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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


The Migrant Center for Human Rights (“Migrant Center”) is a 501(c)(3) non-profit organization that provides legal services to immigrants detained at the South Texas Detention Complex, in Pearsall Texas. This facility is the third largest in the country and holds up to 1,900 immigrants on a given day. The Migrant Center works almost exclusively with asylum seekers and has served approximately 600 asylum seekers in the last three years. Our team’s legal expertise includes more than 42 combined years of immigration removal defense litigation experience, much of this with asylum seekers. As a non-profit organization, we also have an expertise in working pro se respondents and therefore are particularly aware of the unique challenges they face in trying to have a fair day in court.

This proposed regulatory changes will affect hundreds of thousands of the 1,191,028 people with cases pending in Immigration Court and over 300,000 asylum seekers who have
affirmative asylum applications pending with U.S. Citizenship and Immigration Services (USCIS). Because the proposed regulatory changes will affect vulnerable individuals whose return to their country of origin will result in persecution, torture, and death, the stakes couldn’t be higher.

Our reading of the Notice has led us to conclude that the proposed regulatory changes will subject vulnerable asylum seekers to unclear, and sometimes unlawful, standards with virtually no due process protections. We oppose these proposed changes because they would effectively make it impossible for anyone to find safety in the United States through the U.S. asylum system. They would deny most asylum seekers their day in court, they would illegally usurp the power of Congress to set law by rewriting the law, they would contravene the U.S.’s non-refoulement obligations under domestic and international law to refrain from returning refugees to places where their lives or freedom would be threatened, they would set absurd requirements that have no bearing on asylum law, such as denying asylum to people who have two or more layovers before reaching the United States, and would roll back decades of established legal precedent, resulting in the disappearance of refugee protections that have long been accepted as a key part of who we are as a nation. Accordingly, we urge you to withdraw the Notice in its entirety and instead dedicate your efforts – and our taxpayer dollars – to advancing policies that respect individuals’ legal right to seek asylum.

I. Preparation of This Comment.

The Migrant Center receives many requests for assistance from indigent immigrants and has limited resources. As a result, we are unable to respond to the plethora of legal issues in the Notice during the 30-day timeframe. We feel that a longer comment period would be necessary to serve the intended purpose of the Notice and Comment process under the Administrative Procedures Act, namely: “(1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review.” Capital Area Immigrants’ Rights Coalition (CAIR) v.
We are concerned that by rewriting with limited notice decades of legal precedent and upending the entire U.S. asylum system – where the consequences are literally life and death for refugees the U.S. has a responsibility to protect – will result in an incomplete administrative record.

As a result of these limitations, the Migrant Center is only able to comment on two of the many significant issues: the definitions of persecution and political opinion. Silence on the other issues is not consent: the fact that we do not discuss a particular change does not mean we agree with it and, in fact, an initial read through of the 161 page Notice and conversations with colleagues have led us to believe that the proposed regulatory changes are likely legally erroneous in their entirety or, at best in substantive part.

We are including links to relevant materials and ask that you incorporate these references into the administrative record.

II. What Constitutes Persecution.

The Immigration and Nationality Act (“INA”) protects refugees who were or will be persecuted in their country of origin (“an asylum applicant who successfully establishes that he has been the subject of past persecution shall be presumed to have a well-founded fear of future persecution” 8 C.F.R. § 208.13(b)(1)). What qualifies as persecution is a very fact-specific inquiry. It is difficult to create a standard definition but there are some guiding principles that can be used by adjudicators to help ensure uniform application of the law.

