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Re: RIN 1125-AA94 / EOIR Docket No. 18- 0002

I write to comment upon—and correct legal errors in—the Department of Homeland Security and Department of Justice’s joint notice of proposed rulemaking regarding asylum.¹ I focus particularly on the Proposed Rule’s treatment of gender-based asylum and withholding claims.²

I am a Professor of Law at the University of California, Davis, School of Law, where I teach Asylum and Refugee Law, among other courses. (I write on behalf of myself, not the University of California, Davis, or its School of Law.) I began representing clients seeking asylum in 2009, having since done so at the Asylum Office level, in Immigration Court, before the Board of Immigration Appeals, and in the Second and Ninth Circuits, the latter through amicus work.³ I have also published scholarship on both substantive and procedural aspects of asylum law in the United States,⁴ as well as statutory and constitutional gender equality law.⁵

¹ Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 36264 (June 15, 2020).

² The decision to comment only on one aspect of the Proposed Rule is necessitated in part by the Departments’ restriction of the public comment period to an unreasonably short thirty days.

³ See Amici Curiae Brief of Constitutional Law and Procedure Scholars Judith Resnik and Brian Soucek in Support of Petitioner, *C.J.L.G. v. Barr*, 923 F.3d 622 (9th Cir. 2019) (en banc).

⁴ See Brian Soucek, *The Last Preference: Refugees and the 1965 Immigration Act*, in THE IMMIGRATION AND NATIONALITY ACT OF 1965: LEGISLATING A NEW AMERICA (Gabriel J. Chin & Rose Cuison Villazor eds., 2015); Brian Soucek, *Copy-Paste Precedent*, 13 J. APP. PRAC. & PROCESS 153 (2012); Brian Soucek, Comment, *Social Group Asylum Claims: A Second Look at the New Visibility Requirement*, 29 YALE L. & POL’Y REV. 337 (2010) (cited by *Umaña-Ramos v. Holder*, 724 F.3d 667 (6th Cir. 2013)).

⁵ See Brian Soucek & Vicki Schultz, *Sexual Harassment by Any Other Name*, 2019 U. CHI. LEGAL F. 227; Brian Soucek, *Queering Sexual Harassment Law*, 128 YALE L.J. F. 67 (2018); Brian Soucek, *Hively’s Self-Induced Blindness*, 127 YALE L.J. F. 115 (2017); Brian Soucek, *The Return of Non-Congruent Equal Protection*, 83 FORDHAM L. REV. 155 (2014); Brian Soucek, *Perceived Homosexuals: Looking Gay Enough for Title VII*, 63 AM. U. L. REV. 715 (2014).

The Proposed Rule is misguided and legally infirm in almost too many ways to count, but this comment focuses solely on one: the Rule’s treatment of gender-based claims of persecution. The Rule’s near-categorical bar of such claims is not only a policy mistake and a humanitarian outrage—though it is both those things. The language of the Proposed Rule is contrary to federal immigration law and unreasonable in its interpretation of ambiguities within that law. If published in this form, it will—and should—be quickly challenged and enjoined. Instead of funding a futile defense in the courts, the Departments of Homeland Security and Justice should fix the Rule now and devote their limited resources to the refugees whom federal law, international law, and our treaties have committed the United States to protecting.

There are at least six things wrong with the proposed Rule’s treatment of gender-based persecution claims:

1. the Rule confuses social group analysis with nexus;
2. the Rule misunderstands why particular social groups cannot be categorically barred;
3. the Rule grossly misrepresents the only case offered as justification for its new bar on gender-based claims;
4. the Rule wrongly interprets particularity to mean small rather than well-defined;
5. the Rule invents a new, vague prohibition against “evidence promoting cultural stereotypes” and unfairly applies it only to one side of asylum disputes; and
6. the Rule does not recognize or justify its potential effect on LGBTQ refugees.

Together, these errors produce a rule that unreasonably interprets statutory text, departs without justification from the Departments’ own past decisions, and abandons our country’s longstanding commitments to victims of persecution.

