



July 15, 2020

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Submitted via <https://www.regulations.gov>

RE: RIN 1125-AA94 or EOIR Docket No. 18-0002; Comment in Opposition to DOJ/DHS Joint Proposed Rulemaking: Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review

Dear Ms. Reid:

The City Bar Justice Center (“CBJC”), in conjunction with *pro bono* partner Willkie Farr & Gallagher LLP (“Willkie Farr”), submits this Comment in response to the Notice of Proposed Rulemaking: Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review (the “Notice”) published in the Federal Register on June 15, 2020. The proposed rules (each a “Proposed Rule” and collectively, the “Proposed Rules”) would radically alter the substantive and procedural rules governing all adjudications of applications for asylum, withholding of removal, and protection under the Convention Against Torture. Some of its most troubling changes would expand an Immigration Judge’s (“IJ”) ability to deny asylum applications without a hearing and extend the definition of a “frivolous” application, with its accompanying harsh penalty. We strongly oppose the proposed changes to the asylum process, asylum eligibility and eligibility for other related forms of protection.

As the nonprofit affiliate of the New York City Bar Association, CBJC increases access to justice by leveraging the *pro bono* efforts of New York lawyers, law firms, and corporate legal departments. Each year, CBJC assists more than 25,000 low income and vulnerable New Yorkers through limited and direct legal representation, community outreach, and education efforts on a wide range of civil-justice matters. CBJC’s Immigrant Justice Project assists asylum seekers fleeing persecution, survivors of violent crimes and trafficking here in the United States, and individuals seeking humanitarian protection and other forms of relief. We represent clients before U.S. Citizenship & Immigration Services (“USCIS”), Executive Office for Immigration Review (“EOIR”), including both the immigration courts and the Board of Immigration Appeals (“BIA”), as well as federal courts. Our *pro bono* volunteers, in partnership with CBJC, have secured asylum for countless applicants over the course of almost 30 years.

Willkie Farr is an international law firm with over 700 attorneys, and a longstanding *pro bono* partner of CBJC. The firm takes great pride in the volume and variety of the work it performs on a *pro bono* basis and has a long-standing commitment to serving the underprivileged and promoting social justice. Through its partnership with CBJC and similar nonprofit organizations,

Willkie Farr attorneys across the United States have provided legal representation to individuals from across the world who have suffered persecution and been forced to flee their native countries as a result. Through its partnership with CBJC, Willkie represents clients before EOIR, USCIS, the BIA, and the federal appeals courts. The Proposed Rule would severely impede the ability of Willkie Farr (and other law firms) to continue its *pro bono* practice in the aid of asylum seekers and those seeking other forms of relief.

As a threshold matter, we object to the 30-day comment period. The Administrative Procedures Act (“APA”) requires agencies to “afford interested persons an opportunity to participate” in rulemaking. Consistent with the APA, Executive Order 12866 requires agencies to “...afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days.” The paltry 30 days provided, particularly during a global pandemic, does not allow adequate time to respond meaningfully to the myriad of proposed changes. Indeed, it seems designed to overwhelm and stifle public comment on a Rule that upends the asylum system as it exists today.

Although we oppose the Notice in its entirety, we are unable to address the many proposed changes within the 30 days provided, so this Comment focuses on the pretermission and frivolousness provisions. Both would cause irreparable harm to all asylum seekers, and particularly *pro se* asylum applicants. They would also inhibit the ability of *pro bono* counsel to effectively represent asylum applicants and undercut CBJC’s *pro bono* model and mission. We therefore submit this Comment to (A) provide discussion and insight regarding the overreaching and legally unsupported changes set forth in the Notice, including (I) the unauthorized license afforded to IJs to deny an asylum application without a hearing and (II) the expansion of the definition of frivolous and granting to asylum officers (“AOs”) newfound power to find that an application is frivolous, (B) present contrary evidence to the supposed public policy basis of the Notice and (C) discuss the severe and detrimental impact of the Proposed Rule on *pro se* applicants and, by extension, *pro bono* representation.

Based on the foregoing, we urge the withdrawal of the proposed addition of new subsection (e) to 8 CFR § 1208.13, as it compromises the due process rights of asylum applicants. We similarly urge the withdrawal of the proposed changes to 8 CFR § 208.20 and 8 CFR § 1208.20, as they operate as a cudgel to subdue prospective asylum applicants rather than to address the Notice’s unsubstantiated allegations of rampant fraud. In fact, because the CBJC believes the asylum system should not be rewritten via regulation, especially without giving the public adequate time to comment in the midst of a pandemic, we urge the agencies to withdraw this rulemaking in its entirety.

A. The Proposed Rules Regarding Pretermission and Frivolous Applications Would Deny Asylum Applicants Their Rights and Are Contrary to Statutory Language and Existing Precedent.

I. The Proposed Rules Regarding Pretermission Are Inconsistent With An Asylum Seeker’s Right to Be Heard.

The Immigration and Nationality Act (“INA”) expressly provides asylum seekers an opportunity to be heard on their claim for protection. The Proposed Rules set forth in the Notice

allowing IJs to pretermite an asylum seeker's application directly contradict the statutory rights of an asylum seeker to be heard. The Notice proposes to add a paragraph (e) to 8 CFR § 1208.13 that would allow IJs to pretermite and deny any application for asylum, statutory withholding of removal, or protection under the Convention Against Torture on the basis that, in the IJ's view, the applicant has not established a *prima facie* claim for relief or protection. Under the Proposed Rule, an IJ may pretermite an asylum seeker's case in two circumstances: (1) following an oral or written motion by the Department of Homeland Security or (2) *sua sponte* upon the IJ's own authority.

The Proposed Rule would allow (indeed, encourage) such determinations to be based on the Form I-589 application alone, frequently prepared by asylum seekers without representation¹ and without knowledge of the intricacies of U.S. asylum law. The applicant's only relief would be to respond within ten days to the IJ's written notice of pretermision. This is at best a hollow opportunity to respond. The very same unrepresented, non-English speaking applicants whose applications were deemed to be fatally deficient out of the box—again, without any hearing—will be in the very same situation as they were before, when they sought to present their case through a Form I-589 and what little documentary evidence they may have been able to access at that time. Applicants who struggle, whether through lack of legal representation, ignorance of the intricacies of asylum law and procedure, or inability to speak English, to present a *prima facie* case through the paper record will fare no better in responding to an IJ's written notice of pretermision.

As an example, the Notice implies that a failure to identify a particular social group (“PSG”) to which the asylum seeker belongs would be a fatal flaw in an application and grounds for pretermision. *See Notice* at 36277 citing *Matter of A-B-*, 27 I&N Dec. 316, 340 (A.G. 2018). However, this ignores the realities of current case law on cognizable PSGs, which requires a precarious balancing act between a PSG that is “too broad to have definable boundaries” and one that is “too narrow to have larger significance in society.”² Crafting a PSG—which has been described as “an enigmatic and difficult-to-define term”³—is a difficult task for legal professionals. It is practically impossible for unrepresented applicants to sufficiently delineate in their Form I-589 a PSG that will satisfy an IJ empowered and encouraged to deny asylum applicants relief without a hearing should the pretermision changes advanced in the Notice be put into effect.