Persecution has been defined by the Board of Immigration Appeals (“BIA”) as “a threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive.” Matter of Acosta, 19 I&N Dec. 211, 222 (BIA 1985), see also Fatin, 12 F.3d 1233, 1240 (3rd Cir. 1993). Similarly, the 5th Circuit, where the Migrant Center is located, has defined persecution as “harm or suffering” inflicted on a person in order to punish her for a belief or characteristic that her persecutor “sought to overcome.” Faddoul v. INS, 37 F.3d 185, 188
The United Nations High Commissioner for Refugees (“UNHCR”) gives no universal definition of persecution, but states that “a threat to life or freedom on account of race, religion, nationality, political opinion, or membership of a particular social group is always persecution.” *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/IP/4/Eng/REV.3 Reedited, Geneva, December 2011, UNHCR 1979, Part One, Chapter II, B(1)(b)(51) (hereinafter “UNHCR Handbook”). Merriam Webster Dictionary defines persecute as: “to harass or punish in a manner designed to injure, grieve, or afflict, specifically: to cause to suffer because of belief”.

The proposed regulatory change will add a new paragraph to 8 CFR 208.1 and 8 CFR 1208.1 to redefine what it means to be “persecuted” to cover only severe harms such that, according to the proposed regulatory change, “persecution requires an intent to target a belief or characteristic, a severe level of harm... For purposes of evaluating the severity of the level of harm, persecution is an extreme concept involving a severe level of harm that includes actions so severe that they constitute an exigent threat.” (Exigent is defined by Merriam Webster Dictionary as “requiring immediate aid or action”.) Far from providing clarity to adjudicators, this change will only result in adjudicators needing to determine what constitutes “severe” and “exigent”.

In fact, persecution has always meant serious harm and does not encompass all possible forms of mistreatment. See *Shi v. U.S. Att'y Gen.*, 707 F.3d 1231, 1235 (11th Cir. 2013) (explaining that persecution is “does not include every sort of treatment [that] our society regards as offensive” (quotation marks and citations omitted)); *Gormley v. Ashcroft*, 364 F.3d 1172, 1176 (9th Cir. 2004) (same). So by taking the time to tell adjudicators in official terms that the harm must not only be serious as defined in their circuit but must be severe, the proposed regulatory change is ignoring circuit precedent and improperly indicating to adjudicators (DOJ and DHS employees) that more cases should be denied than currently are. The proposed regulatory change illogically goes against our justice system by not trusting adjudicators who specialize in this area of the law to conduct proper legal determinations on their own under well-defined definitions of persecution in their circuits.
We are also concerned by the fact that the proposed regulatory change gives examples of what is *not* persecution and no examples of what *is* persecution, similarly indicating to adjudicators that it wants to see more denials, and demonstrating a certain bias against asylum seekers:

Persecution does not encompass the generalized harm that arises out of civil, criminal, or military strife in a country, nor does it encompass all treatment that the United States regards as unfair, offensive, unjust, or even unlawful or unconstitutional. It does not include intermittent harassment, including brief detentions; threats with no actual effort to carry out the threats... The existence of laws or government policies that are unenforced or infrequently enforced do not, by themselves, constitute persecution, unless there is credible evidence that those laws or policies have been or would be applied to an applicant personally.

However, some of these examples do not say anything new: it is true that some harassment will not be enough to qualify as persecution, while other harassment will be. *Matter of T-Z*, 24 I&N Dec. 163, 170 (BIA 2007) (explaining that economic harm must be “severe” to qualify as persecution). Persecution may include “the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment or other essentials of life.” UNHCR *Handbook*, ¶ 114. It is true that some forms of mistreatment would not be considered persecution while others would (we are not agreeing that violation of U.S. constitutional rights would not qualify as persecution as we believe the rights enshrined in our Constitution are fundamental). It is true that some in-country strife will be low-level, however other country-wide strife such as the genocide in Rwanda would constitute persecution and in fact, the World War II genocide against the Jewish people is what caused the United Nations 1951 Convention and 1964 Protocol Relating to the Status of Refugees, upon which our laws are based, to be written. By saying persecution “does not encompass” these forms of harm, the proposed regulatory change undermines the very humanitarian tenants upon which our system is based.

