

The Sisters of Mercy of the Americas submits this comment urging the Department of Justice (DOJ) and Department of Homeland Security (DHS) to withdraw these proposed rules in their entirety. The rules, as written, would eliminate the life-saving possibility of asylum for tens of thousands of vulnerable migrants, in violation of the United States' duties under domestic law and international treaty obligations. The United States of America has been a beacon of freedom since its founding by religious refugees and others from Europe. Turning our backs on current-day refugees who seek life and liberty would be an amoral act. We urge you to choose differently.

The Sisters of Mercy of the Americas is a religious community of over 2,350 Roman Catholic sisters. We dedicate our lives to God through religious vows, and we commit our resources to serve, advocate and pray for those in need around the world. Our community was founded in Dublin, Ireland in 1831 to alleviate the suffering of those who were sick, poor and uneducated. In the 1840s and 1850s, our sisters migrated to the United States as immigrants to continue meeting the unmet needs of the era. Our earliest ministries in the United States provided education, health care, religious instruction and safe lodging for women and girls, many of whom were immigrants too.

Today, promoting the dignity and fullness of life of immigrants continues to be a critical concern of our community. Catholicism cherishes the sacredness of every life. We recognize that persons who flee their home countries out of fear do so as a last resort to avoid being severely harmed or killed. When those people knock at the door of the United States for refuge, Jesus counsels us to generously "welcome the stranger" and provide shelter. (Matthew 25). The asylum system of the United States serves this critical function of saving vulnerable lives. We believe that

sending people back to places where they would likely face persecution, torture or death, when the United States has the capacity to intervene, would be an amoral and unjust act.

Our community operates and sponsors more than 200 service organizations. We work passionately to eliminate poverty, the escalation of violence, the oppression of women, the abuse of children, and other injustices. Among our sisters who work with immigrants, we have sisters who work to meet the pastoral, social service and legal needs of asylum seekers. Our sisters can be found welcoming immigrants at the Texas-Mexico border, providing pastoral accompaniment to detained immigrants, securing housing and other services for paroled immigrants, standing up for immigrants in the courtroom, and praying for immigrants at all points of the journey. Our objections to the proposed rules are rooted in our varied experiences and direct relationships with those seeking asylum. We are convinced that the rules, if implemented, would cause harm and suffering to countless individuals and families.

### **We Object to the Agencies' Abbreviated 30 Day Period to Comment on the Notice of Proposed Rulemaking (NPRM)**

The proposed regulatory changes seek to rewrite the laws adopted by Congress and decades of judicial precedent. They would be the most sweeping changes to asylum since the 1996 overhaul of the Immigration and Nationality Act, Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA). It is wrong for the government to give such a short time for the public to review, digest and respond to a document that contains this magnitude of change. This is

even truer when the proposed changes would have life or death consequences. For this procedural reason alone, we ask the administration to rescind the proposed rule.

**We Strongly Object to the Substance of the Proposed Rule and Urge the Administration to Rescind it in its Entirety**

Overall, the proposed rules would result in virtually all asylum applications being denied, by removing due process protections, imposing new bars, heightening legal standards, changing established legal precedent, and creating sweeping categories of mandatory discretionary denials. In a best case scenario, the result of these changes would be to leave a higher percentage of those fleeing harm in a permanent state of limbo, if they are able to meet the higher legal standard to qualify for withholding of removal under INA § 241(b)(3). We object to this outcome because it would result in countless families being permanently separated. As Catholics, we strongly support measures that promote family unity, not family exile.

Due to the constricted timeframe for responses and the voluminous nature of the proposed changes, our comments do not address the harm many of the significant proposed changes would cause. Our silence on any particular aspect of the changes in no way indicates that we are in agreement with the change. We oppose these regulations in their entirety and we call upon the agencies to withdraw them.

**The Pretermission of Claims Deprives Asylum Applicants of a Fair Day In Court**

We are alarmed by the due process violations 8 CFR § 1208.13 (e) would introduce into the asylum system. A basic concept of fundamental fairness is the right to be heard in court. This section that would allow immigration judges to deny asylum, withholding of removal and protection under the Convention Against Torture based solely on an insufficient application form would most severely impact unrepresented applicants. Allowing the pretermission of claims would be an abrupt change from decades of precedent and practice before the immigration court. *See Matter of Fefe* 20 I&N Dec. 116, 118 (BIA 1989) (“In the ordinary course, however, we consider 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.”)