1. The Rule Confuses Social Group Analysis with Nexus

The proposed Rule would amend 8 C.F.R. §§ 208.1 and 1208.1 with new regulatory language concerning particular social groups, political opinion, persecution, nexus, and evidence based on stereotypes. Within the subsections on nexus, the Proposed Rule would dictate that when adjudicating asylum and withholding of removal claims, DHS and DOJ “in general, will not favorably adjudicate the claims of aliens who claim persecution based on” a nonexhaustive list of eight “circumstances”—one of which is “gender.”⁶ The Rule, in other words, would generally bar claims of persecution on account of gender.

Locating this sweeping change within a regulation on “Nexus” betrays a basic confusion about how refugee law operates. Refugee law in the United States requires

⁶ 85 Fed. Reg. at 36292, 36300.

a showing of past or feared persecution on account of one of five enumerated grounds.⁷ “Nexus” refers to the “on account of” portion of this showing. As such, the nexus analysis involves questions about the motive or reasons behind persecutory acts⁸ and the type of proof needed to establish it.⁹ Nexus does not concern the nature or extent of the five grounds themselves—for example, questions about what counts as a political opinion, or what groups are cognizable under the “membership in a particular social group” prong.

The eight “circumstances” singled out in proposed §§ 208.1(f) and 1208.1(f) are inconsistent in this regard. Some do concern nexus. To say, for example, that claims based on “[i]nterpersonal animus or retribution” will or should generally fail¹⁰ is to make a statement about the reasons for persecution—i.e., nexus. (Were a personal dispute the sole or predominant reason for someone’s persecution, that person could hardly establish one of the enumerated grounds as “a central reason” for their persecution.) Some of the other proposed bars operate differently, however. A general bar on claims based on perceived gang affiliation or gender¹¹ is a limit on the potential *grounds* recognized within the refugee definition—not a clarification or restriction on what it means to act “on account of” such grounds.¹²

The Proposed Rule implicitly recognizes this—or betrays its confusion—by repeating the language about gang affiliation in both the “Nexus” subsections and the ones entitled “Particular social group” (proposed §§ 208.1(c) and 1208.1(c)).¹³ By contrast, the bar on gender-based claims appears *only* in the “Nexus” subsection. This is erroneous. To support a general bar on gender-based claims within the nexus analysis, the Departments would need to show that gender is not generally a central reason for persecution throughout the world. Such a showing is utterly absent here. The Proposed Rule does nothing to establish any empirical claims about causation.

The Proposed Rule’s general bar on gender-based claims thus must stand or fall not as an interpretation of the words “on account of,” but instead of the words “membership in a particular social group.” Whether the latter phrase can be reasonably interpreted to exclude gender-based groups requires a look at previous

⁷ 8 U.S.C. § 1101(a)(42).

⁸ See 8 U.S.C. § 1158(b)(1)(B)(i) (an enumerated ground must be “at least one central reason for” the persecution for purposes of asylum.); 8 U.S.C. § 1231(b)(3)(C) (for withholding of removal claims, an enumerated ground must be “a reason” for the persecution).

⁹ See, e.g., *I.N.S. v. Elias-Zacarias*, 502 U.S. 478, 483 (1992) (“[S]ince the statute makes motive critical, [those seeking asylum or withholding] must provide some evidence of it, direct or circumstantial.”).

¹⁰ See 85 Fed. Reg. at 36292, 36300.

¹¹ See *id.*

¹² Similarly, the bar on claims based on “[g]eneralized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerilla, or other non-state organizations” is an attempt to redefine “political opinion,” not a clarification of the nexus standard. See 85 Fed. Reg. at 36292, 36300. The Proposed Rule implicitly recognizes this, insofar as it includes this language also in proposed §§ 208.1(d) and 1208.1(d), the sub-sections entitled “Political opinion.” *Id.* at 36291, 36300.

¹³ See *id.*

administrative and judicial understandings of “particular social groups.” Looking instead to the words and case law associated with the “nexus” prong of the refugee definition would be misleadingly irrelevant.