Furthermore, the proposed regulatory change, in stating that multiple brief detentions do not constitute persecution, ignores the well-established law accepted across the country that adjudicators must look at harm cumulatively and not as isolated instances. The majority of
federal circuit courts – Second, Third, Fourth, Sixth, Seventh, Eight, Ninth, and Eleventh – have looked at this issue and found that the adjudicator should consider the cumulative effect of harm:

- *Poradisova v. Gonzales*, 420 F.3d 70, 79-80 (2d Cir. 2005) and *Manzur v. DHS*, 494 F.3d 281, 289-90 (2d Cir. 2007);
- *Fei Mei Cheng v. Att’y Gen. of U.S.*, 623 F.3d 175, 190-98 (3d Cir. 2010);
- *Baharon v. Holder*, 588 F.3d 228, 232 (4th Cir. 2009);
- *Haider v. Holder*, 595 F.3d 276, 286-88 (6th Cir. 2010);
- *Kholyavskiy v. Mukasey*, 540 F.3d 555, 570-71 (7th Cir. 2008);
- *Ngengwe v. Mukasey*, 543 F.3d 1029, 1036 (8th Cir. 2008);
- *Korablina v. INS*, 158 F.3d 1038, 1044 (9th Cir. 1998) and *Javhlan v. Holder*, 626 F.3d 1119, 1123 (9th Cir. 2010);
- *De Santamaria v. Att’y Gen. of U.S.*, 525 F.3d 999 (11th Cir. 2008).

In fact the BIA, the Administration’s highest adjudicatory body for immigration cases, has also recognized this legal principle. *Matter of O-Z- & I-Z*, 22 I&N Dec. 23, 26 (BIA 1998).

As the UNHCR, explains: “The cumulative effect of the applicant’s experience must be taken into account.” *UNHCR Handbook*, ¶ 201. Considering harm cumulatively makes sense, as separately considering each instance of harm neither captures the total impact on the individual (this impact is often greater than the sum of its parts) nor does it capture the intent of the persecutors. As stated in the UNHCR Handbook, persuasive authority in our courts: “various measures not in themselves amounting to persecution (e.g. discrimination in different forms), in some cases combined with other adverse factors, such as a general atmosphere of insecurity in the country of origin, may amount to persecution on ‘cumulative grounds.'” *UNHCR Handbook*, note 38, ¶ 53.

A common example of where multiple detentions amount to persecution that we see at the Migrant Center is the systematic use of repetitive, short detentions used by the Cuban government to force people to conform to its political Marxist ideology. Now while we might agree that a few days in detention a few times a month is not significant physical harm depending on the circumstances (and the proposed regulatory change effectively and illegally
eliminates the ability of adjudicators to consider circumstances such as conditions of confinement, etc.), the proposed regulatory change ignores two legal issues. One, unjustified deprivation of liberty is a serious harm. “The individual’s harm or suffering need not be physical and may take other forms, such as... the deprivation of liberty.” UNHCR Handbook, ¶ 114. And two, persecution can be either physical or psychological. Tamara-Gomez v. Gonzalez, 447 F.3d 343, 349 (5th Cir. 2006), citing Aguilera-Cota v. I.N.S., 914 F.2d 1375 (9th Cir. 1990); see also, Matter of O-Z & I-Z-, 22 I. & N. Dec. 23 (BIA 2006). In fact, in the Migrant Center’s experience, the psychological harm a refugee experiences is often more severe than the physical harm as it frequently has a more profound and long-lasting impact than any physical injury. In interviewing the several Cuban refugees we’ve worked with, for example, it is abundantly clear that the Cuban government has intentionally and intelligently created a system of repetitive, multiple detentions to harass political opponents to the degree that they are psychologically adversely affected.

To get an idea of how repetitive arrests may affect someone psychologically, think of the effect of hearing fingernails on a chalkboard over and over again. In fact, repetition is a well-utilized torture technique. In Chinese water torture for example, the persecutor drips a drop of water onto the person’s head for hours. It is the repetitive nature of this action alone that makes it torture. In the case of repetitive detentions, our Cuban clients report that between arrests they could not stop thinking of when the government would next put them in detention, causing them to live in a state of constant anxiety and fear. The proposed regulatory change, by ignoring both logic and case law in such a profound manner, is acting in a way that is arbitrary and capricious, a violation of the Administrative Procedures Act, the INA’s legislative history and intent, and our international treaty obligations.