The changes that the Notice seeks to impose on the asylum process will deprive both IJs and asylum applicants of the benefits that live testimony provides. Both case law and statute describe the importance of live testimony in the asylum process; as the Ninth Circuit stated, “[t]he importance of an asylum or withholding applicant's testimony cannot be overstated, and the fact that Oshodi submitted a written declaration outlining the facts of his persecution is no response to

¹ In 2017, approximately 23% of asylum seekers were unrepresented; this rose from 15.8% in 2012 and 13.6% in 2007. The odds of gaining asylum are five times higher when represented: 91% of asylum seekers without representation are denied. *TRAC Immigration Project, Asylum Representation Rates Have Fallen Amid Rising Denial Rates* (2017), available at <https://trac.syr.edu/immigration/reports/491/#:~:text=Rising%20Denial%20Rates-Asylum%20Representation%20Rates%20Have%20Fallen%20Amid%20Rising%20Denial%20Rates,asylum%20denials%20were%20up%20sharply.&text=While%20asylum%20grants%20increased%2C%20denials,denied%20asylum%20to%2061.8%20percent>.

² Fatma Marouf, *Becoming Unconventional: Correcting the ‘Particular Social Group’ Ground for Asylum*, 44 N.C. J. Int'l L. & Com. Reg. 489 (2019) citing *Matter of A-B-*, 27 I. & N. Dec. at 336.

³ *Rios v. Lynch*, 807 F.3d 1123, 1126 (9th Cir. 2015).

the IJ's refusal to hear his testimony." *Oshodi v. Holder*, 729 F.3d 886 (9th Cir. 2013) (en banc); see also INA § 208(b)(1)(B)(iii) (mentioning "demeanor," "responsiveness," and "the consistency between the applicant's or witness's written and oral statements" as factors to be considered in asylum credibility determinations). When providing testimony, asylum seekers have additional means to express their credible fears and expand upon the information they provided in their I-589 applications. This is even more important for applicants who cannot read or write in English, as providing testimony is critical to explaining their claim when they cannot do so in the written application. Empowering IJs to make decisions based only on reviewing a Form I-589 application means that IJs facing heavy caseloads are likely to preemptively dismiss meritorious claims that are inartfully described.

The Notice further seeks to justify these radical changes by asserting that other immigration applications are subject to pretermission without a hearing, therefore there is "no reason to treat asylum applications differently." *Notice* at 36277. This statement ignores the fundamental difference between an asylum seeker and other individuals seeking redress under the INA, thereby discounting the oftentimes life threatening consequences of a denied asylum application. Asylum is a solemn protection for foreign nationals who flee persecution in their native countries, memorialized in international law and United States law. Under international law, the United States is obligated to extend protection to those who qualify for such relief. Refugees are, by definition, a most vulnerable group, often fleeing persecution and violence directed at their very existence. It is imperative that an asylum seeker's statutory and due process rights be protected during the application process.

i. The Notice's Claim That There Is No Statutory Basis for Requiring a Hearing Is Erroneous.

Citing a small portion of 8 CFR § 11240.11(c)(3), the Notice asserts that there is no statutory basis for requiring hearings. The Notice claims that "[c]urrent regulations require a hearing on asylum application only to resolve factual issues in dispute." *Notice* at 36277 citing 8 CFR § 11240.11(c)(3). The Notice's unfairly cabined reading of the regulation ignores the following sentence in 8 § CFR 1240.11(c)(3): "[a]n evidentiary hearing **extending beyond** issues related to the basis for a mandatory denial of the application pursuant to § 1208.14 or § 1208.16 of this chapter is not necessary once the immigration judge has determined that such a denial is required." (emphasis added) (Thereby contemplating a hearing, albeit limited in subject matter.) This sentence makes clear that an IJ is still required to hold an evidentiary hearing, even if the IJ determines there is a basis for mandatory denial.

The Notice's assertion that no statutory provisions require hearings also ignores the other statutory rights and protections for asylum applicants provided in both the INA and the CFR. For example, 8 CFR § 1240.10 states that in a removal proceeding, the IJ shall "advise the respondent that he or she will have a reasonable opportunity to examine and object to the evidence against him or her, to present evidence in his or her own behalf and to cross-examine witnesses presented by the government [...]" Additionally, INA § 240(a)(1) states that, in general "an immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of the alien." Additional evidence for an asylum seeker's statutory rights to a hearing can be found in INA § 240(b)(1), stating that "[t]he immigration judge shall administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses," and INA § 240(b)(4), stating

that “the alien shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien’s own behalf, and to cross-examine witnesses presented by the Government [...]” Furthermore, 8 CFR § 1208.13 specifically states that the “testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration.” There can be no other explanation for these provisions, other than the clear right of asylum seekers to present their case at a hearing—this language would otherwise be superfluous. Depriving asylum seekers of the opportunity to provide testimony removes an avenue for applicants, who may have had difficulty completing their Form I-589 and providing additional documentary information that meets the high and complex standards of the asylum process, to be granted asylum based on an otherwise sound case. The notion that an asylum application is entitled to a hearing is clear throughout applicable law and deprivation of such an opportunity is unlawful.

ii. The Notice Ignores The Inherently Factual Nature of Asylum Cases as Supported by Case Law.

As noted above, the Notice only cites a fraction of 8 CFR § 1240.11(c)(3) in support of its claim that hearings should only be held to resolve “factual issues” and are, therefore, not required when an IJ determines that an applicant has failed to establish a *prima facie* case. In doing so, the Notice ignores the inherently factual nature of the vast majority of asylum claims and seeks to sweep away entire rafts of case law recognizing to be true.

For example, although the Notice states that a failure at the application stage to show membership in a proposed social group would be grounds to pretermite a case (*id.*), the BIA has repeatedly stressed that the social group analysis is “inherently factual [in] nature.” *Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. 189, 191 (BIA 2018). An IJ’s determination of whether a particular social group is “socially distinct” must be made on the individualized record in the asylum applicant’s particular case. An asylum applicant must be afforded the opportunity to provide evidence showing that her group is socially distinct, even if a prior precedent decision found a similar group to be not cognizable based on the record in that case. *See, e.g., Matter of M-E-V-G*, 26 I&N Dec. 227, 251 (BIA 2014) (noting that precedent decisions should not be read as “blanket rejection[s]” of all factually similar asylum claims because “[s]ocial group determinations are made on a case-by-case basis”); *Matter of S-E-G-*, 24 I&N Dec. 579, 587 (BIA 2008) (noting that the “evidence of record” did not “indicate that Salvadoran youth who are recruited by gangs but refuse to join [...] would be ‘perceived as a group’ by society”) (emphasis added); *Pirir-Boc v. Holder*, 750 F.3d 1077, 1084 (9th Cir. 2014) (“[t]o determine whether a group is a particular social group for the purposes of an asylum claim, the agency must make a case-by-case determination as to whether the group is recognized by the particular society in question.”). An IJ cannot conclude, without affording an applicant the opportunity to present his or her case and resolve any factual disputes, whether the applicant belongs to a valid PSG under law.