2. The Rule Misunderstands Why Groups Cannot Be Categorically Barred

The Proposed Rule’s general bar on asylum and withholding claims based on gender thus operates as a presumption against the recognition of gender-related particular social groups (PSGs). Like the other groups which the Proposed Rule says DHS and DOJ, “in general, will not favorably adjudicate,” gender-based PSGs are in danger of being denied categorically rather than considered on a case-by-case basis.

The Departments recognize that doing so puts them on unstable ground. For although the Proposed Rule correctly notes that, historically, the BIA has “routinely issued decisions delineating which groups did and did not qualify” as PSGs,¹⁴ the Rule also acknowledges that “[f]ederal courts have raised questions about whether the Board or the Attorney General can recognize or reject particular social groups in this manner.”¹⁵ The Proposed Rule recognizes these “questions” but does nothing to address them.

The Proposed Rule thus rides roughshod over the Ninth Circuit’s clear holding that it would be “error”¹⁶ to refuse to recognize a particular social group in a given country without making a case-by-case determination:

To 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. To be consistent with its own precedent, the BIA may not reject a group solely because it had previously found a similar group in a different society to lack social distinction or particularity, especially where, as here, it is presented with evidence showing that the proposed group may in fact be recognized by the relevant society.¹⁷

What the Proposed Rule fails to understand is that the categorical cases it cites—cases where the Board seemed to dictate “which groups did and did not qualify” as PSGs—all come from the 1990s, the period before particularity and social visibility/distinction were added to the immutability test as requirements for establishing a particular social group.¹⁸

¹⁴ 85 Fed. Reg. at 36278 (citing cases recognizing Somali subclans and homosexuals in Cuba).

¹⁵ 85 Fed. Reg. at 36278 n.27 (citing *Pirir-Boc v. Holder*, 750 F.3d 1077, 1084 (9th Cir. 2014); *Grace v. Whitaker*, 344 F. Supp. 3d 96, 126 (D.D.C. 2018)).

¹⁶ *Pirir-Boc*, 750 F.3d at 1084 n.7.

¹⁷ *Pirir-Boc*, 750 F.3d at 1084.

¹⁸ See *Matter of A-B-*, 27 I&N Dec. 316, 327-31 (A.G. 2018) (tracing the test’s development over time).

This evolution in the PSG test matters for case-by-case versus categorical adjudication. After all, a trait’s immutability—whether it is the sort of characteristic “members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences”¹⁹—is a question of law that can be determined categorically. When that was the sole test, it made sense for the BIA to determine categorically that, say, “homosexuals in Cuba” comprise a particular social group.²⁰ By contrast, social distinction is inherently fact-based: societies either do or do not see themselves as carved up in particular ways, and a group’s salience in a particular society can change over time.²¹ Later-added criteria like social distinction are the reason why, now, “a social group determination must be made on a case-by-case basis.”²²

Insofar as the Proposed Rule’s bar on gender-based claims is meant to operate categorically, it departs from the Board’s and courts’ requirement that social group determinations must be made on a case-by-case basis. The Departments perhaps believe that by saying only that, “in general,” they will not favorably adjudicate gender-based claims, they are imposing something less than a categorical bar. A federal court has rejected that very argument.²³ But even accepting that claim *arguendo*, the question remains: how can DHS and DOJ justify a general presumption against the cognizability of gender-based asylum and withholding claims?

Given the three-part test for establishing a particular social group, the Departments would have to argue that, in general, gender-based groups—“women,” for example—are either not based on an immutable characteristic, not socially distinct, or not defined with particularity. The first two claims are absurd on their face. No one would argue that gender is a trait one can be required to change, or that, in general, women are not recognized as a group in societies throughout the world. The Proposed Rule’s bar on gender-based claims thus can only be based on the proposition that, in general, gender-related groups fail the particularity requirement.

¹⁹ *Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985).

²⁰ *See Matter of Toboso-Alfonso*, 20 I&N Dec. 819 (BIA 1990).