It is also an incorrect statement of the law that threats require that an “effort” to carry out the threat has already occurred in order to constitute persecution. According to at least nine circuits (including the 5th), death threats, or threats to carry out other acts amounting to persecution and/or torture, can rise to the level of persecution if serious and credible. Those cases include:
This case law has stood the test of time, being reaffirmed over the years and as recently as 2020 in some circuits. As stated previously, according to the UNHCR, “it may be inferred that a threat to life or freedom … is always persecution.” UNHCR Handbook, ¶ 51. Additionally, adjudicators must consider the political context of an applicant’s country in determining whether the applicant suffered persecution. Korablina v. INS, 158 F.3d 1038, 1045 (9th Cir. 1998) (finding that multiple death threats amounted to persecution where social and political turmoil existed in applicant’s country of origin); Castro v. Holder, 597 F.3d 93, 102-06 (2d Cir. 2010); and De Brenner v. Ashcroft, 388 F.3d 629, 638 n.2 (8th Cir. 2004).
The proposed regulatory change is correct in that the mere fact that a law is not enforced adequately does not \textit{per se} constitute persecution, however, there can be persecution where the applicant proves that the law is not enforced due to persecutory intent (the proposed regulatory change ignores the \textit{mens rea} element of persecution in this regard) and that such disregard in fact consequently results in persecution. There can also be persecution where, by not proactively protecting a group of citizens, such as LGBT+ individuals, that the government has the responsibility to protect and the knowledge that they are lacking protection, the government is creating a permissive climate and giving the green light to other persecutors that it is acceptable to persecuted these individuals. In fact, the government may even be held responsible in this circumstance under the higher “consent or acquiescence” standard of the \textit{UN Convention Against Torture}. Additionally, the proposed regulatory change is confusingly worded; if applied to a real-life scenario, it would read: If there is a law saying that LGBT+ individuals should have equal rights to rent and buy property that is not enforced, there will be persecution only if the law “would be applied to an applicant personally”. But we want the law to be applied to the individual.

The language “applied to the applicant personally” is likely to create additional confusion and conflict with existing legal principles, both that mentioned above in mass persecutory situations such as genocide and that of widespread and profound discrimination such as that against LGBT+ individuals not being allowed a place to live (in fact, most laws have broad applicability to a group and it is unclear what, if any, additional burden of proof the proposed regulatory change is trying to put on the applicant to show that he would be personally affected beyond that he is part of the group mentioned by the law). The Notice appears to recognize this problem. In its comments, but not in the actual proposed regulatory language, it states that there is an exception to its proposal: “there must be evidence these laws or policies were widespread and systemic, or evidence that persecutory laws or policies were, or would be, applied to an applicant personally. \textit{Cf. Wakkary v. Holder, 558 F.3d 1049, 1061 (9th Cir. 2009)} (an applicant is not required to establish that his or her government would personally persecute the alien upon return if he or she can establish a pattern or practice of persecution against a protected group to which they belong.
However, the governmental conduct must be “systematic” and “sufficiently widespread” and not merely infrequent.”

However, even this language, were it to be included in the regulation, is somewhat problematic because it deviates from well-established case law by ignoring that individuals who can show that others “similarly situated” are persecuted can meet their burden of proof to show that they would also be persecuted. In other words, it is not necessary for there to be “widespread or systemic” persecution for an individual to show that there is at least about a 10% chance (asylum) or greater than 50% chance (INA withholding of removal) of them facing persecution based on what has happened to similarly situated individuals. The possibility / probability analysis should not be mixed in with the definition of persecution as conflating these concepts only creates more legal confusion.

Lastly, we note that the proposed regulation, in highlighting “actions so severe that they constitute a… threat” “requiring immediate aid or action” (exigent), ignores the reality that oftentimes individuals live in persecutory situations that do not necessarily “require” immediate aid or action. For example, the Migrant Center has worked with many domestic violence victims who often stay living in abusive relationships where they are repetitively raped due to fear of what their abuser will do if they try to leave. An unfriendly adjudicator could find that because a woman stayed in that relationship and didn’t take action when she was raped then she did not “require” aid and therefore was not severely harmed. The Migrant Center has seen many cases like this, where it is ultimately a threat to her child that causes the mother to overcome her fear and leave the relationship. The word exigent (required) creates a lot of ambiguity. Among other things, who is the threat exigent for: the individual (as in the example above), society, the government, the proverbial “reasonable man”, U.S. culture…?