There are many other examples of factual issues that cannot be resolved without a hearing, such as an applicant’s credibility and the question of whether inconsistencies in an application may be resolved. By taking a narrow, and incorrect, view of what constitutes a “factual dispute,” the proposed Notice ignores the inherently fact-based nature of an asylum application.

iii. The Notice's Claim That There is No Case Precedent Requiring Hearings or Oral Testimonies Is Also Erroneous.

In addition to incorrectly claiming that there are no statutory requirements regarding hearings for asylum seekers, the Notice also erroneously contends that there is no case precedent that asylum applicants must be permitted to present oral testimony in support of their application. *Notice* at 36277. In an effort to support this position, the Notice claims that the BIA's decisions in *Matter of Fefe* and *Matter of E-F-H-L-* are no longer precedential; the former due to its partial reliance upon 8 CFR §§ 208.6 (1988), 236.3(a)(2) (1988), and 242.17(c) (1988), which are no longer in effect, and the latter because it was vacated on procedural grounds. *Notice* at 36277. However, the Notice's bases for claiming that these decisions should no longer have precedential value are without merit.

First, in *Matter of Fefe*, the BIA held “[the BIA] consider[s] the full examination of an applicant to be an essential aspect of the asylum adjudication process for reasons related to fairness to the parties and to the integrity of the asylum process itself.” Thus, under *Matter of Fefe*, an IJ should not deny or pretermite an asylum application based on the written Form I-589 alone. The Notice asserts that the regulations underpinning this decision are no longer in effect, and therefore *Fefe*'s holding is no longer applicable. However, while there has been a regulatory change, the current regulations at 8 CFR § 1240.11(c)(3) are substantially similar to those cited in *Fefe*. And while the Eighth Circuit questioned the continued precedential value of *Fefe*, it did not decide whether or not *Fefe* was still good law. *See Ramirez v. Sessions*, 902 F.3d 764, 771 (8th Cir. 2018). Additionally, the BIA expressly found that the regulatory changes did not undermine *Fefe*'s holding in *Matter of E-F-H-L-*. As *Matter of E-F-H-L-* was vacated solely on procedural grounds, its substantive reasoning is still persuasive.⁴ Moreover, the BIA has continued to cite *Fefe* and reaffirm an asylum applicant's right to testify in unpublished decisions. *See, e.g., E-A-M-L-*, AXXX XXX 266 (BIA Dec. 19, 2018) (unpublished). Finally, the rationale of *Fefe* remains true even if the regulations have changed slightly since then: applicants must be afforded a fair process. Denying an applicant the opportunity to present his or her case does not meet basic notions of fairness.

Additional precedent bearing on the right to testify can be found in *Matter of Mogharrabi*, 19 I&N Dec. 439, 445 (BIA 1987) (a noncitizen may establish eligibility for asylum through testimony alone, so long as “the testimony is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis of his fear”) and *Interiano-Rosa*, 25 I&N Dec. 264, 266 (BIA 2010) (holding that even where a noncitizen does not meet the IJ's imposed deadline to provide documentary evidence in support of an application for relief, the IJ should still provide “an opportunity to proceed to a merits hearing with [the respondent's] testimony”). The Notice does not, because it cannot, dispute that these cases remain good law.

Ignoring the above, the Notice relies on a narrow reading of *Matter of A-B-* to support such a draconian change in procedure. *See Notice* at 36277; *see also Matter of A-B-*, 27 I&N Dec. 316,

⁴ It should be noted that *Matter of E-F-H-L-*, 27 I&N Dec. 226 (AG 2018) was a self-certified case by the Attorney General to himself. This practice explicitly undermines and avoids established case law and regulations.

340 (A.G. 2018)⁵ (“if an alien’s asylum application is fatally flawed in one respect—for example, for failure to show membership in a proposed social group [...]—an immigration judge or the Board need not examine the remaining elements of the asylum claim.”). However, *Matter of A-B-* nowhere holds that an asylum applicant does not have the right to a hearing if their application is deficient or seems to be on paper “fatally flawed.” Rather, it reaffirms the inherently factual nature of many asylum claims and exhorts IJs to employ “rigorous analysis” consistent with the standards outlined in *M-E-V-G-* and *W-G-R-* (discussed *supra*). *Id.* at 340. The precedent regarding the necessity and essential nature of allowing an asylum applicant to testify instead weighs on the side of allowing these types of issues to be tested and resolved at a hearing.

Similar to the claims that there is no statutory basis for requiring hearings in asylum cases, the Notice glosses over the context of the cases they are relying on and ignores, in large part, the body of case law that does not support their position.

iv. The Proposed Changes Would Deny Asylum Applicants Their Due Process Rights.

By allowing an IJ to pretermite an asylum seeker’s case solely on the basis of the Form I-589, the Proposed Rule erodes an asylum applicant’s due process rights to a full and fair hearing. The Notice ignores a wealth of established case law clearly stating that an asylum applicant’s due process rights include the right to a full and fair hearing, including the opportunity to present evidence and testimony in a meaningful manner. *See Oshodi v. Holder*, 729 F.3d 883, 889-93 (9th Cir. 2013) (en banc) (stating that a “vital hallmark of a full and fair hearing is the opportunity to present evidence and testimony on one’s behalf” and holding that the IJ violated due process by denying asylum based on an adverse credibility finding after refusing to allow the applicant to testify to the contents of his application). This includes the due process right to be heard. *See Juncay v. Holder*, 316 F. App’x 473, 480-81 (6th Cir. 2009) (holding that the IJ denied a noncitizen due process by failing to hold a hearing on the merits of his asylum application); *Podio v. INS*, 153 F.3d 506, 511 (7th Cir. 1998) (holding that the IJ failed to provide a fair hearing where he refused to hear testimony from the respondent’s witnesses); *Kerciku v. INS*, 314 F.3d 913, 918 (7th Cir. 2003) (an IJ “violates due process by barring complete chunks of oral testimony that would support the applicant’s claims”); *Tun v. Gonzales*, 485 F.3d 1014, 1025 (8th Cir. 2007) (holding that for a removal hearing to be fair, “the immigrant must be given the opportunity to fairly present evidence, offer arguments, and develop the record”); *Shoaira v. Ashcroft*, 377 F.3d 837, 842 (8th Cir. 2004) (same); *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (“The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.”) (internal quotations and citations omitted); *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) (noting that where credibility and veracity are critical to the administrative decision-making process, due process requires a hearing because “written submissions are a wholly unsatisfactory basis for decision”). *See also Senathirajah v. INS*, 157 F.3d 210, 221 (3d Cir. 1998) (“Justice requires that an applicant for asylum or withholding of deportation be afforded a meaningful opportunity to establish his or her claim.”).

⁵ Similar to *Matter of E-F-H-L-*, 27 I&N Dec. 226 (AG 2018), it should be noted that *Matter of A-B-* (A.G. 2018) was a self-certified case by the Attorney General to himself.