²¹ *See Soucek, Social Group Asylum Claims, supra* note 4, at 342; *Matter of M-E-V-G-*, 26 I&N Dec. 227, 242-43 (BIA 2014) (describing how a group like “former employees of a country’s attorney general” might become social distinct over time, thereby necessitating case-by-case adjudication).

²² *M-E-V-G-*, 26 I&N Dec. at 242. Insofar as a group’s particularity is also tied to factual findings about whether “the terms used to describe the group have commonly accepted definitions in the society of which the group is a part,” *id.* at 239, the particularity criterion too requires case-by-case rather than categorical adjudication. *See also id.* at 241 (discussing landowners as a PSG in some countries but not others).

²³ *See Grace v. Whitaker*, 344 F. Supp. 3d 96, 125-26 (D.D.C. 2018) (holding that an Attorney General opinion saying that gang-based claims “generally” will not qualify for asylum impermissibly “create[s] a general rule”).

The following Point shows that the single case the Proposed Rule offers in support of this proposition does no such thing—in fact, it does the opposite. Point 4 then explains why the proposition is wrong as a matter of law.

3. The Rule Misrepresents the Meager Case Law It Offers

In support of its sweeping dictate that the government, “in general, will not favorably adjudicate the claims of aliens who claim persecution based on . . . gender,”²⁴ the proposed Rule offers shockingly little support—in fact just one citation, to a 2005 case from the Tenth Circuit, *Niang v. Gonzales*.²⁵ Yet *Niang* holds the exact opposite of the proposition for which it is cited.

The proposed rule quotes two sentences of *Niang* in a parenthetical: “There may be understandable concern in using gender as a group-defining characteristic. One may be reluctant to permit, for example, half a nation’s residents to obtain asylum on the ground that women are persecuted there”²⁶ But *Niang* immediately goes on to explain that while one *may* have such a concern, one *should not*. In the opinion’s words, “the focus with respect to such claims should be not on whether either gender constitutes a social group (*which both certainly do*) but on whether the members of that group are sufficiently likely to be persecuted”²⁷ Lest any doubt remain about the court’s holding, the Tenth Circuit reiterates that the BIA’s decisions “provide[] no reason why more than gender *or* tribal membership would be required to identify a social group.”²⁸

In reaching this holding—that gender alone can provide the basis for a cognizable social group—*Niang* relies on both the BIA’s decision in *Acosta*, which listed “sex” as its very first example of the kind of “common, immutable” characteristic which could give rise to a “particular social group,”²⁹ but also to then-Judge Alito’s opinion in *Fatin*, where the Third Circuit held that a woman who claims persecution “simply because she is a woman” has thereby identified “a group that constitutes a ‘particular social group’” for purposes of asylum.³⁰

The sole case DHS and DOJ cite in support of generally barring gender-based persecution claims thus stands for the opposite: that gender *can* provide an adequate basis for establishing membership in particular social group.

²⁴ 85 Fed. Reg. at 36292, 36300.

²⁵ 422 F.3d 1187 (10th Cir. 2005).

²⁶ 85 Fed. Reg. at 36291 (quoting *Niang*, 422 F.3d at 1199).

²⁷ *Niang*, 422 F.3d at 1199 (emphasis added).

²⁸ *Id.* at 1200 (emphasis added).

²⁹ *Id.* at 1199 (citing *In re Acosta*, 19 I&N Dec. 211, 233 (BIA 1985)).

³⁰ *Id.* at 1200 (citing *Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir. 1993)).

This is a shocking misrepresentation. Were this citation and quote offered for this purpose in federal court, it would clearly be sanctionable.³¹ Misused this way within the regulatory process, this citation leaves the proposed bar on gender-based claims completely devoid of support or justification.

4. The Rule Wrongly Interprets “Particularity” To Mean Small

The Proposed Rule’s quotation from *Niang* does not represent the holding of that case—in fact, it represents the opposite, the position *Niang* rejects. But insofar as DHS and DOJ mean to offer this position as their own (rather than misrepresenting it as the Tenth Circuit’s), the claim is unreasonable and contrary to law.