**Mercy** Sister Jennifer, an immigration attorney in New York, explains that it is unreasonable to expect that an unrepresented applicant would be able to produce an I-589 asylum application form that sufficiently articulates each of the necessary legal elements. Through years of counseling clients, she is well acquainted with how much time and explanation is required to help asylum seekers understand the asylum process and the reasons why their claim is or is not meritorious. She further comments that while the regulation allows ten days for a response before an immigration judge can pretermite a claim, this is not sufficient time to find and consult with a pro bono attorney. Studies have shown that represented applicants are as much as five times more likely to receive a positive asylum determination as compared to pro se applicants.

Sister Karen has participated in a pastoral presence ministry for over five years, through which she visits with detained immigrants once or twice a month. Her interactions have made her acutely aware of how hard it is for many immigrants to understand the intricacies of their cases and contact

their attorneys from detention, for those who are represented. She has observed the great difficulty many people have in obtaining documents from the outside to bolster their cases. She further highlights that language and cultural barriers only exacerbate these challenges. Sister Marlene, a retired BIA accredited representative, adds that an applicant who does not speak English will not be able to read, understand or write the I-589 asylum application form. That person will need to find someone who speaks English to assist them.

Sisters Patricia and JoAnn are long-time immigrant advocates in Illinois who have spearheaded a number of welcoming houses, prayer vigils and other advocacy efforts. They understand the major impact an applicant's testimony can have on the outcome of an asylum case. They recall being present during one particular merits hearing of a man from Pakistan, where the applicant testified for a couple hours. They describe his testimony as "so compelling and heart-breaking" about the danger he had faced, and which his wife and small children continued to face in Pakistan. At the end of the contested hearing, after the judge had personally asked the applicant a number of questions to further assess credibility, he granted the application for relief. Under the proposed rule, adjudicators who choose to sua sponte pretermit cases, or who grant ICE motions for pretermission, would deny the applicant this chance to be heard and encountered by the person who has the discretionary power to grant or deny relief.

Sister Diann, an interfaith court observer, has also witnessed the impact an applicant's testimony can make. She recalls a particular case where a woman from Honduras had been kidnapped by the gangs as a teenager and forced into sexual slavery. Sister Diann describes how, through her testimony, the woman was courageously able to tell her whole story. She notes the

excellent recall the woman had in telling the specific events of the trauma she had endured, including the failure of the police to protect her. Sister Diann reports that this woman was granted asylum. She now has the opportunity to live safely in the United States and seek the therapy and treatment she needs.

Allowing immigration judges to deny asylum without taking any testimony or looking beyond the asylum application would inevitably lead to meritorious cases being denied and vulnerable asylum seekers being returned to harm. We unequivocally oppose this proposed change.

**Countless Women and Girls Will be Returned to Life-Threatening Situations if the terms “Particular Social Group,” “Political Opinion” and “Nexus” Are Re-Defined**

The Sisters of Mercy have had a special concern for the welfare of women and girls since our founding. We strenuously oppose the proposed changes in 8 C.F.R. §§ 208.1(C), (D) and F) because they disregard the suffering of women and discount the societal evil of gender-based violence. The proposed regulations would have a compounding effect on women and girls.

The redefinition of “particular social group” would contravene the purpose of having a flexible refugee definition that captures those who do not fall within the other protected characteristics. “The term membership of a particular social group should be read in an evolutionary manner, open to the diverse and changing nature of groups in various societies and evolving international human rights norms.” United Nations High Commissioner on Refugees (UNHCR) Guidelines On International Protection: “Membership of a particular social group” within the context of Article

1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, May 7, 2002, <https://www.unhcr.org/en-us/publications/legal/3d58de2da/guide-lines-international-protection-2-membership-particular-social-group.html>. The implementation of the new definitions would undo decades of precedent. The redefinitions would invalidate many articulations of particular social group that have been found to be cognizable by the BIA, circuit courts and the Supreme Court for decades. Specifically, the rules would foreclose many gender-based social groups that advocates in the United States have fought for since Matter of Kasinga was successfully decided in 1996. Internationally, UNHCR has long-recognized the special need to protect women and has considered gender to be a protected characteristic within the refugee definition.

One of the most unjust aspects of this proposed rule is its requirement that an asylum seeker state with exactness every particular social group before the immigration judge, else forever lose the opportunity to present the claim. An asylum seeker's life should not be dependent on an applicant's ability to expertly craft arguments in the English language in a way that satisfies highly technical legal requirements; the asylum officer or immigration judge has a duty to help develop the record. It would be unconscionable to send an applicant back to persecution for failure to adequately craft particular social group language.

Sister Marlene, the former BIA accredited representative, has prepared hundreds of asylum applications. She describes how esoteric the concept of "particular social group" seems to people who are not familiar with the asylum system. She used to advise women detained in Dilly, TX several times a year. During one of those trips, she remembers struggling to help a woman

understand the concept before her credible fear interview. The woman had been slashed, tied to a tree and left to die by her husband.