Due process also requires a neutral and impartial IJ who has not pre-judged an asylum applicant's claim. *See Serrano-Alberto v. Attorney Gen.*, 859 F.3d 208, 213 (3d Cir. 2017) (Due process includes “a reasonable opportunity to present evidence” and “a decision on the merits of [an asylum] claim by a neutral and impartial arbiter.”) (internal quotations and citations omitted). *See also Cano-Merida v. INS*, 311 F.3d 960, 964-65 (9th Cir. 2002) (holding that the IJ violated due process of *pro se* asylum seeker where the IJ pressured the noncitizen to “drop his asylum claim before any significant exploration of all relevant facts had occurred” and finding that “Cano was presented with the Hobson’s choice of proceeding with a claim the decision-maker had labeled as baseless, or dropping his claim and receiving six months to make departure arrangements”). Allowing IJs to pretermite an asylum claim without ever hearing from the applicant denies applicants of this very fundamental element of due process—impartiality.

Finally, the Notice’s equation of asylum applications with other immigration applications that may be pretermitted without a hearing due to legal insufficiency is facile and ignores the unique complexities of asylum cases. And the Notice’s reliance on *Zhu v. Gonzales* for this point is misplaced. *See Zhu v. Gonzales*, 218 F. App’x 21, 23 (2d Cir. 2007) (finding that pretermission of an asylum application due to a lack of a legal nexus to a protected ground was not a due process violation **when the alien was given an opportunity to address the issue**).⁶ As discussed above, asylum seekers are a particularly vulnerable group, often fleeing persecution or violence that directly threatens their life. There is a marked difference between an individual who is affirmatively applying for an immigration benefit with the advantages of time, access to documents, representation, and more, as opposed to asylum seekers who have recently fled for their lives and have limited or no access to the documentary evidence to substantiate or support their claim. Testimony is indispensable in an asylum case. Other cases may be granted on papers alone, proving the applicant shows their statutory eligibility; because of the inherently factual nature and the necessity of credibility determinations, asylum cases cannot. It also ignores the United States’ responsibilities under international law. As the BIA recognized in *Matter of S-M-J-*, “[a]lthough [it] recognize[s] that the burden of proof in asylum and withholding of removal cases is on the applicant, we do have certain obligations under international law to extend refuge to those who qualify for such relief.” 21 I&N Dec. 722, at ___ (1997).

The Notice does not explain how the denial of a hearing at which an applicant can meaningfully present his or her case comports with an asylum applicant’s rights to due process under existing—and still binding—precedent.

v. The Notice’s Comparison of Asylum Applications to Motions to Reopen to Apply for Asylum Is Problematic.

The Notice states that pretermission due to a failure to establish *prima facie* legal eligibility for asylum is akin to denying a motion to reopen to apply for asylum on the same basis. To reach this conclusion, the Notice cites *INS v. Abudu* for the proposition that “the BIA may deny a motion to reopen to file an asylum application if alien has not made *prima facie* case for that relief.” *Notice* at 36277. However, the Respondent in *INS v. Abudu* expressly **declined** to seek asylum in his

⁶ Notably, the finding in *Zhu* was also based on the represented applicant being given a 30-day period to respond before any pretermission was effectuated—a far cry from the ten-day period contemplated in the Proposed Rule, which would apply equally to both represented and *pro se* applicants.

initial proceedings, and his motion to reopen his deportation proceeding to enable him to apply for asylum was denied because all the facts except for one had been available to the respondent before his initial hearing. *See INS v. Abudu*, 485 U.S. 94, 94 (1988). This is a far cry from pretermission of an initial claim where an applicant at the outset seeks to fully exercise their rights to asylum—which merits a different and lower standard, as expressly recognized by the Supreme Court. *See id.* at 111 (“[A]n alien who has already been found deportable has a much heavier burden when he first advances his request for asylum in a motion to reopen”). Holding an asylum seeker’s initial application to the same standard as a motion to reopen to apply for asylum finds no support in *INS v. Abudu*, and such reasoning cannot justify the radical changes the Notice proposes to make.

II. The Proposed Rules Regarding Frivolousness Include Overreaching and Inequitable Changes.

As set forth in the Notice, the Departments propose to take a three-step approach to deny asylum applications *en masse* based on allegedly frivolous applications. The Notice seeks first to “clarify” that “knowingly” making a frivolous application—which was not previously defined in the INA—will now include both actual knowledge and willful blindness, which the Proposed Rule interprets to mean the applicant was “aware of a high probability that his or her application was frivolous and deliberately avoided learning otherwise.” *Notice* at 36273. Second, the Proposed Rule would expand the definition of “frivolous,” which currently only applies to those “material elements” of an asylum claim that are “deliberately fabricated,” to also include applications that are “filed without regard to the merits of the claim” or are “clearly foreclosed by applicable law”; thus shifting the standard from a purely factual determination to a legal one. *Notice* at 36295. Third, under the Proposed Rule, AOs—who are not required to be attorneys—would be given the discretion to deny or refer an asylum claim to an IJ based solely on the AO’s own determination of frivolousness. When coupled with the Notice’s expanded discretion for IJs to pretermite cases, the functional outcome of these changes is the eradication of the individual’s meaningful opportunity to be heard.

This three-prong approach, as further discussed below, is inconsistent with both a plain reading of the statute and legislative intent. And the resulting impact on applicants is not only severe, but also inconsistent with the intent behind identifying and declaring applications to be “frivolous.” Under section 208(d)(6) of the INA, an immigrant may be permanently ineligible for any benefits under the INA if the Attorney General determines that such individual has knowingly made a frivolous application for asylum and has also received the notice required under paragraph (4)(A) of the same section. By expanding the definition of “frivolous” and allowing AOs to make that determination themselves, the Administration seeks to weaponize this lifetime ban and use it in a way that was never intended nor sanctioned by Congress.

Moreover, these proposed changes disenfranchise asylum applicants and particularly *pro se* applicants. Such *pro se* applicants are able to attest to the factual circumstances they experienced in connection with their asylum application, but are ill-equipped to evaluate the legal merits of their own claim in a foreign jurisdiction, in a judicial system they are not familiar with, and perhaps in a language they are not yet fluent in. The Proposed Rule as set forth in the Notice would create the unjust situation in which an applicant would be barred—for life—from relief under the INA if she submitted a legitimate asylum claim that was not presented correctly or was, unknown to her, foreclosed by applicable law just the day before.

The severity of this lifetime ban is not lost on an Administration that looks to weaponize it to thwart a crisis of “rampant” asylum fraud that simply does not exist.

i. The Purported Clarifying of the Term “Knowingly” and Expansion of the Definition of “Frivolous” Are Extreme Changes to the Current Landscape of Asylum Law and in Direct Conflict With Both a Plain Reading of the Text and Legislative Intent.