The quotation from *Niang* expresses a worry about permitting “half a nation’s residents to obtain asylum.” The claim is that gender-based social groups—groups such as “women in El Salvador”—are simply too big. As the Departments have sometimes argued in the past, a social group must be “limited in size” if it is to satisfy the particularity requirement; it should not be “comprised of a potentially large and diverse segment of society.”³²

Importantly, though inconsistently, the Department of Justice has also *disclaimed* the notion that a group’s particularity is tied to its size. As it told the Third Circuit: “The Board has *not* construed ‘particularity’ to impose a specific numerical limitation on a social group; rather, a group may not be indeterminate.”³³ The Ninth Circuit’s deference to the Board’s particularity requirement is explicitly premised on the government’s assurance that particularity refers to a group’s “clear boundaries” rather than its size or the diversity of its members:

The BIA’s statement of the purpose and function of the “particularity” requirement does not, on its face, impose a numerical limit on a proposed social group or disqualify groups that exceed specific breadth or size limitations. Nor is it contrary to the principle that diversity within a proposed particular social group may not serve as the *sine qua non* of the particularity analysis.³⁴

³¹ See, e.g., *Napoli v. Sears, Roebuck & Co.*, 835 F. Supp. 1053, 1062-63 (N.D. Ill. 1994) (“Misrepresenting a court’s opinion is unwise; indeed, it clearly provides the basis for sanctions under Fed. R. Civ. P. 11.”); *Howard v. Liberty Mem’l Hosp.*, 752 F. Supp. 1074, 1080 (S.D. Ga. 1990) (“The Court cannot imagine how the plaintiffs’ attorney could justify these misstatements of the law.”).

³² See Brief of Respondent at 17, 23, *Aquino-Rivas v. Holder*, 431 F. App’x 200 (3d Cir. Mar. 10, 2011); see also *Ticas-Guillen v. Whitaker*, 744 F. App’x 410 (9th Cir. 2018) (“The Board of Immigration Appeals affirmed, upholding the rejection of Ticas-Guillen’s asylum and withholding claims on the IJ’s stated ground that her proposed social group—‘women in El Salvador’—was ‘just too broad.’”); *Perdomo v. Holder*, 611 F.3d 662 (9th Cir. 2010) (“The BIA reasoned that ‘all women in Guatemala’ is overly broad and internally diverse, and constitutes ‘a mere demographic division . . . rather than a particular social group.’”).

³³ Brief for Respondent at 60, *Valdiviezo-Galdamez v. Holder*, 663 F.3d 582 (3d Cir. July 8, 2009).

³⁴ *Reyes v. Lynch*, 842 F.3d 1125, 1135 (9th Cir. 2016).

Confusion on this point surely stems from the Board’s and the Attorney General’s continued description of the particularity criterion as a check on groups that are too “amorphous, overbroad, diffuse, or subjective.”³⁵ Whereas “amorphous” and “subjective” speak to the clarity of a group’s boundaries, “overbroad” and “diffuse” suggest a concern with a group’s size.

Insofar as the Proposed Rule does mean to impose size or homogeneity restrictions on particular social groups, this would be a departure from the Departments’ past practice, and from past representations which have led courts to approve such practice.³⁶ Worse, it would be an unreasonable interpretation of the statute.³⁷

Ambiguous as the phrase “membership in a particular social group” clearly is, one guide to its meaning runs like a thread through decades of agency and judicial attempts to interpret the phrase: the canon of *ejusdem generis*.³⁸ This instructs interpreters to read general words “in a manner consistent with the specific words” found within the same enumeration.³⁹ “Membership in a particular social group” thus should be understood as a concept akin to the other statutory grounds: race, national origin, religion, and political opinion.

