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Attention: Desk Officer, U.S. Citizenship and Immigration Services, DHS

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

Robert F. Kennedy Human Rights writes in response to the Department of Homeland Security (“DHS”) and the Department of Justice’s (“DOJ,” collectively with DHS, the “Departments”) Notice of Proposed Rulemaking (“Proposed Rule”) on the Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, RIN 1125-AA94 / EOIR Dkt. No. 18-0002; A.G. Order No. 4714-2020, published in the Federal Register at 85 F.R. 36264 on June 15, 2020 (“Notice”).<sup>1</sup>

The Proposed Rule eviscerates the United States (“U.S.”) asylum system and defies the nation’s obligations under international human rights law to safeguard refugees seeking humanitarian protection. Far from being the “comprehensive solution” the Departments allegedly seek, the Proposed Rule will further confuse vulnerable asylum seekers and U.S. officials with unclear standards and unnecessary barriers at every stage of the asylum process. The Proposed Rule will dramatically limit the ability of individuals with well-founded fears of persecution to obtain, or even apply for, asylum in the U.S. and tragically result in asylum seekers, especially women and LGBTQ individuals, being unlawfully returned to countries where they face severe harm and even death. Accordingly, we urge the Departments to promptly withdraw the Proposed Rule in its entirety.

**I. Organization**

Robert F. Kennedy Human Rights is a nonpartisan, not-for-profit international human rights organization dedicated to realizing Robert Kennedy’s vision of a more just and peaceful world. We partner with frontline advocates in the United States and around the world to carry on Robert Kennedy’s unfinished work of social justice.

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<sup>1</sup> Where this comment includes linked material in footnotes, we request that the Departments review the linked material in its entirety and consider it part of the record.

For decades Robert F. Kennedy Human Rights has worked closely with our partners to defend the human rights of marginalized groups, including those persecuted because of their gender, sexual orientation, and gender identity. We have witnessed the grave threats that women and LGBTQ individuals face around the world and the inability or unwillingness of some governments to protect against those threats. We recognize the strength and courage of anyone forced to flee their home and are committed to upholding their rights to dignity and protection. Today Robert F. Kennedy Human Rights joins with our partners to oppose the Proposed Rule because of the unconscionable effect it will have on people seeking asylum in the U.S.

## **II. The United States Must Comply with Refugee Protection Standards Set Out in International Human Rights Law**

As a party to the Protocol Relating to the Status of Refugees (“Protocol”), the U.S. must adhere to the standards for the protection and treatment of refugees contained in the Protocol and 1951 Convention Relating to the Status of Refugees (“Refugee Convention”), including the definition of a refugee:

[Anyone 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 of [their] country of nationality and is unable, or, owing to such fear, is unwilling to avail [themselves] of the protection of that country.<sup>2</sup>

In recognition of this obligation, the U.S. replicated the Refugee Convention’s definition in its national asylum legislation.<sup>3</sup> But it is not enough to employ the same words. Following the rules laid out in the Vienna Convention on the Law of Treaties, the U.S. must interpret and apply those words in good faith, consistent with the context, object, and purpose of the Refugee Convention.<sup>4</sup>

One particularly well-established source for interpretive guidance on the Refugee Convention is the *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection* (“UNHCR Handbook”) published by the Office of the United Nations High Commissioner for Refugees (“UNHCR”).<sup>5</sup> However, as we detail below, rather than defer in good faith to the UNHCR Handbook or other authorities on human rights law, the Departments’ seek to unilaterally redefine key terms from the refugee definition in a way that entirely disregards the humanitarian, protection-centered object and purpose of the Refugee Convention.

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<sup>2</sup> Convention Relating to the Status of Refugees art. I(A)(2), *opened for signature* July 28, 1951, 189 U.N.T.S. 150 (entered into force April 22, 1954) [hereinafter Refugee Convention], <https://www.unhcr.org/en-us/3b66c2aa10>.

<sup>3</sup> See 8 U.S.C. § 1101(a)(42).

<sup>4</sup> See Vienna Convention on the Law of Treaties art. 26, 31, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980), <https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf>.