III. What it Means to Have a Political Opinion.

Protection from persecution in the form of asylum (INA § 208(b)(1)(A), 8 U.S.C. 1158(b)(1)(A)) and withholding of removal (INA § 241(b)(3)(A), 8 CFR 208.16(b), 8 CFR 1208.16(b)) under the Immigration and Nationality Act (“INA”) require that an individual seeking
protection prove they meet the United Nations definition of a refugee, which requires that they suffered past persecution, or have about a 10% possibility or greater than 50% probability, respectively, of being persecuted “on account of race, religion, nationality, membership in a particular social group, or political opinion”. INA § 101(a)(42), 8 U.S.C. 1101(a)(42), 8 U.S.C. 1231(b)(3)(A), 8 CFR 208.30(e)(2). Political opinion, as the Migrant Center has seen over the years, is not always clearly understood by adjudicators – Immigration Judges, Board of Immigration Appeals (“BIA”) Panel Members, and USCIS Asylum Officers – because in real life it often encompasses more than protesting against a government policy.

The Notice incorrectly attempts to narrow the scope of political opinion, fails to recognize that while there may exist some ambiguity when the law is applied to the facts of a particular case, our democratic system intentionally gives judges a certain amount of judicial discretion to evaluate and respond to the facts presented in order to reach a fair outcome in the individual’s case (as opposed to using a stringent straight-jacket approach that fails to capture reality). While the DOJ and DHS’ effort to provide guidance holds some merit, the departments are unfortunately squandering this opportunity by putting forth a narrow definition of political opinion that is contrary to a plain language reading of the dictionary, scholarly analysis, and common sense.

The proposed regulatory change is based on cherry-picked cases that are additionally misinterpreted in such a way as to make them seem favorable to restricting protection for those fleeing persecution. While Notice is correct that The United Nations High Commissioner for Refugees (“UNHCR”) analyzes political opinion in terms of holding an opinion different from the government or not tolerated by the relevant governmental authorities, this is not the extent of what is meant by the concept of political opinion, merely the most clear example. Notice, Pg. 57. UNHCR Handbook, ¶¶ 80–82. Similarly, just because the BIA has looked for evidence “that his political views were antithetical to those of the government” does not automatically mean that this is an exhaustive inquiry into the issue – other political opinions can exist – so the Notice is misinterpreting BIA caselaw. Notice, Pg. 57. Matter of S-P-, 21 I&N Dec. 486, 494 (BIA 1996).

An applicant can qualify for asylum or INA withholding of removal if he shows that he was persecuted for his political opinion or a political opinion imputed to him. For imputed political
opinion, an applicant must demonstrate through direct or circumstantial evidence that specific conduct or speech gives rise to the inference that he holds a political opinion and that this political opinion is attributed to him by his persecutors. *INS v. Elías-Zacarias*, 502 U.S. 478, 481-83 (1992). An applicant may establish persecution on account of an imputed political opinion whether or not the applicant actually holds that opinion. See, e.g., *Sangha v. INS*, 103 F.3d 1482, 1489 (9th Cir. 1997).

An applicant does not need to verbalize his political opinion to render that opinion cognizable under the INA; actions may be sufficient to show an opinion giving rise to persecution. *Rivas-Martinez v. INS*, 997 F.2d 1143, 1147 (5th Cir. 1993). This aligns with well-established U.S. case law on free speech under our Constitution’s First Amendment, which states that acts or omissions, whether through words, deeds, or other form of expression such as art, constitutes protected speech. Freedom of expression is an internationally recognized *jus cogens norm* that can be found across international and regional treaties and human rights instruments such as the *International Covenant on Civil and Political Rights* and the *Universal Declaration of Human Rights*. Freedom of expression can only be limited in very narrow circumstances, which include hate speech and incitation to violence. *Brandenburg v. Ohio*, 395 U.S. 444, 445-46 (1969). Freedom of expression is considered a fundamental right, that is necessary for maintenance of an individual’s well-being.

