Comments Submitted by American Gateways RE: Proposed Collection of Information, Joint Notice of Proposed Rulemaking (NPRM) by the Executive Office for Immigration Review, Department of Justice; U.S. Citizenship and Immigration Services, Department of Homeland Security: Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review / RIN 1125-AA94 and 1615-AC42 / EOIR Docket No. 18-0002 / A.G. Order No. 4714-2020 (published in the Federal Register on June 15, 2020).

OMB Control No. 1615-0067

American Gateways provides much needed legal representation for indigent immigrants in Central Texas. Our mission is to champion the dignity and human rights of immigrants, refugees, and survivors of persecution, torture, conflict, and human trafficking through exceptional legal services at low or no cost, education, and advocacy. Our agency began in 1987 as the Political Asylum Project of Austin and was founded to provide legal representation to Central American immigrants fleeing persecution and seeking asylum in the U.S. Over the past thirty-three years, American Gateways has become an indispensable legal services provider for low-income asylum seekers and immigrants in Central Texas.

American Gateways submits these comments specific to the proposed collection of information set forth in the joint notice of proposed rulemaking regarding Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review (the "Proposed Rule"), published by the Department of Homeland Security (DHS) and Department of Justice (DOJ) (collectively, the "Departments") on June 15, 2020, to express its opposition to the proposed I-589, Application for Asylum and for Withholding of Removal (ID EOIR-2020-0003-0002) (the "Proposed Form I-589") and the accompanying instructions for Proposed Form I-589 (ID EOIR-2020-0003-0004) (the "Proposed Instructions"). The proposed collection of additional information on Form I-589 is unnecessary for the proper performance of agency functions, will substantially enhance the burden of collection for applicants, especially *pro se* applicants, and will not improve the quality, utility, or clarity of the information to be collected. The Proposed Form I-589 also runs afoul of the requirement that proposed collections of information be "written using plain, coherent, and unambiguous terminology" that "is understandable to those who are to respond." 5 C.F.R. § 1320.9(d). Finally, the Proposed Form I-589 would make it virtually impossible for service providers like American Gateways to assist *pro se* individuals seeking asylum, statutory withholding of removal, or withholding of removal under the Convention Against Torture (CAT) regulations with completing the I-589 application.

American Gateways staff work inside four detention centers in Central Texas—T. Don Hutto Residential Center, South Texas Detention Complex, Karnes County Residential Center, and Limestone County Detention Center. With limited resources, it is impossible for American Gateways to represent the thousands of detainees who are seeking asylum. Hence, American Gateways staff often provides *pro se* assistance to detained asylum seekers. When providing *pro se* assistance, American Gateways does not give legal advice, but instead educates individuals about the requirements for asylum and withholding of removal so that they can complete applications on their own. The proposed changes to Form I-589 require applicants to have in-depth knowledge of the asylum laws and regulations. For example, the proposed changes would require an individual to list a cognizable particular social group. They would also require that an individual who is seeking protection from torture explain how the perpetrator of such torture was

an official acting in his official capacity or with the acquiescence or consent of an individual acting in his official capacity. The vast majority of individuals that American Gateways serves *pro se* are non-English speakers. In addition, many of them are illiterate or have minimal education. Even those with advanced education do not have the legal knowledge to be able to complete the Proposed Form I-589 on their own, as doing so would require an advanced knowledge of the ever-changing U.S. asylum laws.

American Gateways describes below how some of the proposed changes would impact our organization, our clients, and other individuals we serve, and the reasons for our opposition. Omission of any proposed change from these comments should not be interpreted as tacit approval.

I. The Proposed Form I-589 is not only unnecessary for the proper performance of agency functions but would interfere with the fair adjudication of applications for asylum, statutory withholding of removal, and withholding of removal under the CAT regulations.

The proposed changes to Form I-589 are not necessary for the proper performance of agency functions. The current Form I-589 collects detailed information regarding the factual and legal bases of an applicant's claim for asylum, statutory withholding of removal, and withholding under the CAT regulations. The existing collection tool is more than sufficient to guide the adjudication of claims, especially when supplemented by an applicant's oral testimony. Additionally, collecting information that requires an in-depth understanding of U.S. immigration law from individuals who have little, if any, familiarity with the U.S. legal system cannot possibly assist the Departments in performing their duties to fairly adjudicate asylum and withholding claims.

Pursuant to well-established constitutional and statutory law, immigrants in removal proceedings are entitled to due process of law, including the right to notice and the opportunity to be heard. *See, e.g.*, *Wing v. United States*, 163 U.S. 228, 238-39 (1896) (holding that due process rights applied to individual detained for unauthorized entry into the United States); *Yamataya v. Fisher*, 189 U.S. 86, 100-01 (1903) (reaffirming that immigrants in removal proceedings are guaranteed due process rights, including the right "to be heard upon the questions involving [the] right to be and remain in the United States"); *Agyeman v. INS*, 296 F.3d 871, 877 (9th Cir. 2002) ("An alien who faces deportation is entitled to a *full and fair* hearing of his claims."); *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950) ("[T]he fundamental requisite of due process of law is the opportunity to be heard. This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest."); *Matter of Fefe*, 20 I&N Dec. 116, 118 (BIA 1989) ("At a minimum, . . . the regulations require that an applicant for asylum and withholding take the stand, be placed under oath, and be questioned as to whether the information in the written application is complete and correct."). Given these basic due process protections that guarantee a right to a hearing, it is neither necessary nor appropriate for the Departments to collect any additional information on the Form I-589.