The Proposed Rule works to threaten tens of thousands of legitimate asylum applicants with a severe penalty that was contemplated by Congress as *only* applicable to those individuals who knowingly filed, with regards to a material element of the claim, a deliberately fabricated application. Because of the severity of this penalty, under the current framework, such a finding may only be made if an IJ or the BIA is satisfied that the applicant, during the course of the proceedings, has had sufficient opportunity to account for any discrepancies or implausible aspects of the claim. 8 CFR § 1208.20. The legislature formulated this high standard for frivolousness and put in place the safeguards for a meaningful review and opportunity to be heard by an IJ or the BIA “with the severity of the consequences [of the lifetime ban] in mind.” *In re Y-L-*, 24 I&N Dec. 151, 158. The Administration’s Proposed Rules as set forth in the Notice ignore that intent and substitute the legislature’s clear formulation for their own.

The Proposed Rule purports to “clarify” the legislature’s intent in order to include a broadened definition of “knowingly” that encompasses an asylum claim made with willful blindness, which is proposed to be defined as the applicant “being aware of a high probability that his or her application was frivolous and deliberately avoid[ing] learning otherwise.” *Notice* at 36273. The Notice states that the application must have been “knowingly made—*i.e.*, knowing of its frivolous nature[...]

 to be considered frivolous. *Id.* This proposed amendment is coupled with an expansion of the definition of frivolous to include claims that are filed “without regard to the merits of the claim” or are “clearly foreclosed by applicable law.” *Notice* at 36295. That the Notice seeks to “clarify” the meaning of “knowingly” to include willful blindness is an improper extension of the term and inconsistent with a plain reading of the statute’s text and legislative intent.

The Notice states that “[t]he statutory text does not provide a definition of “frivolous,” expressly restrict how it may be defined, or compel a narrow definition limited solely to the deliberate fabrication of material elements[...]

Notice at 36274. But this is wrong. The statutory text does, in fact, compel a narrow definition limited solely to the deliberate fabrication of material elements, thus restricting how the term “frivolous” may be interpreted. The legislature’s express exclusion of purportedly “other types of frivolousness” such as “abusive filings, filings for an improper purpose, or patently unfounded filings” was purposeful. *Notice* at 36274. The Administration seems to suggest here that the legislature must have included an enumerated laundry list of those items that would *not* encompass frivolousness in order for the list they did draft (*i.e.*, *only* deliberate fabrication as to a material element of the claim) to be recognized as clear. A matter that is not covered by the plain text of the law is to be treated as not covered. *See generally, The District of Columbia v. Heller*, 554 U.S. 570 (2008) (Scalia writing for the majority). The Administration cannot ignore the plain text of the law.

The current rule states that an asylum claim may be considered frivolous only if a material element of an asylum claim is determined to be deliberately fabricated. This is a cognizant departure from the language included in the then proposed rule, which sought to define a frivolous application as one that “is fabricated or is brought for an improper purpose.” Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 FR 444, 468 (Jan. 3, 1997) (proposed rule). The Notice properly takes note of this amendment to the language between the proposed and final rule, stating that the final rule “did not explain why DOJ altered its proposed definition.” *Notice* at 36274. But the legislature’s intent is clear in its final language. The legislature’s decision to replace the more broad “is fabricated or brought for an improper purpose,” in the proposed rule, which would have been applicable to all aspects of an asylum claim (not only those that are material), with the more pointed “is deliberately fabricated,” applicable only to material elements of an asylum claim in the final rule, necessarily means that the legislature intended to narrow this section’s reach. The Notice ignores the drafting history, and the proposed different formulations, entirely.

The characterization of this measured substitution as “settling” is blatant misinterpretation. Regardless of a lack of explanation in the legislative history for the basis for this change, the fact of the change itself establishes the intent to narrow what can be considered as “frivolous.” To broaden the meaning of “frivolousness” would, therefore, be inconsistent with the clear legislative drafting history and Congress’s intent when this rule was first considered. The Proposed Rule states that “*one of the central principles in asylum reform process begun in 1993*” is “to discourage applicants from making patently false claims.” Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 FR at 447 (emphasis added). The same *Black’s Law Dictionary* cited in the Notice defines “false” as “[u]ntrue; [d]eceptful; lying; [n]ot genuine; inauthentic; [w]rong, erroneous.” *Black’s Law Dictionary* (11th ed. 2019). A false claim, or untrue claim, or wrong claim is not a *meritless* claim and the legislature that drafted the final rule properly understood and provided for such distinction; the current Proposed Rules as set forth under the Notice does not. *See generally, Heller*, 554 U.S. at 573 (stating that the “normal meaning [of a word] excludes secret or technical meanings”).

The principle of discouraging applicants from making patently false claims is well codified in the final rule’s requirement that an application be “knowingly” “deliberately fabricated” in order to be considered frivolous. The Notice’s statement that its proposed change would “better effectuate the intent [...] to discourage applications that make patently *meritless* or false claims” is disingenuous. Congress’s intent to discourage patently false claims was appropriately and effectively discharged by the regulations that the Departments seek to displace. *See King v. Burwell*, 576 U.S. 988 (2015) (“[c]ontext always matters. Let us not forget, however, why context matters: It is a tool for understanding the terms of the law, not an excuse for rewriting them”) (dissent). The plain language of the statute reflects Congress’s intent to effect a narrow view of frivolous.

ii. *The Expansion of the Definition of “Frivolous” Will Allow Adjudicators to Preemptively Deny Potentially Meritorious Asylum Claims.*

The Administration proposes expanding the term “frivolous” to include applications “without merit” or those “filed without regard to the merits,” as well as claims that are “clearly

foreclosed by applicable law.” *Notice* at 36295. This staggering expansion of frivolousness beyond the realm of facts and into the world of legal sufficiency would require individuals who have fled their home country in fear of their life—who often do not speak English and cannot afford to hire an attorney—to understand the intricacies of American immigration law. These changes would force refugees to undertake significant, complex legal research during a period of immense trauma in their lives to assert a claim, or else risk a finding that they were willfully blind to the fact that their claim was legally meritless, ultimately culminating in the refugee’s removal and permanent ineligibility for any U.S. immigration benefits. The effect of this proposed change is likely to prove cataclysmic to *pro se* applicants, who may be able to articulate the facts about what happened to them, but not form a coherent legal argument without the assistance of an attorney. As a result, well-meaning asylum seekers with a legitimate fear of persecution would be subjected to the harsh penalty—historically reserved for cases of fraud—of permanent ineligibility for any U.S. immigration benefits.

Further, the Administration is using the threat of permanent ineligibility for immigration benefits as a tool to dispel even *more* refugees, offering the option to accept a voluntary departure order back to their home country (the same country they just risked their life to flee from) instead of making a frivolous finding. However, as the Administration knows, even a timely voluntary departure does not protect a refugee from other inadmissibility bars and overstaying a voluntary departure period can bring extremely severe consequences—including a monetary fine of up to \$5,000 and ineligibility for grants of cancellation of removal, adjustment of status, change of status, registry, and voluntary departure. INA § 240(B)(d). Thus, if a refugee is ordered to voluntarily depart and fails to do so, but later becomes eligible to adjust his or her status, he or she would almost certainly be found ineligible to do so for 10 years. *Id.* The threat of a frivolousness finding that would result in permanent ineligibility for immigration benefits is designed to coax asylum applicants—including those with potentially meritorious claims—into just giving up and going “home” to a country where they are in mortal danger. This is an inappropriate and unjustifiable use of the Administration’s power.