The canon of *ejusdem generis* unambiguously requires us to reject any restrictions based on a social group’s size or diversity. After all, just as every person has a gender, so too does every person have a race and national origin, religion and political opinion (since atheism and political quietism also qualify). Members of the majority race in a given country, if persecuted on that account, would undoubtedly qualify for asylum, no matter how many of them there are. So too would Christians, or Muslims, or socialists, despite their numbers. It does not matter that Christians, Muslims, and socialists may share few other traits besides their religious or political convictions. Imposing a size or homogeneity criterion on social groups such as women thus would be treating particular social groups as something not “of the same kind” (the literal meaning of *ejusdem generis*) as the other four grounds. There is nothing in the statutory language to suggest that differential treatment of this sort is reasonable.

For those troubled by the worry expressed (but not shared) by the Tenth Circuit in *Niang*, the answer is that “half a nation’s residents” will *not* “obtain asylum”—not, that is, unless they all make it to the United States, apply in a timely way, and show a well-founded fear of persecution on account of their gender. It is the high bar of persecution and the difficult proof of nexus that keep the proverbial floodgates from

³⁵ *Matter of A-B-*, 27 I&N Dec. 316, 335 (A.G. 2018) (quoting *Matter of M-E-V-G-*, 26 I&N Dec. 227, 239 (BIA 2014)).

³⁶ *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (“An agency may not . . . depart from a prior policy sub silentio . . .”).

³⁷ *See id.* (“ . . . And of course the agency must show that there are good reasons for the new policy.”).

³⁸ *See, e.g., Matter of A-B-*, 27 I&N Dec. at 327; *Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985).

³⁹ *Matter of Acosta*, 19 I&N Dec. at 233.

spilling open, not artificial restrictions on social groups (such as women in certain countries) which would otherwise clearly meet the Board’s three criteria of immutability, social distinction, and particularity, properly understood in terms of clearly delineated boundaries.

5. The Rule Invents a Vague and Unfairly Applied Prohibition Against “Evidence Promoting Cultural Stereotypes”

In addition to its general bar on gender-based claims, the Proposed Rule would add language at 8 C.F.R. §§ 208.1(g) and 1208.1(g) that makes inadmissible “evidence promoting cultural stereotypes about an individual or a country, including stereotypes based on race, religion, nationality, or gender.” It does so, however, only when the evidence is offered by asylum or withholding applicants, not when offered by the government.⁴⁰ This new categorical restriction is either unnecessary or unreasonably overbroad—it is hard to know which, because the language of the rule is so vague as to be arbitrary and unreasonable for that reason too. Further, its one-sided application—prohibiting refugees from submitting a type of evidence that is allowed from the government—violates the Due Process Clause of the Fifth Amendment and is inconsistent with the justification the Proposed Rule itself offers.

According to the Proposed Rule, “the Departments propose to make clear that *pernicious* cultural stereotypes *have no place* in the adjudication of applications for asylum and statutory withholding of removal, regardless of the basis of the claim.”⁴¹ The proposed regulatory text, however, is at once broader and narrower than this statement of intent: broader insofar as it bars “evidence promoting cultural stereotypes” writ large, not just “pernicious” ones; and narrower insofar as it bars evidence based on stereotypes only when offered to *support* an asylum or withholding claim. Though the Departments say stereotyping has *no place* in asylum adjudication, their Proposed Rule actually would leave it in place—but on one side of the dispute only. As Justice Scalia once wrote, the government has “no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules.”⁴²

Not only is this one-sided evidentiary bar inconsistent with the Proposed Rule’s stated goal; its lopsided application violates the due process rights of those seeking asylum or withholding of removal. As the Ninth Circuit has said in a case where the government was permitted evidence not allowed a defendant, the “asymmetrical application of evidentiary standards is unconstitutional.”⁴³ Though this was said in

⁴⁰ See 85 Fed. Reg. at 36292, 36300-01 (evidence “offered to *support* the basis of an alleged fear of harm from the individual or country shall not be admissible in adjudicating that application” (emphasis added)).

⁴¹ *Id.* at 36282 (emphases added).

⁴² *R.A.V. v. St. Paul*, 505 U.S. 377, 392 (1992).