It is within this framework that after World War II the United Nations determined that asylum should be granted to those fleeing suppression of their religious and political views. While an “opinion” is fairly easy to understand as a person’s view or outlook, the word “political” is more complex. The easy understanding of political is that laid out by the Notice: the “applicant possesses an ideal or conviction in support of the furtherance of a discrete cause related to political control of a state or a unit thereof.” But this is far from the extent of what it means to have a political opinion.

There are three major issues with this definition. First, political opinions can exist independent of “discrete” causes. For example, an individual can hold a general political opinion that women should be treated equally as men and face persecution on this basis without the
individual expressing support of a discrete cause, such as proposed legislation calling for equal pay. As long as the opinion is clear enough that it can be articulated and understood by the adjudicator, and that the persecutor understood this to be the individual’s opinion, it is a logical fallacy that this opinion must be tied to a discrete cause to be political.

Second, “political” does not always mean “control” of a state. While actions pertaining to who gets elected would likely meet the definition of political, most political opinions relate to policies and not “control of a state”, such as how public money is allocated to local governments. Black’s Law Dictionary defines “political” as “[p]ertaining to politics; of or relating to the conduct of government.” Black’s Law Dictionary, 1198 (8th ed. 2004) (cited by Matter of N-M, 25 I. & N. Dec. 526 (BIA 2011). Merriam-Webster Dictionary defines political as “of or relating to government, a government, or the conduct of government… of, relating to, or concerned with the making… of governmental policy.”

According to the Fifth Circuit, political expression is not even limited to conventional political action. Coriolan v. INS, 559 F.2d 993, 1004 (5th Cir. 1977) (superseded by statute on other grounds as stated in Najjar v. Ashcroft, 257 F.3d 1262 (11th Cir. 2001)). Political opinion, for the purposes of establishing eligibility for protection, includes opinions on or assertions of basic human and civil rights. Fatin v. INS, 12 F.3d 1233 (3rd Cir. 1993); see also, Lazo-Majano v. INS, 813 F.2d 1432, 1435 (9th Cir. 1987) (overruled in part on other grounds by Fisher v. INS, 79 F.3d 955 (9th Cir. 1996)). Even the Notice cites to federal case law against its position: refusal to submit to the violent advances of gang members may be akin to a political opinion taking a stance against a culture of male-domination. Notice, Pg. 63, Hernandez-Chacon v. Barr, 948 F.3d 94, 102–03 (2d Cir. 2020).

Instead, the Administration relies on one case, Saldarriaga v. Gonzales, 402 F.3d 461, 467 (4th Cir. 2005), but then misinterprets it. In Saldarriaga v. Gonzales, the Fourth Circuit found that disapproval of a drug cartel is not a political opinion. We agree with the Fourth Circuit that without more, disapproval of any group is not per se political opinion. It is necessary for the applicant to articulate why they are against said group, and that the reason they are against the group relates to politics, in other words the operation of society, including that group’s role within society. In fact,
the Fourth Circuit explicitly states that in general, but not always, is political opinion viewed as relating to a state: “in recognition of… [a] general understanding that a political opinion is intended to advance or further a discrete cause related to political control of a state,” (emphasis added) and that cooperation with the government, absent “any opinion motivating that cooperation” is insufficient. Notice, Pg. 57, 63, Saldarriaga v. Gonzales, 402 F.3d 461, 466-8 (4th Cir. 2005). Critically, in Saldarriaga v. Gonzales the record showed no opinion motivating the individual’s actions, political or otherwise. As this is a threshold issue, ie there was no political opinion to evaluate, any statements on “political” can reasonably be argued to be dicta, an issue not before the court. And in fact, this is what the court was saying, that it needed additional information before it could make a ruling on the “political” prong of the analysis. That the proposed regulatory changes rests on the misinterpretation of one case – in fact copying almost verbatim the language of the court – to establish nation-wide law, shows a lack of thorough analysis of this issue and is extremely problematic for the errors that result as discussed here.