Sister Jennifer, the immigration attorney, has also had years of experience explaining the concept of “particular social group” to asylum seekers. She cautions that applying this part of the regulation to asylum seekers, particularly pro se applicants, would raise serious due process concerns. She describes her experience of advising detained and unrepresented asylum seekers in Dilly, TX as a volunteer, commenting that each appointment took at least one hour or longer. She states that it was very challenging to explain the intricate legal concept of “particular social group” to immigrants who had just arrived in the US. She recalls a particular woman, a Spanish speaker, who was able to clearly describe the group that had harmed her in her country, but who had difficulty conceptualizing herself as part of a larger group, targeted for harm. To compound the difficulty, the asylum seeker was also coping with becoming pregnant as a result of being raped during her journey to safety in the United States. The impact of being in major transition and recently experiencing trauma diminished the asylum seeker’s ability to focus on abstract legal concepts. It would be unreasonable to expect such a pro se applicant to coherently articulate all of the particular social groups she may belong to in the highly technical way the proposed rule would require.

We are gravely concerned that restricting the particular social group definition by prohibiting claims involving “interpersonal disputes” and “private crimes” will foreclose the possibility of asylum for many women and children who have suffered severe gender violence and abuse. The further limitation in the nexus definition explicitly instructs adjudicators to disregard the powerful

and invidious impact of “gender” in the nexus analysis, and situations where the abuser does not also abuse additional women.

Advocates for women know that gender based violence is never merely an “interpersonal dispute” or a “private crime.” Gender-based violence is a cause and consequence of inequality and systemic oppression. Sister Rosemary, a nurse in Texas who has operated a domestic violence shelter for decades explains that: “All of society is affected by domestic violence. It affects the health, education, law enforcement and court systems while also taking a toll on employment and other community programs. For domestic violence to be stopped in the community, the community needs to hold the batterer accountable for their actions while also providing the resources and options survivors need to recover and thrive.”

Sisters Patricia and JoAnn from Illinois tell of a woman from Africa who fled her country with her children to escape her husband’s severe abuse. They lived at the house the sisters operated until the woman got a work permit and a good job. With legal assistance, she was able to obtain asylum based on the harm she had suffered as a female. Today, one child is in college and the other is finishing high school. Under the proposed regulations, this woman’s claim would have likely failed.

Similarly, the redefinitions of the term “political opinion” when analyzed with “nexus” will foreclose many asylum claims for women who advocate for women’s rights, girls’ rights to attend school, girls’ rights opposing forced marriage, and against pervasive male dominated societies that allow the wide-spread oppression of women. The proposed rule flouts decades of thoughtful

precedent when it explicitly limits political opinion claims to the “furtherance of a discrete cause related to political control of a state or a unit thereof.”

We are further concerned that the proposed rules would foreclose humanitarian protection for particular social group and political opinion gang claims. Many human rights reports detail the unique danger transnational gangs pose to women and girls, in countries where the gangs operate as de facto governments. Many of our sisters, like Sister Diann, have lived and served in Central American countries. We personally know about the endemic police corruption in many of these countries, and the ineffectiveness of the police to protect women and girls.

We cannot condone an asylum system that makes invisible the persecution of women “on account of” their gender, and requires that their claim automatically fail. A categorical denial of all cases where gender is a component of the nexus is antithetical to the case-by-case analysis asylum law requires.

### **The Definition of Persecution Impermissibly Alters the Accepted Definition and Fails to Recognize the Unique Needs of Children**

The most fundamental aspect of asylum law is the obligation of countries to protect individuals with well-founded fears of persecution from being returned to harm. *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 428, (1987). The proposed rule would, for the first time, provide a regulatory definition of persecution—a definition that would unduly restrict what qualifies as persecution. The rule emphasizes that the harm must be “extreme” and that threats must be “exigent.” Yet, the

rule neglects to provide any guidance about adjudicating claims by children and discounts the effect of cumulative harm. This ignores current precedent recognizing that when past-persecution arises at the time the applicant is a child, the events must be viewed from a child's perspective. The harm suffered may therefore be less for a child than an adult. See Jorge- Tzoc v. Gonzales, 435 F.3d 146 (2d Cir. 2006) (reversing and remanding for failure to consider effect of respondent's status as a child when the events occurred); see also Ordonez-Quino v. Holder, 760 F.3d 80,90-93 (1st Cir. 2014) (BIA reversed and case remanded where harm to Mayan Quiche child was not viewed from his perspective and incidents of persecution were not treated cumulatively); See Guidelines for Children's Asylum Claims, 1998 WL 34032561 at \*14 (Dec. 10, 1998).