This follows in a long line of actions by the Administration designed to chip away at the resources available to migrants coming from Central America and further complicate the asylum process. *See, e.g., Matter of A-B-* (2018) (in which Attorney General Sessions overruled BIA precedent which previously recognized domestic violence and gang violence as valid bases for asylum); 8 CFR § 1208.13(c)(4) (July 2019) (barring migrants who enter the southern border through Mexico from seeking asylum). The Proposed Rules now weigh the scales against asylum seekers by requiring them to advance legally precise case theories, often without the aid of legal help. Coupled with the improperly broadened definition of “frivolousness,” asylum seekers’ inability precisely to state their claims for asylum to the satisfaction of AOs or IJs empowered peremptorily to deny claims may also bar them from being able to claim any remedy whatsoever under U.S. immigration law. Given the current and ongoing flux in case law—often prompted by the Attorney General’s recent embrace of the process of self-certifying cases in order to upend long-established precedent—the expansion of frivolousness to include claims “foreclosed by applicable law” is not only unreasonable but cruel.

Even if the Administration’s recent actions tell us nothing else, they at least reveal that asylum law is evolving at a rapid rate with which even immigration law practitioners have difficulty keeping up. To require an asylum seeker to attest not only to their lived experience and

trauma, but also to the efficacy of complex legal arguments—or else risk expedited removal and the loss of immigration benefits for life—is unfair and unnecessarily penal in intent. If they were to go into effect, the Proposed Rules contemplated in the Notice would result in the wholesale denial of potentially meritorious asylum claims, ultimately culminating in legitimate asylum seekers’ expulsion from the United States to a countries in which they are in grave danger, as well as a permanent ban on ever receiving U.S. immigration benefits. Such a result is unjust in every sense of the word.

iii. *Allowing an AO to Make a Threshold Determination of Frivolousness Forecloses Meaningful Factual Development and Facilitates Wrongful Pretermission.*

The Notice states that “[a]llowing asylum officers to refer or deny frivolous cases solely on that basis would strengthen USCIS’s ability to root out frivolous applications more efficiently [...] and would help the Department better allocate limited resources and time and more expeditiously adjudicate meritorious asylum claims.” *Notice* at 36275. Given that IJs must review a claim *de novo*, it is unclear how an AO’s determination of frivolousness would help encourage judicial efficacy. By focusing on the possible frivolousness of a non-material element of the claim, an AO is likely to do *less* fact-finding, therefore giving the IJ less information to review when making a determination and in turn causing the IJ to expend more time and resources reviewing the claim.

The expansion of an AO’s ability to determine and refer cases to an IJ based on frivolousness would only result in a lowered burden if courts, through wrongful pretermission, as discussed above, decided not to hear cases. This combination of an AO’s extended discretion to refer an applicant to an IJ coupled with an IJs heightened discretion to not hear cases under the Notice necessarily results in the removal of the individual’s meaningful opportunity to explain discrepancies or purportedly implausible aspects of the claim. This removes a vital safeguard as discussed by the legislature and strips an applicant of any meaningful opportunity to be heard.

iv. *Credibility Determinations Already Provide Adjudicators With The Necessary Tools to Weed Out Fraudulent Asylum Applications.*

The stated legislative intent to “discourage applicants from making patently false claims” and to “reduce the likelihood that fraudulent or frivolous applications will enable deportable or excludable aliens to remain in the U.S. for substantial periods” is already provided for through an AO’s ability to make factual credibility determinations and refer cases to IJs under such determinations. *Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures*, 62 FR at 447; S. Rep. No. 104-249 at 2 (1996). According to the USCIS RAIO Combined Training Program, AOs are instructed to provide the applicant an opportunity to explain any information in the Form I-598 that conflicts with interview testimony when making a credibility determination. *See* USCIS RAIO Combined Training Program, “Interviewing – Introduction to the Non-Adversarial Interview Training Module,” 29 (December 20, 2019) (stating that AOs “must learn to distinguish between the likelihood that the interviewee is confused and the possibility that his or her non-responsiveness is an attempt to receive a benefit by fraud.”). AOs are thus already implementing the goals of the legislature without the discretion to make frivolousness determinations, an intricate legal task. To improperly expand the scope of their

discretion could lead to a conflation of negative credibility and frivolousness that is inconsistent with case law and punitive to applicants.

In *Matter of B-Y-*, the BIA makes clear that a determination of credibility must be distinct from a determination of frivolousness. *Matter of B-Y-*, 25 I&N Dec. 236, 240 (BIA 2010). The BIA states that such determinations must be made separately because the burden of proof differs as to credibility and frivolousness—the respondent has the burden of demonstrating credibility, while the Government bears the burden in the frivolousness determination. *Id.* See also *Scheerer v. United States Attorney General*, 445 F.3d 1311, 1322 (11th Cir. 2006) (reversing a finding of frivolousness and stating that “[u]nder 8 CFR § 208.20 a finding of frivolousness does not flow automatically from an adverse credibility determination”). *Matter of B-Y-* places a significant burden on IJs—one that would likely be lost on a non-attorney—to bifurcate findings of credibility and frivolousness because such findings of frivolousness “should not simply be left to be interfered or extrapolated from the strength of the overall adverse credibility determination.” *Matter of B-Y*, 25 I&N at 241. This proposition is further supported by the Eleventh Circuit in *Scheerer*, which stated that “[i]nconsistencies between testimony and an asylum application [...] do not equate to a frivolousness finding under Section 1158(d)(6), which carries with it much greater consequences. It is because of those severe consequences that the *regulation requires more*: a finding of deliberate fabrication of a “material element” of an application, plus an opportunity for the alien to account for inconsistencies.” *Scheerer*, 445 F.3d at 1322 (emphasis added). This balancing is important given the severe repercussions of an application found to be frivolous and is only properly protected by a thorough review by an IJ or the Board and meaningful opportunity to be heard by such. See *Asylum Procedures*, 65 Fed. Reg. at 76,128.

Allowing AOs to refer cases solely on the basis of frivolousness thus does nothing to further implement the legislative intent to deter fraudulent applications. It is important to ask, then, what this Proposed Rule truly aims to do, particularly when the logical result is the compounding of two distinct determinations into a single standard, not made by an IJ or the Board, that likely results not only in the denial of reprieve but the active infliction of harm.

B. The Purported Justifications for the Proposed Rules are False, Biased and Based Upon a Hostile View of Asylum.

I. The Public Policy Notion that Fraudulent Asylum Applications Are Rampant and Increasing is False and Unsupported by Facts.

