

July 14, 2020

The Honorable Chad Wolf
Acting Secretary
2707 Martin L. King Avenue, SE
U.S. Department of Homeland Security
2707 Martin L. King Avenue, SE
Washington, DC 20528

The Honorable Matthew Albence
Deputy Director and Senior Official
Performing the Duties of the Director
U.S. Immigration and Customs Enforcement
U.S. Department of Homeland Security
500 12th Street, SW
Washington, DC 20536

Re: Opposition to Executive Office for Immigration Review, Department of Justice; U.S. Citizenship and Immigration Services, Department of Homeland Security RIN 1125-AA94 or EOIR Docket No. 18-0002

Dear Acting Secretary Wolf and Acting Director Albence:

On behalf of the physician and medical student members of the American Medical Association (AMA), I appreciate the opportunity to provide our comments in opposition to the Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review proposed rule (Proposed Rule). As the largest professional association for physicians and medical students, and the umbrella organization for state and national specialty medical societies, the AMA has been, and continues to be, deeply committed to ensuring the health and safety of all individuals regardless of immigration status. **We write to strongly urge the Administration to withdraw the Proposed Rule.** The Proposed Rule imposes new barriers at every stage of the asylum process, which will be impossible to meet for the vast majority of applicants, resulting in a multitude of valid asylum seekers being returned to countries that do not value their lives, health, or social equity.

Asylum seekers are a vulnerable group that often face circumstances in which their health and well-being were at significant risk in their former countries and may have been further compromised during their journey to seek safety. Because the Proposed Rule will place these asylum seekers in even greater peril, we oppose it in its entirety. We address below a few of the more pertinent health and social equity related issues.

8 CFR §208.1-The Definition of a Particular Social Group is Underinclusive and is Contrary to Evolving Law and Societal Norms

As the United States developed its immigration law, Congress implemented the United Nations Protocol Relating to the Status of Refugees (Refugee Protocol).¹ The adopted Refugee Protocol is the foundation of the United States' permanent procedure for the admission and protection of refugees. As such, refugees are defined as:

¹ 19 U.S.T. 6223, 606 U.N.T.S. 268.

any person who is outside of any country of such person's nationality * *
* and who is unable or unwilling to return to, and is unable or unwilling
to avail himself or herself of the protection of, that country because of
persecution or a well-founded fear of persecution on account of race,
religion, nationality, membership in a particular social group, or political
opinion.²

Under current law, those applying for asylum must demonstrate a well-founded fear of persecution on account of their race, religion, nationality, membership in a particular social group, or political opinion. These concepts are known as the protected classes and are meant to be flexible categories so that these may change to encompass those in dire need around the world.

However, the Proposed Rule seeks to unduly limit eligibility for these protected classes. In particular, the Proposed Rule would require a Particular Social Group to be composed of members who share a common immutable characteristic, defined with particularity as socially distinct in the society in question, and “have existed independently of the alleged persecutory acts....” This definition is unduly narrow and will exclude the timely rise of new and expanded delineations of groups.

For example, female genital mutilation (FGM) was recognized as a basis for asylum and a cognizable Particular Social Group in the *Matter of Kasinga*.³ This case expanded the acknowledgement of a Particular Social Group to include “[y]oung women who are members of the Tchamba-Kunsuntu Tribe of northern Togo who have not been subjected to FGM, and who oppose it.” This enlarged view of women’s rights opened a door for many worthy asylum seekers and recognized FGM in general as a Particular Social Group. However, the lack of flexibility inherently built into the current rule would make it extremely difficult to allow for changing societal norms, such as the norms that now consider FGM to be a form of child abuse and recognized Particular Social Group. The AMA is opposed to the development of rules and laws that will inhibit social equity and do not leave room for, and recognize, the many inherent biases that exist across the world that will actively need to be addressed and changed.

8 CFR § 208.1(f)-The Rule Proposes to Raise the Nexus Requirement to an Unreasonable and Exclusive Standard and Unfairly Targets Women and Gender Asylum Claims

To establish eligibility for asylum the applicant must demonstrate his or her persecution, or well-founded fear of persecution, was on account of one or more of the above-mentioned protected grounds.⁴ This is known as the “nexus requirement.” The Proposed Rule seeks to exclude specific claims that may be brought under the nexus requirement including personal animus or retribution, interpersonal animus, and gender.

The Bureau of Population, Refugees, and Migration (PRM) notes that there is an “inherent insecurity and danger that is associated with displacement, a breakdown of support systems and community structures, a lack of services, and the sudden absence of basic supplies and resources....”⁵ Moreover, PRM recognizes

² <https://www.govinfo.gov/content/pkg/USCODE-2018-title8/html/USCODE-2018-title8-chap12-subchapI-sec1101.htm>.