<sup>5</sup> *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection*, UNHCR, HCR/1P/4/ENG/REV. 4 (2019) [hereinafter UNHCR Handbook], <https://www.unhcr.org/en-us/publications/legal/5ddfc47/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html>.

A central standard of international refugee protection is the principle of *non-refoulement*, that individuals seeking asylum have a right not to be expelled or returned (*refouled*) to any place where their life or freedom would be threatened or they would be in danger of torture. Both the Refugee Convention and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”), to which the U.S. is also a party, explicitly incorporate this principle and prohibit States from removing individuals seeking protection in their territory to such a situation.<sup>6</sup> In both treaties, the obligation to protect against *refoulement* is non-derogable, meaning the U.S. cannot suspend it for any reason, including a declared state of emergency.<sup>7</sup> Unfortunately, the drastic changes to the characteristics of who can receive asylum in the U.S. proposed by the Departments and the accompanying removal of key due process protections in the asylum system will inevitably contravene the principle of non-refoulement, removing vulnerable asylum seekers to a country where they are at risk of persecution, torture, or death.

If enacted, the Proposed Rule will place the U.S. in violation of its obligations under international law and further degrade the reputation of our nation and its human rights record. Robert F. Kennedy Human Rights would particularly like to highlight the following ways in which the Proposed Rule disregards binding standards on the protection and treatment of refugees and unduly narrows the scope of asylum in this country:

### **III. The Proposed Definitions of “Particular Social Group” and “Political Opinion” Exclude Bona Fide Asylum Seekers from Those Protected Groups**

To qualify for asylum in the U.S., an individual must demonstrate a well-founded fear of persecution on account of one or more protected grounds: “race, religion, nationality, membership in a particular social group, or political opinion.”<sup>8</sup> As noted above, these stem from the Refugee Convention. In the Proposed Rule, the Departments seek to codify new definitions of the terms “particular social group” (PSG) and “political opinion” that will materially impact who will be able to claim a fear of persecution on those grounds. The Departments’ definitions retrogressively narrow the Convention grounds and will disqualify people from being granted asylum who meet the definition of refugee under international law and are entitled to humanitarian protection.

#### *A. Membership in a Particular Social Group*

First, the Departments seek to codify a more specific definition of PSG in U.S. law because they claim the term is not defined in the Refugee Convention and therefore further clarification is

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<sup>6</sup> Refugee Convention, *supra* note 2, art. 33; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3(1), *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987) [hereinafter Convention Against Torture], <https://www.ohchr.org/Documents/ProfessionalInterest/cat.pdf>.

<sup>7</sup> *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, UNHCR, ¶ 12 (2007), <https://www.unhcr.org/4d9486929.pdf>; General Comment No. 4 on the Implementation of Article 3 of the Convention in the Context of Article 22, Committee Against Torture, ¶¶ 8–9, CAT/C/GC/4 (2018), *available at* [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fGC%2f4&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fGC%2f4&Lang=en).

<sup>8</sup> 8 U.S.C. § 1101(a)(42).

needed. However, the Departments fail to recognize that the treaty body in charge of the Refugee Convention, UNHCR, *does* offer detailed interpretative guidance for the term. The UNHCR Handbook states that a PSG “normally comprises persons of similar background, habits or social status.”<sup>9</sup> Further, the *Guidelines on International Protection No. 2* issued by UNHCR explain that members of a PSG share or are perceived to share a common characteristic that is immutable “and therefore cannot be changed, [or] which, though it is possible to change them, ought not to be required to be changed because [it is] so closely linked to the identity of the person.”<sup>10</sup>

Notably, regarding interpretation, UNHCR explicitly instructs that the term PSG “should be read in an evolutionary manner, open to the diverse and changing nature of groups in various societies and evolving international human rights norms.”<sup>11</sup> Counter to the inclusive, evolutionary interpretation of PSG endorsed by UNHCR, the Departments seek to implement an exclusionary and regressive definition. In particular, the Proposed Rule includes a non-exhaustive list of characteristics that would be insufficient to establish membership in a PSG, including:

- presence in a country with generalized violence or a high crime rate;
- the attempted recruitment of the applicant by criminal, terrorist, or persecutory groups; and
- interpersonal disputes [and] private criminal acts of which governmental authorities were unaware.<sup>12</sup>