The current administration erroneously cites an increase in fraudulent asylum cases as the policy basis for the changes set forth in the Notice, particularly regarding the expansion of the definition of “frivolous.” The Notice states that “[f]rivolous asylum applications are a costly detriment, resulting in wasted resources and increased processing times for an already overloaded immigration system. See *Angov v. Lynch*, 788 F.3d 893, 901-02 (9th Cir. 2015) (“[Immigration f]raud, forgery and fabrication are so common—and so difficult to prove—that they are routinely tolerated. * * * [I]f an alien does get caught lying or committing fraud, nothing very bad happens to him. * * * Consequently, immigration fraud is rampant.”).” *Notice* at 36273. But the Notice fails to cite any meaningful statistics to support it and instead only offers banal platitudes about judicial efficacy. If fraud is the underlying issue, as the Administration claims, then expanding the definition of “frivolous” would not have an effect. Not only does the Notice fail to explain the

link between fraud and frivolousness, the fundamental premise that there is rampant fraud which demands such draconian, and unrelated, measures is not supported by the facts.

Many of the Administration's claims of "rampant" fraud are based on a 2014 House Judiciary Subcommittee hearing to a 2009 internal USCIS report which claims there is evidence of a 70% rate of proven or possible fraud in asylum cases and states that "[i]f 70 percent of these grants were made based on fraudulent applications, American taxpayers are being defrauded out of hundreds of millions, if not billions, of dollars each year." *Asylum Fraud: Abusing America's Compassion?* Hearing before the Subcommittee on Immigration and Border Security of the House Committee on the Judiciary, 113th Cong., 2d Sess. (2014). This 2009 report was based on a small sample of 239 affirmative asylum applications, from the short window of May to October 2005, which claimed to find "proven fraud" in 29 applications (12%). *Id.* This is hardly evidence, ten years after the fact, of a 70% fraud rate.

The Administration also points to the findings from Operation Fiction Writer, a criminal investigation of attorneys and application preparers who purportedly counseled asylum seekers to lie about religious persecution and forced abortions to bolster their claims. Although Operation Fiction Writer is one serious example of criminal immigration fraud from 2014, criminal prosecutions for immigration offenses have generally been down. Convictions for immigration offenses with a prison sentence of one year or more in November 2017 were down 10% from 2016 and 41.1% from five years earlier. TRAC Immigration Project, *Serious Criminal Immigration Convictions Still Infrequent Under Trump* (2018), available at <https://trac.syr.edu/immigration/reports/496/>. This evidence suggests that, if anything, asylum fraud has decreased.

II. The Notice Presents Its Opinion on Increasing Asylum Applications as Evidence of Malfeasance As Objective Fact.

The Notice also points to the significant increase in asylum cases and asylum seekers as a failure of the U.S. immigration system, with the President claiming that the approximately 1,700% increase in asylum claims over the past year is evidence that immigrants have found a way to "game the system." See Notice at 36273; Remarks by President Trump at the National Federation of Independent Businesses 75th Anniversary Celebration, June 19, 2018, available at <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-national-federation-independent-businesses-75th-anniversary-celebration/>.

However, this supposed explanation ignores the fact that the significant increase in the number of asylum seekers can be directly tied to the humanitarian crises south of the border. The vast majority of defensive cases were filed by applicants from Northern Triangle countries (El Salvador, Guatemala, and Honduras) and Mexico. A 2018 Department of Homeland Security report detailing the amount of affirmative and defensive asylum cases between 2016 and 2018 states that "[s]imilar to [2017], the largest numbers of applications filed with the courts were from citizens of the Northern Triangle countries (78,762) and Mexico (24,412) (Table 6b). These four countries made up over a third (65 percent) of all defensive asylum applications filed with EOIR." Refugees and Asylees: 2018, available at https://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2018/refugees_asylees_2018.pdf; See also U.S. Department of Justice,

Executive Office for Immigration Review, Statistics Yearbook: Fiscal Year 2018, available at <https://www.justice.gov/eoir/file/1198896/download>; Kristie de Pena, *Asylum Fraud Isn't What You Think It Is*, Niskanen Center, Aug. 14, 2018, available at <https://www.niskanencenter.org/asylum-fraud-isnt-what-you-think-it-is/>; Lindsay M. Harris, Sessions fundamentally misses the mark on asylum system, The Hill, Oct. 17, 2017, available at <https://thehill.com/opinion/immigration/355734-sessions-fundamentally-misses-the-mark-on-the-asylum-system>.

The Departments' efforts to deny Central American migrants *en masse* have been extremely successful. Following *Matter of A-B-*, asylum grant rates for El Salvador, Guatemala and Honduras—the same countries repeatedly and falsely accused by the Administration of filing fraudulent and meritless asylum applications (an accusation advanced without evidence in the Notice)—fell to an average of 14.4 percent (June to November 2018) compared to a 23.9 percent grant rate in the first five months of 2018—a nearly 10-point drop. All other countries saw virtually no change in grant rate, with only a 0.5-point decrease. See Syracuse University Transactional Records Access Clearing House (TRAC) Asylum Decision Tool, available at <https://trac.syr.edu/phptools/immigration/asylum/>. Similarly, at the time of its passage, the effect of the government's bar on applicants traveling through Mexico was “to effectively close the border to the vast majority of the 18,700 asylum seekers on Mexico's side of the border[,] most of [whom] have traveled from Central America and Cuba.” Santiago Perez, *New Asylum Rule Strands Thousands at Southern Border*, The Wall Street Journal (July 16, 2019), available at <https://www.wsj.com/articles/new-u-s-asylum-rule-strands-thousands-at-southern-border-11563285772>. And that is to say nothing of the thousands of migrants who have attempted to travel to the United States to escape persecution since the Administration passed the rule in July 2019.

III. Supposed Gains in Judicial Efficiency Are Either Illusory or Disingenuous.

Any supposed gains in judicial efficiency through the expanded definition of frivolousness—with which the Proposed Rules metaphorically arms intrepid AOs and IJs to cut through the thick weeds of fraudulent asylum claims—is immediately undercut by vague language ripe for appellate challenges. By removing the requirements that a fabrication be “deliberate” and “material,” and instead imposing broader standards, the Proposed Rule opens the door to increased litigation. Under the Proposed Rules, an application would be deemed frivolous “if applicable law clearly prohibits the grant of asylum.” Notice at 36276. As the Notice itself takes pains to note that “reasonable arguments” to modify or even reverse existing law may not be frivolous, it is clear that there is ample room to litigate the “reasonableness” of claims. Due to the draconian penalty associated with a finding of frivolousness, applicants may be more inclined to appeal any such finding. Increased appellate litigation, at both the BIA and the Circuit Courts, undermines any justification based on judicial efficiency.

Similarly, it is important to note that the sweeping discretion to pretermite hearings is likely to prove tempting to IJs operating in a pressure-cooker environment of harsh performance metrics. In 2018, EOIR issued Performance Metrics requiring IJs to complete 700 cases per year, 95% at the first scheduled individual hearing, and further requiring a remand rate of less than 15%. See EOIR Performance Plan Adjudicative Employees, March 30, 2018 available at <https://www.aila.org/infonet/eoir-memo-immigration-judge-performance-metrics>. The metrics

place pressure on IJs to quickly adjudicate cases without granting continuances. Allowing IJs to prepermit asylum cases without holding a hearing, coupled with incentives for IJs to quickly process cases in order to meet the EOIR's performance metrics, will necessarily lead to the premature denial of applications that may have had a chance of succeeding at a hearing. That is, IJs will feel pressured to use prepermission to meet their metrics, having been stripped of other options. The increased "efficiency" comes at a grave price—a duplicitous trade off with due process.