⁴³ *Gray v. Klauser*, 282 F.3d 633, 641 (9th Cir. 2002), *remanded on other grounds by* 537 U.S. 1041 (2002).

the criminal context, the court made clear that equal treatment of the government and its adversaries is required not just under the Sixth Amendment, but under the Due Process Clause as well.⁴⁴ And indeed, although the Supreme Court has said that the Due Process Clause does not mandate any particular discovery procedures for obtaining evidence, “it does speak to the balance of forces between the accused and his accuser.”⁴⁵ For a hearing to be fundamentally fair, the rules for presenting evidence, no less than obtaining it, surely “must be a two-way street”⁴⁶ to satisfy the Constitution. The Departments make no attempt in the Proposed Rule to explain why the government should be differently, and more favorably, situated than refugees when it comes to the type of evidence it is allowed to present.

Even were it to be symmetrically applied, however, the proposed bar on “evidence promoting cultural stereotypes about an individual or a country” would be either unnecessary or overbroad, depending on how it is interpreted. Insofar as stereotypes refer to overgeneralizations, preconceptions, or outmoded or prejudicial notions about a person or culture, evidence trading on such stereotypes is just bad evidence, and should be discounted as such. No new rule is needed to make this clear. But insofar as “evidence promoting cultural stereotypes” extends to evidence about widespread beliefs or systemic harms within a given country, this new rule would bar evidence that the Proposed Rule itself recognizes as a valid basis for establishing persecution.⁴⁷ The pattern-or-practice evidence of persecution that is explicitly endorsed by this very Rule would be endangered if, because of its systemic rather than individualized nature, it were to be dismissed as mere stereotyping.

Troublingly, the single instance of stereotyped evidence offered in the Proposed Rule only deepens this ambiguity. Quoting Attorney General Sessions, the Proposed Rule’s one example of “countrywide negative cultural stereotypes” is this: “[*Matter of*] *A-R-C-G*’s broad charge that Guatemala has a ‘culture of machismo and family violence’ based on an unsourced partial quotation from a news article eight years earlier.”⁴⁸ Again the ambiguity: the problem might be that the claim about a culture of machismo is insufficiently sourced. But on the other hand, the problem might be with the nature of the claim itself: that it is demeaning, or not necessarily reflective of every man in Guatemala. The former interpretation makes no change to current practice; the latter would make too much of a change, for currently accepted evidence of widespread, systemic acts and beliefs might always be seen as demeaning of a

⁴⁴ See *id.* at 645-46 (citing *Webb v. Texas*, 409 U.S. 85, 97-98 (1972), for “the principle that a state rule or ruling that imposes a greater evidentiary burden on a defendant without justification violates due process”); *id.* at 646 (citing *Washington v. Texas*, 388 U.S. 14 (1967), where “the Supreme Court objected to a Texas rule that applied unequal standards to defendants and the state”).

⁴⁵ *Wardius v. Oregon*, 412 U.S. 470, 474 (1973).

⁴⁶ *Id.* at 475.

⁴⁷ See 85 Fed. Reg. at 36280 (citing *Wakkary v. Holder*, 558 F.3d 1049, 1061 (9th Cir. 2009), for the proposition that applicants need not show that laws or policies were or would be applied to them personally if they can show that persecution of their group is “widespread and systemic”).

⁴⁸ 85 Fed. Reg. 36282 (quoting *Matter of A-B-*, 27 I&N Dec. 316, 336 n.9 (A.G. 2018)).

culture, or not applicable to every individual within it. Barring such evidence as stereotype-promoting would be the end of pattern-or-practice claims. And if broad societal evidence of machismo and gendered violence is barred, claims by abused women are even more likely to be dismissed as mere “interpersonal disputes.”⁴⁹

The fact that the Proposed Rule’s language about “evidence promoting cultural stereotypes” admits of two such different interpretations is itself a reason for rejecting it. Evidence submitted on a refugee’s behalf should be evaluated for its relevance and weight, not for whether an adjudicator sees it to be “promoting” something as vaguely understood as “cultural stereotypes about an individual or a country.”