Third, a state “or a unit thereof” is not necessary for an opinion to be political. At its core political refers to a viewpoint on how society should organize and run itself. Merriam-Webster Dictionary defines politics as "the art or science of government… concerned with guiding or influencing governmental policy… the total complex of relations between people living in society… relations or conduct in a particular area of experience". It is important to note the difference between a state and a government. A state is an entity, a government is the structure that runs the state. The problem with the proposed regulatory change is that, in choosing the word “state” and not “government”, it limits political opinion so that supporting a candidate vying for a position of power within the governing structure of a political party may be deemed as not holding a political opinion.

We also note that there are still ambiguities in the words “state” and “government”. For example, some states have both an actual government and a shadow government. Even the definition of state is flexible in that states, while commonly thought of in terms of our modern-day construct of nation-states or countries, are at heart possessing of their own definition which can have a broader applicability. A state is defined roughly as a physical area (although some native
nations do not have physical land), with more or less determined boundaries (many states have boundary disputes), that has a government that has instituted rules of conduct, such as collecting taxes, providing common goods, such as utilities, health and education services, and that maintains indicia of being an independent unit such as using a common currency (many economic currency zones exist across states such as the Euro and the Central African Franc), speaking a common language (although most states are not homogenous in this sense), and having a flag, national hymn, and common customs and traditions (which often cross state borders). Even if we assume that the proposed regulatory change means state, nation, government, and country to mean the same thing – which is contrary to the rule of statutory construction that requires words in law to be interpreted at face value – it creates more ambiguity and not less. All for a concept that doesn’t form part of the definition of political in the first place.

A political opinion, which can more accurately be defined as “a viewpoint relating to the control or conduct of rule-makers, or relating to the making of policy determining the relations between people living in society”, does not require the involvement of a state, nation, government, or country. For example, an individual can hold a political opinion that LGBT+ individuals should not be systematically raped and murdered, that the social contract requires that all individuals respect the right to life and personal integrity of others. An individual can hold the political opinion that the church should not prohibit its parishioners from getting an abortion. And an individual can hold the political opinion that people should not be discriminated at work because of their ethnicity or skin color.

The proposed regulatory changes goes on to say that adjudicators “will” deny cases where “political opinion [is] defined solely by generalized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerilla, or other non-state organizations absent expressive behavior in furtherance of a [“discrete” is listed here in one of three places in the rule but not in the other two] cause against such organizations related to efforts by the state to control such organizations or behavior that is antithetical to or otherwise opposes the ruling legal entity of the state or a legal sub-unit of the state”(emphasis added).
This rule runs into the same problems as discussed above. First, political opinion against non-state organizations and can be related to efforts to control or not control such organizations. In fact, many political opinions we see at the Migrant Center relate to states’ failure to seriously attempt to control criminal organizations. Second, this definition would bar from protection an individual who is against a non-state organization unless that opinion related to the role of the state in controlling or not controlling the organization. No state action (or lack thereof) is necessary for the individual to hold a political opinion vis-à-vis a non-state organization. Third, political opinions do not need to be related to a specific cause, although we agree that a general statement of belief, without more, may not be sufficient to establish a political opinion. “[T]he mere existence of a generalized ‘political’ motive underlying the guerrillas' forced recruitment is inadequate to establish (and, indeed, goes far to refute) the proposition that [the respondent] fears persecution on account of political opinion, as § 101(a)(42) requires.” Notice, Pg. 100, INS v. Elias-Zacarias, 502 U.S. 478, 482 (1992).