C. The Proposed Rules Disproportionately Disenfranchise *Pro Se* Asylum Applicants and Will Hamper *Pro Bono* Representation.

CBJC provides free legal services to low-income New Yorkers, many of whom would otherwise be required to represent themselves *pro se*, by mobilizing *pro bono* lawyers, law firms, and corporate legal departments. As one of its core projects, CBJC's Immigrant Justice Project works to secure representation for vulnerable immigrants including asylum seekers, survivors of violent crimes and trafficking in the United States, and others seeking humanitarian remedies. After receiving a request for assistance, CBJC screens prospective clients, first by telephone and then in an in-depth meeting. Cases are accepted only after a legal analysis of the grounds for asylum. CBJC then pairs the asylum seeker with a *pro bono* attorney, continuing to provide mentorship and guidance throughout the representation. *Pro se* applicants receive the benefit of a high-quality representation without charge, while *pro bono* attorneys are able to take on challenging cases bolstered by the support and legal expertise of CBJC staff. This successful model has resulted in hundreds of individuals being granted asylum before the Asylum Office and in Immigration Court.

In an increasingly complicated legal framework, it is no surprise that the odds of gaining asylum are five times higher when represented: 91% of asylum seekers without representation are denied. *See* TRAC, Asylum Representation Rates Have Fallen Amid Rising Denial Rates (2017), available at <https://trac.syr.edu/immigration/reports/491>. Yet nationally, only 37% of asylum seekers are represented. *See* American Immigration Council, Access to Counsel in Immigration Court (2016), available at https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf. Legal representation has an undeniable impact on outcomes but unfortunately, asylum seekers, especially recent arrivals to the U.S. or those lacking resources, struggle to find competent counsel. *See Accessing Justice: The Availability and Adequacy of Counsel in Immigration Proceedings: New York Immigrant Representation Study Report*, 33 *Cardozo L. Rev.* 357 (2011-2012). With no right to counsel in immigration proceedings, legal services and *pro bono* attorneys provide an invaluable resource. Indeed, studies show that representation leads to higher appearance rates, as well as fairer, more efficient, and more consistent adjudication. *Pro bono* attorneys in particular have long been a recognized and appreciated bulwark of the Immigration Court system, "benefit[ing] both the respondent and the court, [by] providing respondents with welcome legal assistance and the judge with efficiencies that can only be realized when the respondent is represented." *See* <https://www.justice.gov/sites/default/files/eoir/legacy/2008/04/24/08-01.pdf>; *see also* City Bar Justice Center Press Release, "NYC Bar Association Calls for Right to Counsel for Immigrant Detainees" (November 2009) (noting that representation increases judicial efficiency and decreases wastefulness).

Yet the Proposed Rules will result in the summary dismissal of countless claims by asylum seekers before legal service organizations like CBJC even have the opportunity to locate *pro bono* representation. Potentially meritorious cases would be pretermitted not because the applicant has no claim, but because they did not know how to articulate it within the confines of a written I-589 application. Such cases may never reach *pro bono* counsel. CBJC knows firsthand that this rule will lead to legitimate asylum seekers being deported. One particular case is illustrative: a potential client contacted CBJC after an IJ refused to let her testify and denied her asylum. CBJC accepted her case and found her *pro bono* counsel with Willkie Farr. After the BIA remanded based on denial of due process, Willkie Farr represented the client, who testified at a full hearing and ultimately prevailed based on her political opinion and particular social group membership. Under the proposed pretermission regulation, the initial denial would stand and the client would have been deported. Although that specific case is dramatically on-point, the impact of the Proposed Rule is in fact much broader. It is commonplace for CBJC to accept clients who have already submitted an I-589 asylum application but have not yet had their individual hearing. *Pro bono* attorneys then work with clients to refine and articulate their claims into an accepted legal framework. This involves not only a nuanced understanding of legal theory but also eliciting and including facts that an individual may think irrelevant—but which in fact prove critical to advancing their claim. Many of these cases are subsequently granted. Under the Proposed Rule, they would simply disappear.

The expansion of frivolousness also poses unique harms to *pro se* applicants and, by extension, potential *pro bono* representation. Though the Notice is careful to note that “reasonable arguments to extend, modify, or reverse the law as it stands” should not be considered frivolous, it is hard to see how a *pro se* applicant would be able to convincingly argue that existing case law should be either refined or reversed. Notice at 36276. This harm is especially acute given the turbulent state of asylum case law over the past several years. In one CBJC case, an Attorney General opinion undermining the entire legal theory of the case was issued just days before the scheduled hearing. *Pro bono* counsel was able to seek a briefing extension from the IJ and perform the exhaustive legal research required to advance the case. A *pro se* applicant would likely find this an impossible task. The expansion of frivolousness to encompass legal arguments is unjust, particularly as applied to *pro se* applicants, many of whom are also detained. Fear of the harsh consequences resulting from a finding of frivolousness may also disproportionately lead *pro se* applicants to accept voluntary departure, withdrawing their applications with prejudice and waiving any right to appeal. This iron fist in a velvet glove forecloses the efforts of any future *pro bono* counsel.

The proposals on pretermission and frivolousness effectively tie the hands of any *pro bono* counsel seeking to rehabilitate a case filed by a *pro se* applicant. By frustrating and complicating the process, the Administration may actually decrease judicial efficiency while concurrently stripping asylum applicants of a meaningful opportunity to gain asylum.

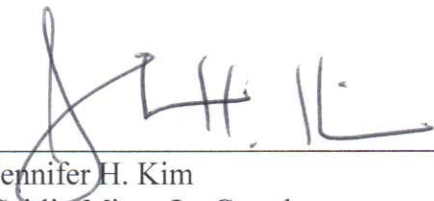
Conclusion

As asylum law currently stands, *pro se* asylum seekers have the odds stacked against them; the Proposed Rule will make it impossible for a *pro se* applicant to make a successful claim for asylum. This is because the Proposed Rule, through the expansion of the definition of frivolous and heightened deference to IJs to pretermitt cases, seek to exclude, frustrate and ultimately

penalize any applicant that cannot navigate the complex waters the Administration has purposefully agitated.

Finally, we are again compelled to lodge our overarching objection to this Notice and the Proposed Rule in its entirety, beyond the sections on pretermission and frivolousness. The United States is currently grappling with a global health pandemic of unprecedented scope and uncertain future effects. The unique challenges posed by the pandemic have been recognized by the Departments in other contexts, yet ignored here. The Notice, with its inexcusably short 30-day comment period, operates to rewrite the entire asylum system by regulation without affording the public a meaningful opportunity to respond. It upends decades of established case law and in multiple instances ignores the very statute it supposedly implements. It is lawmaking by fiat, and it is made worse by directing its most drastic changes squarely toward a vulnerable and traumatized population.

For all the reasons set out above, the City Bar Justice Center and Willkie Farr urge the Departments not to put into effect the drastic changes to asylum law and procedure proposed in the Notice.

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