6. The Rule Does Not Recognize or Justify Its Potential Effect on LGBTQ Refugees

As the Proposed Rule recognizes, asylum and withholding claims based on sexual orientation have been recognized in the United States for at least thirty years.⁵⁰ Claims based on a refugee’s gender identity have been recognized for at least twenty years.⁵¹ However, because persecution based on sexual orientation or gender identity is necessarily persecution based on sex,⁵² the Proposed Rule’s general bar on gender-based asylum claims threatens to operate also as a general bar on claims by LGBTQ refugees, despite their longstanding protection under both U.S. and international refugee law.⁵³

On the same day the Proposed Rule was published for comment, the United States Supreme Court held, in *Bostock v. Clayton County*, that “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”⁵⁴ Given that the Court’s holding rests solely on the meaning of the word sex and an analysis of but-for causation, there is nothing to distinguish *Bostock*’s analysis of Title VII from the language used in the Proposed Rule. To say that the Departments generally “will not favorably adjudicate the claims of aliens who claim persecution based on . . . gender” implies, under the logic of *Bostock*, that the Departments, in general, will reject claims of persecution based on sexual orientation or gender identity.

⁴⁹ See 85 Fed. Reg. at 36291, 36300.

⁵⁰ See 85 Fed. Reg. at 36278 (citing Matter of Toboso-Alfonso, 20 I&N Dec. 819 (BIA 1990)).

⁵¹ See *Hernandez-Montiel v. INS*, 225 F.3d 1088 (9th Cir. 2000).

⁵² See *Bostock v. Clayton Cnty.*, No. 17-1618 (June 15, 2020), available at https://www.supremecourt.gov/opinions/19pdf/17-1618_hfci.pdf.

⁵³ See United Nations High Commissioner for Refugees, *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity Within the Context of Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees* (2012), <https://www.unhcr.org/509136ca9.pdf>.

⁵⁴ *Bostock*, slip op. at 9.

Given the timing of the Proposed Rule’s publication, it is understandable that the Departments did not address the sweeping implications of *Bostock* on their own proposed rulemaking. However, now that the U.S. Supreme Court has clarified the analytic relationship between sex/gender, sexual orientation, and gender identity, the Departments can no longer ignore the potentially sweeping implications of their Proposed Rule. Unless they abandon the proposed bar on gender-based claims, the Departments either must explicitly clarify that they will continue to recognize particular social group claims based on sexual orientation and gender identity, notwithstanding the general bar on gender-based claims, *or* the Departments must do much more than they presently have done to justify this dramatic departure from decades of settled practice.⁵⁵

The Department of Homeland Security has recently seen what happens when it fails to “appreciate[] the scope of its discretion or exercise[] that discretion in a reasonable manner.”⁵⁶ Here, the proposed bar on gender-based asylum claims is already insufficiently and misleadingly supported, as shown above. Should it be interpreted, in light of *Bostock*, to reach and exclude categories of social group claims that have been recognized by the BIA and the federal courts for decades, the Rule’s even more sweeping changes to U.S. asylum law would be even less adequately justified. Without such justification, the Proposed Rule will—and should—be promptly challenged and vacated, like so many of the Departments’ other recent attempts at rulemaking,⁵⁷ too many of which have targeted and tarnished America’s long-prized reputation as a nation of immigrants.

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The Proposed Rule’s general bar on gender-based asylum and withholding claims should be abandoned. It is contrary to the Refugee Act and decades of case law, lacking in any reasoned justification, and inconsistent with our Nation’s longstanding commitment to refugees, including those whose gender makes them targets for persecution.

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⁵⁵ See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (“An agency may not . . . depart from a prior policy sub silentio or simply disregard rules that are still on the books. And of course the agency must show that there are good reasons for the new policy.” (citation omitted)).

⁵⁶ *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, No. 18-587 (June 18, 2020), slip op. at 29, *available at* https://www.supremecourt.gov/opinions/19pdf/18-587_5ifl.pdf.

⁵⁷ See, e.g., *id.*