on which to establish membership in a PSG include sexual orientation, gender identity, and HIV status.[2]

The Proposed Rule contravenes our international obligations to establish fair and safe asylum procedures by creating a heightened bar that would require applicants to initially

[2] *See, e.g., Avendano–Hernandez v. Lynch*, 800 F.3d 1072, 1082 (9th Cir. 2015) (recognizing that transgender individuals are members of a particular social group); *Nabulwala v. Gonzales*, 481 F.3d 1115, 1118 (8th Cir. 2007) (same for lesbians); *Karouni v. Gonzales*, 399 F.3d 1163, 1172 (9th Cir. 2005) (same for "*all* alien homosexuals"); *Amanfi v. Ashcroft*, 328 F.3d 719, 721 (3d Cir. 2003) (same for men imputed to be gay); *Matter of Toboso–Alfonso*, 20 I&N Dec. 819, 822 (BIA 1990) (same for gay men); USCIS, *Guidance for Adjudicating Lesbian, Gay, Bisexual, Transgender, and Intersex (LGBTI) Refugee and Asylum Claims Training Module*, at 15-17 (noting that HIV may also be a PSG). Available at: https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/Asylum%20Native%20Documents%20and%20Static%20Files/RAIO-Training-March-2012.pdf.

articulate every cognizable PSG before the Immigration Judge or lose the opportunity to present it, even on a motion to reopen where an applicant relied on terrible advice from ineffective counsel. (Notice at 55–56).

The Proposed Rule runs afoul of the treaty obligations by incorporating impractical burdens of evidence for showing persecution. The Proposed Rule's changes to the evidence required to establish persecution are contradictory and fail to account for the ways in which persecution harms asylum seekers. For example, the proposed rule excludes personal animus or retribution as sufficient to establish persecution (*See* Notice at 63). This requirement ignores the long-standing precedent that persecutors have mixed motives for their actions and may engage in persecution for pretextual reasons to hide their bias.[3]

In contradiction to established precedent, the Proposed Rule requires that applicants suffer sufficient harm before seeking asylum. The Proposed Rule states that persecution "does not include intermittent harassment, including brief detention." (Notice at 61). However, detention itself can rise to the level of persecution.[4] Moreover, "intermittent" incidents can quickly become cumulative, amounting to persecution.[5]

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[3] *See Parada v. Sessions*, 902 F.3d 901, 910 (9th Cir. 2018) (pre-REAL ID Act application); and *Madrigal v. Holder*, 716 F.3d 499, 506 (9th Cir. 2013) (post-REAL ID Act application)

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

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

The Proposed Rule states that "the mere existence of potentially persecutory laws or policies is not enough to establish a well-founded fear of persecution." (Notice at 60). Under this reasoning, in countries where same sex relationships carry the death penalty, the fact that LGBTQ people are "infrequently" stoned to death would disqualify these laws as persecutory. This reasoning ignores the reality of the experiences of living under persecutory laws. The laws effect is not only to murder the gay person but also to quell hope and spread terror.[6] Under the Proposed Rule, fear for one's life under a murderous legal regime may be insufficient to establish the grounds for asylum, a clearly contradictory and inhumane result.

Discriminatory laws create fear of government in persecuted populations; blocking access to the criminal justice system and thereby creating vulnerability to violence from state and non-state actors alike. For example, an LGBTQ person living in a place where sexual and gender minorities are criminalized is in danger from the police enforcing the law and in danger from anyone in the community who is aware of their LGBTQ status, potentially their families, employers, and roommates. Therefore, laws criminalizing LGBTQ identity and behaviors are always persecutory by the nature of the fear and vulnerability they create.

The Proposed Rule is contradictory on its face due to the requirements that persecution be simultaneously individuated enough to the asylum applicant that they are in exigent fear for their life and general enough that persecutory state actors and laws are enforced with regularity, while avoiding generalizing claims of cultural bias. In so doing, the Notice creates an impassible field of requirements and standards that eviscerates the intent of the entire asylum process, in contradiction of our laws passed by Congress and obligations under international treaty.

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

THE PROPOSED RULE WILL HAVE A DISPROPORTIONATELY HARMFUL EFFECT ON SURVIVORS OF DOMESTIC VIOLENCE, LGBTQ INDIVIDUALS AND FAMILIES, AND PEOPLE LIVING WITH HIV

The Proposed Rule is particularly dangerous for LGBTQ people and victims of domestic violence, who have suffered persecution based on misogyny, homophobia and transphobia in their home country. Under the INA and decades of precedential case law, many LGBTQ people and victims of domestic violence are eligible for asylum as members of particular social groups subject to persecution and even threat of death.

As of late 2019, there remained at least 68 nations that have laws making consensual same-sex sexual acts illegal.[7] LGBTQ individuals continue to be persecuted world-wide merely for being who they are – subjected to arbitrary arrests, physical and sexual assault, and discrimination in various arenas of society.[8] The Proposed Rule curtails to the point of elimination any protections for LGBTQ refugees in the United States fleeing persecution.

The third country transit ban, which was recently struck down and is seen in a new form in this Proposed Rule, is particularly harmful for LGBTQ asylum seekers. Given the presence of transnational gang violence and a dearth of legal protections for victims of violence, an LGBTQ person may not be able to reasonably expect refuge an interim country on their way to safety.

The one-year filing deadline particularly harmful to LGBTQ and HIV-positive applicants. Due to the nature of LGBTQ identity and HIV infection, asylum seekers may not be

[7] ILGA World: Lucas Ramon Mendos, State-Sponsored Homophobia 2019: Global Legislation Overview Update (Geneva; ILGA, December 2019)

[8] ILGA World: Lucas Ramon Mendos, State-Sponsored Homophobia 2019: Global Legislation Overview Update (Geneva; ILGA, December 2019)

aware of their membership in a particular social group that gives them grounds for seeking asylum until years after their entrance into the United States. The process of understanding and identifying oneself as having an LGBTQ identity requires safety, security, and support which may be inaccessible to asylum seekers fleeing exigent circumstances in their home country. Additionally, the presence of HIV infection may not be detected until an asylum seeker is able to access culturally competent and clinically appropriate medical care, which may be unavailable to potential asylum applicants in much of the United States and in their home country.

CONCLUSION

The rule is a blatantly unlawful attempt to administratively rewrite the asylum laws of the United States. Taken individually, the proposed rules changes are illegal because they contravene the laws of the United States and abrogate the obligations of the United States under the Convention Against Torture and the Refugee Convention. Taken together, the rules are a blatant attempt to create an impassible asylum system of contradictory standards and impracticable evidentiary burdens. The Proposed Rule seeks to codify into regulations currently litigated and overturned administrative and legal decisions. By departing from settled jurisprudential principles, the Proposed Rule creates fear and uncertainty in asylum seekers and burdens advocates with the cost of appeals and the continued litigation required to challenge the Department's illegal position. We take this opportunity to remind the DOJ and DHS that they are constitutionally bound to obey and uphold the laws of the United States and therefore must abide by the language and purpose of the INA. For these reasons, Whitman-Walker Health strongly opposes the proposed rule and recommends that the Administration promptly rescind it.

Respectfully submitted,

Benjamin Brooks, Assistant Director of Policy
Denise Hunter, Senior Staff Attorney
Elizabeth Pinolini, Equal Justice Works Fellow

WHITMAN-WALKER HEALTH
1377 R Street NW Suite 200
Washington, DC 20009

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