The Sisters of Mercy have cared for and worked with children for nearly two centuries. We believe any definition of persecution that fails to recognize the varied ways children experience, understand and communicate harm is fatally flawed. Sister Karen, a family medicine physician, explains that: "Children who are exposed to traumatizing events early in their life experience serious negative impact to their physical and mental health. Trauma activates stress hormones, immune system and neurological changes detrimental to the child's developing brain and body. Without early intervention and help, traumatized children grow up to be traumatized teens and adults, and will develop abnormal reactions to stress, chronic physical ailments, relationship issues [and] learning difficulties..." Sister Rosemary, a former mental health counselor and school teacher further explains that children take in trauma as a "total experience" that overwhelms and eclipses everything else in the present moment. This causes the internalization of trauma, which they cannot as easily put into perspective the way many adults can. She explains that the

cumulative effect of trauma is often more pronounced in children, particularly because they develop at different rates and they believe the trauma was somehow their fault. Sister Fran, a psychologist, adds that trauma is always worse for children because they lack the capacity to understand, integrate and transform it.

### **The Proposed Changes to 8 CFR § 208.13 Would Bar Many Asylum Seekers In the Name of Discretion**

For decades, the United States has recognized the unique situation of asylum seekers and found that “the danger of persecution should generally outweigh all but the most egregious of adverse factors.” *Matter of Pula*, 19 I&N Dec. 467, 474 (BIA 1987). The proposed rule would turn years of jurisprudence upside-down to deny most asylum applications on discretionary grounds and severely limit the actual discretion adjudicators’ exercise.

We are concerned that under the proposed rule, any asylum seeker who enters or attempts to enter the United States without inspection could be denied asylum as a matter of discretion. Additionally, the rule would add another bar, preventing most refugees who spend 14 days in any country en route to the United States from qualifying for asylum.

Sister Anne has become very familiar with how this new rule would disqualify most asylum seekers who travel through Mexico. She has ministered to immigrants at the Texas-Mexico border for over five years. She has witnessed how approximately 2,500 people have formed a refugee

camp in Matamoros, Mexico for about the past year. She used to help bring the people life sustaining supplies, however, since Corona virus, most of those efforts have stopped.

The proposed rules place the people waiting across the border, and others who follow them, in an impossible position. They will be denied asylum if they wait on the “metering” lists at a port of entry, yet their claims will also be denied if they cross the border in order to make their requests for protection. Sister Anne describes the often violent situations people face while “waiting in Mexico.” She remembers one particular woman with a toddler who spent ten months waiting in Mexico. For the first few months, the woman and her child lived and slept on the side of the road. One day, while fetching water, she was attacked and raped. Sister Anne also hears of many asylum seekers who must stop in countries they pass through to work and earn money to finance their continued journey towards safety. She recalls one family with a pregnant wife and a young child with disabilities. The family, traveling from Haiti, had to stop in a Central American country for about five months as the woman gave birth. Under the proposed rules, this family would be disqualified from asylum.

## **Conclusion**

The proposed rules represent a radical re-writing of the asylum system that has been operative in the United States for decades. Under the proposed rules, countless individuals who have a well-founded fear of persecution will be denied asylum and returned to the places they fear harm. When the changed substance of key legal definitions, the heightened evidentiary standards and the restrictions placed on discretion are experienced as a whole, from the perspective of someone with

a well-founded fear trying to navigate the system, it is difficult to imagine many who will qualify for humanitarian protection.

Sisters Patricia and JoAnn remember once assisting an asylum seeker from Syria while making a pastoral visit to a jail. The sisters met with the detainees in groups of fifteen. When the time for each group ended, the sisters always shook hands with the detainees as they filed out to offer a real human connection. When the Syrian man shook Sister JoAnn's hand, he told her that he was being released. Sister JoAnn asked him where he would be going. The man responded "with you." Sister JoAnn chuckled, but she and Sister Patricia looked to see if they had room at one of their welcoming houses. They did, and they were able to shelter the man. The sisters used their connections to help him find a job in his profession and obtain an attorney. When he prevailed in his asylum claim, the sisters worked with the government and other faith communities to help bring his wife and children to the United States and set them up with an apartment. The family is united once more-- and safe.

We call upon the agencies to withdraw the proposed regulations in their entirety. Let us not abandon our country's cherished values of inclusion, freedom, fairness and opportunity. As citizens of the United States, we Sisters of mercy emphatically oppose these proposed rules and the untold suffering that their implementation would cause. When individuals in dire need and fear of their lives tell the United States they are going "with us," it is our moral and legal duty to look for and find them room. May our asylum system treat asylum seekers the way we would want to be treated were we the ones in great need.

Sister Patricia McDermott, RSM, President and the  
Institute Leadership Team

**Sisters of Mercy of the Americas**