³ <https://www.justice.gov/sites/default/files/eoir/legacy/2014/07/25/3278.pdf>.

⁴ 8 U.S.C. 1158(b)(1)(B)(i).

⁵ <https://www.state.gov/other-policy-issues/at-risk-populations/>.

that particular and common vulnerabilities need to be taken into account for individuals that are at a heightened risk which encompasses women, girls and Lesbian, Gay, Bisexual, Transgender, and Intersex (LGBTI) individuals.⁶ The United Nations High Commissioner for Refugees which oversees the Refugee Convention, the foundation of our own asylum law, has confirmed that people fleeing gender-based persecution qualify for asylum under the Convention's definition of a refugee.⁷

However, despite a growing international consensus, the Proposed Rule would not consider these individuals, and the persecution that they face, to meet the nexus requirement without considerable evidence. Such change would mean that those who seek to escape arranged marriages, severe domestic violence where laws of the fled country are unable to be protective, honor killings, and other harms suffered by women or LBGTI individuals based on their gender will no longer find refuge in the United States.⁸ "Even women fleeing from sex slavery at the hands of ISIS would not be allowed to argue that they were persecuted on 'account of gender.'"⁹

The Proposed Rule reverts the United States back several decades, prior to passage of the Family Violence Prevention and Services Act¹⁰ and the Violence Against Women Act,¹¹ during a time when domestic and gender-based violence in the United States was considered a private family matter, meant to stay behind closed doors, with the government knowing that abuse was happening but failing to stop it. The Proposed Rule's retrogressive framing of violence as a "personal dispute," even when an asylum seeker is able to document such violence as severe, pervasive, and widely tolerated by authorities and others in the country is unacceptable and further perpetuates cyclical abuse.

Moreover, in many countries, including Jamaica, Iran, and Sudan, LGBTI individuals are persecuted, imprisoned, and sometimes sentenced to death based on their sexual orientation or gender identity.¹² In addition, transgender individuals may be victims of forced sterilization or castration, "corrective rape," domestic violence, forced sex work, institutionalized violence at the hands of the police, and death.¹³ As a result, many LGBTI individuals hide their sexual orientation or gender identity.

To gain asylum in the United States, LGBTI individuals would be required to display proof of persecution in their home country, possibly having to go as far as waiting to endure harm and reporting said persecution, since the Proposed Rule would require survivors to report persecution to authorities in their countries before they can be considered for asylum. However, reporting gender-based violence can be life-threatening due to the associated retribution, the ignorance and dismissal of reports, or even law enforcement officers being complicit in harming survivors. As such, gender-based violence can be a systemic, state-sanctioned human rights abuse and should be acknowledged as such by our asylum system.

⁶ *Id.*

⁷ <https://www.tahirih.org/wp-content/uploads/2020/06/Tahirih-Explains-Gender-Based-Asylum.pdf>.

⁸ https://www.americanbar.org/groups/crsj/events_cle/program-archive/shutting-doors/.

⁹ https://immigrationimpact.com/2020/06/11/end-asylum-trump/?emci=5d6e7ab5-d8ac-ea11-9b05-00155d039e74&emdi=bfc31ca5-41ae-ea11-9b05-00155d039e74&ceid=4500020#_XwZZNChKg2z.

¹⁰ <http://www.learnaboutfvpsa.com/35yrs-impact>.

¹¹ <https://www.govinfo.gov/content/pkg/BILLS-113s47enr/pdf/BILLS-113s47enr.pdf>.

¹² <https://www.apa.org/pi/lgbt/resources/lgbtq-asylum-seekers.pdf>.

¹³ *Id.*

With laws against gender-based violence being limited or non-existent in many countries,¹⁴ the passage of the Proposed Rule would leave countless individuals in abusive situations without hope of a better life. The AMA believes that all forms of family and intimate partner violence are major public health issues and urge the withdrawal of the Proposed Rule to help prevent such violence and to address the needs of survivors. Moreover, the AMA opposes inhumane treatment of people of all genders and encourages the development of programs to educate all cultures on remaining practices of inhumane treatment based on gender and supports the provision of adequate health care for victims. **Since the Proposed Rule is antithetical to this mission, the AMA opposes its implementation.**