The new standard would almost categorically bar women fleeing domestic and gender-based violence, LGBTQ persons fleeing discrimination and violence carried out by private actors, and those fleeing gang-related violence from seeking asylum in the U.S. on PSG grounds. In these circumstances, people are not just fleeing “interpersonal” and “private” acts, they are fleeing because their government is failing to meet its duty to protect against those forms of violence.<sup>13</sup> In this manner, the Proposed Rule directly contradicts UNHCR’s guidance, which recognizes that all of those individuals can have cognizable claims under the PSG category of the Refugee Convention.<sup>14</sup>

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<sup>9</sup> UNHCR Handbook, *supra* note 5, at ¶ 77.

<sup>10</sup> *Guidelines on International Protection No. 2*, UNHCR, ¶ 12, HCR/GIP/02/02 (2002) [hereinafter *Guidelines on Membership of a Particular Social Group*].

<sup>11</sup> *Id.*, ¶ 3.

<sup>12</sup> 85 F.R. 36264, 36279 (June 15, 2020).

<sup>13</sup> Under international law, State’s fundamental obligations are threefold: 1) to respect every person’s human rights by not infringing on those rights, 2) to protect individuals from violations of their human rights from both state and non-state actors, and 3) to fulfill the human rights of all individuals within their jurisdiction by facilitating their enjoyment of those rights. *See, International Human Rights Law*, Office of the U.N. High Commissioner for Human Rights (OHCHR), <https://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx>.

<sup>14</sup> *See Guidelines on International Protection No. 1*, UNHCR, ¶¶ 16–17, 30–31, HCR/GIP/02/01 (2002) [hereinafter *Guidelines on Gender-Related Persecution*]; *Guidelines on Membership of a Particular Social Group*, *supra* note 10, ¶ 12; *Guidelines on International Protection No. 9*, UNHCR, ¶¶ 44–49, HCR/GIP/12/09 (2012) [hereinafter *Guidelines on Claims to Refugee Status Based on Sexual Orientation and/or Gender Identity*]; *Guidelines on International Protection No. 12*, UNHCR, ¶¶ 5, 32–37, HCR/GIP/16/12 (2016).

## B. Political Opinion

Additionally, the Proposed Rule defines “political opinion” in U.S. asylum law to “an ideal or conviction in support of the furtherance of a discrete cause related to political control of a state or a unit thereof.”<sup>15</sup> This unduly narrows UNHCR’s purposefully “broad” interpretation of the term, which includes “any opinion on any matter in which the machinery of State, government, society, or policy may be engaged.”<sup>16</sup> The Proposed Rule’s political control requirement clearly contradicts long-standing UNHCR guidance and will exclude individuals persecuted for seeking to advance women’s rights and LGBTQ rights for themselves or others, whom UNHCR recognizes can fall within the Refugee Convention ground of political opinion.<sup>17</sup>

The Proposed Rule also explicitly instructs against granting asylum to individuals fleeing persecution on account of a political opinion “defined solely by generalized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerilla, or other non-state organizations.” Again, these instructions contravene UNHCR guidance. UNHCR emphasizes that the political opinion ground of the Refugee Convention needs to be flexible to “reflect the reality of the specific geographical, historical, political, legal, judicial, and socio-cultural context” each asylum seeker has fled. Exercising this flexibility, UNHCR has expressly affirmed that a wide variety of opinions related to gangs including “expressing objections to the activities of gangs” and “refus[ing] advances of a gang” can constitute a political opinion for purposes of the Refugee Convention.<sup>18</sup>

In sum, the Proposed Rule’s definitions of “particular social group” and “political opinion” will result in the U.S. violating its obligations to apply the refugee definition established in the Refugee Convention to those seeking asylum in the U.S. and protect those individuals from *refoulement*.

## IV. The Proposed Definition of “Persecution” Denies Protection to Asylum Seekers Fleeing Serious Harms That Amount to Persecution Under International Human Rights Law

Asylum seekers must demonstrate a well-founded fear of persecution on account of a protected ground. The Proposed Rule restricts asylum eligibility in the U.S. by establishing, for the first time ever, a regulatory definition of “persecution” that excludes fact-specific analysis. The Proposed Rule defines persecution as needing to include “actions so **severe** that they constitute an **exigent** threat,” but **not** including:

- generalized harm that arises out of civil, criminal or military strife;

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<sup>15</sup> 85 F.R. 36264, 36280 (June 15, 2020).