This proposed regulatory change presents an additional problem: it requires “expressive behavior”. This ignores well-established case law granting protection to individuals where the persecutor imputes a political opinion onto them, regardless of whether or not they hold this political opinion. As if this disregard for the law were not enough, the proposed regulatory change then states that expressive behavior “is not generally thought to encompass acts of personal civic responsibility such as voting, reporting a crime, or assisting law enforcement in an investigation, and those activities, by themselves, would not support a claim based on an alleged fear of harm due to a political opinion. Notice, Pg. 58. Exercising one’s civil rights to participate in upholding the peace and safety of the community is often intimately tied to the free expression of political opinion. While the proposed regulatory change does qualify its statement with “generally” it is still indicating to adjudicators that they should be denying per se on these types of facts, instead of offering guidance on when exercising one’s civil rights would constitute political opinion. The proposed regulatory change is also wrong on the facts: while some might believe that voting is a civic responsibility, it is also a civil and political right. The proposed regulatory change cannot on one hand try to limit “political” to actions related to the control of a state and then say that the
most basic of actions expressing opinion on who should control a state – voting – is not political opinion.

The loss of the right to vote on its own is can constitute persecution, as the ability to participate in the selection of one’s government is a fundamental right that can only be taken away in limited circumstances. This is commonly understood in democracies around the world. In a New Zealand case involving an Israeli refugee, the loss of citizenship: “deprived her of the ability to vote, has undermined her ability to take part in civic affairs and her ability to access the highest attainable standard of health or the benefit of social welfare available to citizens of Israel.” Refugee Appeal No. 76077, New Zealand: Refugee Status Appeals Authority, 19 May 2009, p. 15 ¶[77]. A British appellate court ruled that an Ethiopian woman had been persecuted when her nationality papers were withdrawn: “[If] a State by executive action deprives a citizen of her citizenship, that does away with that citizen’s individual rights which attach to her citizenship. One of those most basic rights … may well be … the right to vote.)” EB (Ethiopia) v. Secretary of State for the Home Department, [2007] EWCA Civ 809, United Kingdom: Court of Appeal (England and Wales), 31 July 2007, p. 19, ¶ 67 (Justice Longmore).

Furthermore, the Administration ignores the factual reality that in many places in the world, including in parts of Central America and Somalia, gangs and/or terrorist groups have kicked out the state and have set up their own government. Merriam-Webster Dictionary defines government as “the body of persons that constitutes the governing authority of a political unit or organization… the organization, machinery, or agency through which a political unit exercises authority and performs functions … the complex of political institutions, laws, and customs through which the function of governing is carried out.” This is to say that the de facto governing authority is not always the de jure government recognized by the international community. Such recognition can have negligible bearing on reality and it is reality to which our law must look in determining if an applicant needs protection. Therefore, if a non-state actor has for all extents and purposes taken on the role of a government, adjudicators need to have the ability to acknowledge that truth. In today’s reality, non-state actors often have significant control over neighborhoods.
They levy taxes, set curfews, control who comes into their territory, resolve personal disputes, and conduct law enforcement activities.

Additionally, the proposed regulatory change ignores existing federal appeals court rulings that have previously found that standing up to gangs should be considered as a “political opinion.” Rejecting political opinions based on gang violence per se explicitly contravenes UNHCR guidance. March 2010 UNHCR Guidance Note on Refugee Claims Relating to Victims of Organized Gangs (affirming that a wide variety of opinions and beliefs running contrary to organized criminal networks could constitute a valid “political opinion” in the context of the refugee definition); May 2002 UNHCR Guidelines on International Protection re Gender-Related Persecution.

In barring certain forms of political opinion the proposed regulatory change is stepping beyond the statutory bounds of the INA. This is prohibited under the Administrative Procedures Act, which states that the Executive only has law-making authority in so far as it has been tasked by Congress with interpreting statute. The Executive cannot legally rewrite statute. Immigration adjudicators – employees of the Executive branch – need to know that they have the ability to evaluate facts, exercise their judgment, and act as neutral arbiters.

IV. Conclusion.

The proposed regulatory changes will ultimately result in the erroneous denial of protection to bona fide refugees. The resulting forced return of refugees – “refoulement” – violates our federal asylum statute and longstanding legal precedents, and also directly contravenes our international human rights obligations. We therefore ask that you withdraw the Notice in its entirety.

//s// Sara Ramey

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