Furthermore, harm to survivors also undermines public health and safety. Fearing that contact with authorities could lead to placement in expedited removal proceedings, survivors may decline to seek medical care or assistance from public officials. This mindset of fear surrounding proper medical care is detrimental to the United States as a whole, especially now during the COVID-19 pandemic. According to the Centers for Disease Control and Prevention, there are numerous advantages to developing policies that improve population health such as: a reduction in mortality, a reduction in medical costs, and a reduction in life expectancy inequity. Creating an environment where individuals and families feel safe accessing necessary medical and social support is a core public health function that can add both health and economic value to a society.¹⁵ **Now more than ever, as our world is in the midst of a pandemic, the AMA supports immigration measures that strengthen public health and provide access to proper treatment for asylum seekers that may have recently experienced immense emotional and physical trauma.**

8 CFR § 208.18 and 8 CFR § 1208.30—The Proposed Rule Imposes a Nearly Impossible Evidentiary Burden on Those Seeking Protection Under the Convention Against Torture

The Proposed Rule would raise the statutory withholding of removal screening standard and the torture-related screening standard for asylum seeking purposes in the United States to a “reasonable possibility” standard equal to the definition of well-founded fear. Moreover, under the Proposed Rule, pain or suffering inflicted by, at the instigation of, or with the consent or acquiescence of, a public official is not torture unless it is done while the official is acting in their official capacity under the “color of law.” Conversely, pain or suffering inflicted by, at the instigation of, or with the consent or acquiescence of, a public official not acting under color of law, meaning a “rogue official,” does not constitute action by a public official acting in an official capacity even if such actions cause pain and suffering rising to the severity of torture.

The rule also proposes to revise the definition of “acquiescence of a public official” in the regulations to state that “awareness” requires a finding of actual knowledge or willful blindness. The rule further proposes to define “willful blindness” as “the public official or other person acting in an official capacity being aware of a high probability of activity constituting torture and deliberately avoided learning the truth; however, it is not enough that such public official or other person acting in an official capacity was mistaken, recklessly disregarded the truth, or negligently failed to inquire.” These proposed changes will make it close to impossible for survivors to succeed in Convention Against Torture (CAT) withholding of removal or asylum-seeking claims.

¹⁴ <http://pubdocs.worldbank.org/en/679221517425064052/EndingViolenceAgainstWomenandGirls-GBVLaws-Feb2018.pdf>.

¹⁵ https://works.bepress.com/glen_mays/307/.

For example, a survivor would have to show that their government official spouse tortured them deliberately to further an official purpose as indicated by the country's government to gain asylum. In countries where certain forms of sexual assault and "honor crimes" are either legal or not explicitly illegal, there would be no affirmative duty of an official to protect a survivor from this harm.

In addition, the Proposed Rule could potentially void a situation such as that in *Avendano-Hernandez v. Lynch*, where the Ninth Circuit granted relief under CAT to a transgender woman from Mexico and found that "[t]he unique identities and vulnerabilities of transgender individuals must be considered in evaluating a transgender applicant's asylum, withholding of removal, or CAT claim."¹⁶ The Proposed Rule strips away such a significant number of our asylum protections that a government official could be enlisted by a LGBTQI individual's family to torture them to compel them to submit to a forced marriage, acknowledge a different gender identity, or conform with family norms and if that official is considered "rogue," the asylum applicant would further suffer at the hands of authorities with no possibility of recourse.

Moreover, survivors arriving at the border are ill-equipped to effectively communicate every piece of information required to comply with these new proposed restrictions and standards necessary for asylum and/or withholding of removal proceedings. Under the Proposed Rule, asylum seekers would be required to make their case, not to an immigration judge with long-standing experience in these complex issues, but to a minimally-trained border agent. Asylum seekers often arrive profoundly traumatized, hungry, exhausted, and lacking an understanding of our legal process and language. As such, these individuals would not receive a fair or adequate review of their case. In addition, the Proposed Rule determines that applications for asylum deemed "legally deficient" may be dismissed without the opportunity for the defendant to plead their case to an immigration judge in a court setting. This would disproportionately impact victims with limited resources and lacking literacy in immigration law from accessing protections.

The AMA believes that violence is a major public health crisis and supports appropriate interventions which may result in its prevention or cure. Additionally, the AMA opposes torture in any country for any reason and urges appropriate support for victims of torture including changing the situations in which torture is practiced or when the potential for torture is great. Since the Proposed Rule would enable individuals across the world to be exposed to violence and continue to be tortured without the possibility of being granted asylum in the United States, the AMA opposes the implementation of the Proposed Rule.