<sup>16</sup> Guidelines on Gender-Related Persecution, *supra* note 12, ¶ 32.

<sup>17</sup> *See id.* (may include “an opinion as to gender roles” and “non-conformist behavior”); Guidelines on Claims to Refugee Status Based on Sexual Orientation and/or Gender Identity, *supra* note 12, ¶ 3 (may include “[t]he expression of diverse sexual orientation and gender identity . . . , 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”).

<sup>18</sup> *Guidance Note on Refugee Claims Relating to Victims of Organized Gangs*, Division of International Protection, UNHCR, ¶¶ 45–51 (March 31, 2010), <https://www.refworld.org/docid/4bb21fa02.html>.

- intermittent harassment, including brief detentions;
- repeated threats with no actual effort to carry out the threats;
- non-severe economic harm or property damage; and
- the existence of laws or government policies that are unenforced or infrequently enforced, unless there is credible evidence that those laws or policies have been or would be applied to an applicant personally.<sup>19</sup>

Asylum cases are inherently fact-specific and perhaps no part of an asylum claim is more individualized than the specific way in which one person has been or may be harmed by another. As such, UNHCR’s interpretive guidance emphasizes that whether or not actions or threats amount to persecution “will depend on the circumstances of each case” including “the opinions and feelings of the [asylum seeker] concerned.”<sup>20</sup> By establishing a strict definition of persecution that imposes a heightened standard of severity and exigence of harm, the Proposed Rule significantly undercuts the flexibility of persecution in the refugee context, disregards cumulative harm, and will ultimately result in the erroneous denial of protection to bona fide asylum seekers.

On the face of the Proposed Rule, asylum seekers may be forced to wait until persecutory laws are enforced against them or risk exposure to actual violence—up to and including death—before fleeing a dangerous situation. For example, it is widely recognized that the mere existence of laws which criminalize same-sex intimacy and LGBTQ identities “gives social sanction to prejudice and helps create a context in which hostility and violence is directed against LGBTQ people.”<sup>21</sup> But, under the Departments’ logic, if those laws are not enforced or enforced infrequently, they cannot be considered as persecution in an LGBTQ person’s asylum claim. This is an absurd result that undermines the object and purpose of refugee protections. For this reason, the UNHCR Handbook specifically explains that fear of persecution “refers not only to persons who have actually been persecuted, but also to those who wish to avoid a situation entailing the risk of persecution.”<sup>22</sup>

#### V. The Proposed Circumstances that Preclude a Finding of “Nexus” are Unreasonable and Dangerous

In asylum law and adjudications, “nexus” refers to the requirement that an asylum applicant’s persecution be *on account of* one or more protected grounds. The Proposed Rule advances eight blanket circumstances that the government would find insufficient to establish persecution on account of a protected ground. This list of disqualifying claims concerningly includes those based on:

- personal animus or retribution;

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<sup>19</sup> Proposed Rule §§ 208.1(e), 1208.1(e) (emphasis added).

<sup>20</sup> UNHCR Handbook, *supra* note 5, ¶ 52.

<sup>21</sup> Human Rights Watch, *Not Safe at Home*, at 10 (2014), [https://www.hrw.org/sites/default/files/reports/jamaica1014\\_ForUpload\\_1.pdf](https://www.hrw.org/sites/default/files/reports/jamaica1014_ForUpload_1.pdf).

<sup>22</sup> *Id.*, ¶ 45.

- interpersonal animus in which the alleged persecutor has not targeted, or manifested an animus against, other members of an alleged particular social group in addition to the member who has raised the claim at issue; and
- gender.<sup>23</sup>

The enumerated circumstances are illogical and have no rational basis in law. Personal animus is the motivation for a significant portion of persecution. Presumably, if a persecutor did not have personal animus against someone, they would not subject them to persecution. Also, it is manifestly unreasonable to require an individual asylum seeker to prove that a perpetrator of persecution against them has also targeted *others* in their social group in order to receive asylum. As a practical matter, it would often be impossible for many asylum seekers, especially survivors of domestic violence and LGBTQ persons, to know the past history of their persecutor to the degree that they could ever satisfy this requirement.