8 CFR § 208.6 and 8 CFR § 1208.6 – The Proposed Rule Changes and Improperly Expands Disclosure of Information Pertaining to an Asylum Application

The Proposed Rule would allow an asylum applicant's protected information to be disclosed "in certain circumstances that directly relate to the integrity of immigration proceedings... [and] where it is necessary to the Government's defense of any legal action relating to the alien's immigration or custody status."¹⁷

Any entity seeking access to an individual's health information should be required to pass the stringent test of showing why its professed need should override the individual's most basic right in keeping their

¹⁶ *Avendano-Hernandez v. Lynch*, 800 F.3d 1072 (9th Cir. 2015).

¹⁷ <https://www.federalregister.gov/documents/2020/06/15/2020-12575/procedures-for-asylum-and-withholding-of-removal-credible-fear-and-reasonable-fear-review>.

own health information private. Moreover, individuals deserve a full and informed discussion of exactly who is requesting their health information and for what purpose. Only then may the true balancing of interests take place. This is the basis of AMA policy and we believe should be the basis for government collection and distribution of an individual's health information.

However, the Proposed Rule's poorly defined and expanded category of entities that may receive an asylum applicant's protected information has potentially serious, unintended consequences that will impact patient data and autonomy. The AMA's approach to privacy is governed by our Code of Medical Ethics and long-standing policies adopted by our policymaking body, the House of Delegates, which support strong privacy protections.

AMA policy and ethical opinions on confidentiality provide that an individual's privacy should be honored unless waived by the individual in a meaningful way, de-identified, or in rare instances when strong countervailing interests in public health or safety justify invasions of privacy or breaches of confidentiality. When breaches of confidentiality are compelled by concerns for public health and safety, those breaches must be as narrow in scope and content as possible, contain the least identifiable and sensitive information possible, and must be disclosed to the fewest entities and individuals as possible to achieve the necessary end.

However, under the Proposed Rule immigration authorities may seize electronic health records as part of their investigations, which raises several questions about both the accuracy and security of patient data and private health information. Of concern, there may be potential violations to the Health Insurance Portability and Accountability Act of 1996 depending on how the federal government uses and distributes an asylum seeker's information. This is particularly concerning under this new and broader definition of whom may access the protected information of asylum seekers. Moreover, the release of information about asylum applications could put survivors at grave risk of harm, which is precisely the reason why release of such details, other than in exceptional circumstances, is strictly prohibited. Survivors might be deterred from disclosing critical details of their claims, including pertinent medical information, if they fear that disclosure of such information may be breached. Confidentiality is critical to full disclosures, and full disclosures are critical to a survivor's chances for protection.

In addition, the AMA continues to oppose the U.S. Department of Justice's (DOJ) DNA-Sample Collection from Immigration Detainees. With the Proposed Rule's expansion of the sharing protected information, this inaccurate methodology and improperly acquired biological data has an even greater potential to adversely impact one's status in the U.S. and in addition has implications for one's putative biological relatives. With a lack of properly trained and qualified personnel being involved in the DOJ's genetic testing and with current personnel, policies, and procedures falling well short of minimum medical requirements, the Proposed Rule could cause even greater issues within the immigration system as improper medical information is more widely distributed and unethically used against applicants throughout their asylum process.

Finally, the 1997 settlement agreement in *Flores v. Reno*¹⁸ put in place strict national standards for the detention, treatment, and release of all minors in immigration custody to ensure their safety and proper care. Children within the Office of Refugee Resettlement (ORR) custody are given access to mental

¹⁸ <https://www.humanrightsfirst.org/resource/flores-settlement-brief-history-and-next-steps>.

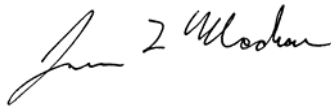
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health care to assist them in dealing with the significant emotional and psychological trauma they have experienced. It has been reported that these children participate in counseling sessions at ORR-funded facilities with the understanding that what is shared will be kept confidential and not used against them or their family in future asylum or immigration court proceedings.

However, if the Proposed Rule is enacted there is no guarantee that confidentiality will be maintained. The AMA strongly condemns the use of medical and psychological records and social work case files that are understood to be confidential as evidence in immigration courts without delineated patient or parental consent. This is especially true of unaccompanied, undocumented minors who have no available parent or guardian truly looking out for their best interest. As it stands, the Proposed Rule could violate basic tenets of medicine and further harm already-traumatized children as their medical information is improperly and unethically used against them in their search for asylum.

We appreciate the opportunity to comment and urge the Administration to prioritize supporting and protecting the health and well-being of individuals and families seeking asylum by withdrawing the Proposed Rule in its entirety. If you have any questions, please contact Margaret Garikes, Vice President for Federal Affairs, at margaret.garikes@ama-assn.org, or by calling 202-789-7409.

Sincerely,

A handwritten signature in cursive script, appearing to read "James L. Madara".

James L. Madara, MD