Additionally, by stating that claims based on “gender” are insufficient to demonstrate persecution on account of a protected ground, the Proposed Rule will effectively preclude women who have experienced or fear they will experience gender-related violence from the asylum process. This provision disregards the reality that law enforcement officers in many countries ignore or dismiss reports of domestic and gender-based violence and are unwilling to intervene in what is seen as a ‘private matter’ and women fleeing those circumstances merit humanitarian protection under the Refugee Convention.

The Proposed Rule’s blanket denial of whole categories of claims in the U.S. asylum system blatantly flouts the object and purpose of the Refugee Convention and key principles of international human rights law.

## **VI. Changes to the Standard for Protection Under the Convention Against Torture (CAT) Will Unlawfully Return Individuals to Torture**

The provisions of U.S. law that implement the Convention Against Torture (“CAT”) include procedures for the withholding or deferral of removal under CAT. These procedures provide critical protection for individuals who face torture in their country of origin and would be otherwise barred from asylum protections and are necessary to fulfill U.S. obligations to uphold Article 3 of CAT: “No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”<sup>24</sup> The Proposed Rule modifies the standard for withholding or deferral of removal under CAT in a manner that will severely limit the ability of individuals to receive relief even though there are substantial grounds to believe they could be subjected to torture.

Specifically, under the Proposed Rule, pain or suffering inflicted by, or at the instigation of or with the consent or acquiescence of, a public official is not torture unless it is done while the official is acting in his or her official capacity (i.e. under “color of law”).<sup>25</sup> Additionally, the Proposed Rule provides that only a government actor who is acting “under color of law” can

<sup>23</sup> See Proposed Rule § 208.1(f)(1)(i)–(viii).

<sup>24</sup> Convention Against Torture, *supra* note 6, art. 3(1).

<sup>25</sup> 85 F.R. 36264, 36286 (June 15, 2020).

acquiesce in torturous conduct by private actors. The definition of “acquiescence” currently requires a finding of actual knowledge or willful blindness; the Proposed Rule redefines “willful blindness” to require that the official be “aware of a high probability of activity constituting torture and deliberately avoided learning the truth.” A reckless or negligent disregard for the truth is not enough.

These changes will make it nearly impossible for many individuals who face a real risk of conduct that amounts to torture under international law to succeed in CAT claims under U.S. law. The changes will be particularly harmful to survivors of gender-based violence. For example, a survivor would have to show that her policeman husband tortured her deliberately to further an official purpose, despite her utter powerlessness because of his position of authority. And, in countries where certain forms of intimate partner violence, sexual assault, and honor crimes are legal, there would be no affirmative duty of an official to protect a survivor from this harm. A government official could be enlisted by a woman’s family to torture her to compel her to submit to a forced marriage. The official would be considered “rogue,” yet she would still suffer at the hands of authorities with absolutely no possibility of recourse at all.

The Proposed Rule eliminates accountability for torture inflicted by “rogue” government actors and curtails accountability for torture inflicted by private actors. It effectively establishes prejudicial requirements for CAT claims that would require an applicant to submit evidence of whether a public official was on the job during the persecution, the public official’s mental state, and the public official’s job description. Any one of these would be insurmountable for a CAT applicant. But together, they effectively close off CAT relief altogether, placing the U.S. in clear violation of its *non-refoulement* obligations as a party to CAT and cruelly returning people to situations where they are likely to be subjected to torture.

## **VII. Conclusion**

Robert F. Kennedy Human Rights strongly opposes the Proposed Rule because it blatantly disregards the international human rights obligations of the U.S. as a signatory to the Refugee Convention and Convention Against Torture to protect and provide fair process to all asylum seekers. The Departments should immediately rescind the Proposed Rule in its entirety and instead promote policies to protect and support asylum seekers.

Thank you for considering these comments in response and opposition to the Proposed Rule. Please feel free to contact Robert F. Kennedy Human Rights for any additional information you might need.

Sincerely,



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