The Departments' proposed changes to the Form I-589 would, in fact, impair proper agency functions because the questions posed require knowledge of immigration law that few applicants possess. Although 84.7% of asylum cases with decisions had representation in FY

2019,[1] only a fraction of applicants (many of whom are detained) are able to secure legal representation in connection with preparing and submitting the Form I-589. In fact, representation rates for detained immigrants are only 30%.[2] Most persons seeking asylum do not speak English and have little, if any, familiarity with U.S. immigration law, which courts have described as "a maze of hyper-technical statutes and regulations that engender waste, delay, and confusion," including among immigration lawyers. *Drax v. Reno*, 338 F.3d 98, 99 (2d Cir. 2003); *United States v. Aguirre-Tello*, 324 F.3d 1181, 1187 (10th Cir. 2003), *vacated* 353 F.3d 1199 (10th Cir. 2004) (en banc). Applications for relief must be submitted in English, or they will be deemed abandoned and the applicant ordered removed. Without counsel, few individuals—most of whom are torture or trauma survivors who suffer from post-traumatic stress disorder or other mental health ailments—can successfully complete the current Form I-589, and even fewer would be able to complete the newly Proposed Form I-589, which requires even greater familiarity with complex and constantly changing laws. As a result, there is a substantial likelihood that the information collected on the Proposed Form I-589 would be incomplete and/or inaccurate by no fault of the applicant. Such incomplete and/or inaccurate information could not possibly enhance the efficacy of adjudicating asylum and withholding claims, much less be indispensable to the performance of agency functions.

Consistent with established law and long-standing practice, immigration judges are well suited to explore the bases of an applicant's asylum claim articulated in a written I-589 application by conducting an evidentiary hearing. As the Eighth Circuit has explained,

> [c]onsidering [a] pro se alien's likely lack of legal knowledge, the difficulty of navigating immigration law, and the possibility of expulsion upon failure to do so successfully, we have recognized it is critical that the [immigration judge] scrupulously and conscientiously probe into, inquire of, and explore for all the relevant facts.

Ramirez v. Sessions, 902 F.3d 764, 771 (8th Cir. 2018) (internal quotation marks omitted); *see also Barragan-Ojeda v. Sessions*, 853 F.3d 374, 381 (7th Cir. 2017) ("An IJ, unlike an Article III judge, is not merely the fact finder and adjudicator but also has an obligation to establish the record. Particularly with a pro se respondent . . . , fair questioning by the IJ often is required to obtain information from the alien necessary for a reasoned decision on the claim.") (citations and internal quotation marks omitted); *Mohamed v. Att'y Gen.*, 705 F. App'x 108, 114 (3d Cir. 2017) ("The importance of that full examination is all the more apparent when considering the difficulties faced by a *pro se* applicant with little or no reading skills who was forced to seek help from his fellow detainees in a facility where he had already been assaulted, collect evidence and seek testimony while detained, and present his case via videoconference."); Immigration Court Practical Manual § 4.15(g) (instructing immigration judges to "advise[] the [pro se] respondent of any relief for which the respondent appears to be eligible"). Given the affirmative obligation of immigration

[1] TRAC Immigration, *Record Number of Asylum Cases in FY 2019* (Jan. 8, 2020), https://trac.syr.edu/immigration/reports/588/.

[2] TRAC Immigration, *Who is Represented in Immigration Court?* (Oct. 16, 2017), https://trac.syr.edu/immigration/reports/485/.

judges to conduct a hearing to "explore for all relevant facts," there is simply no need to collect additional information on the Form I-589, as the Departments propose.

Finally, to the extent the proposed changes to Form I-589 are designed to complement the Departments' proposal to allow immigration judges to pretermit and deny asylum and withholding applications that purportedly fail to establish a *prima facie* claim for relief, the latter proposal violates both due process and the Immigration and Nationality Act (INA). Collecting information to facilitate the unlawful denial of asylum claims would not advance any legitimate government function.

II. The Proposed Form I-589 is unduly burdensome for both applicants and legal services providers.

Under the current regulations, the burdens of seeking asylum are already great. Asylum grant rates have continued to plummet in recent years. In FY 2019, the overall asylum denial rate rose for the seventh straight year to over 69%.[3] The denial rate for unrepresented asylum seekers was a staggering 84%.[4] During the first quarter of FY 2020, less than 27% of asylum requests were granted in immigration court—a 36.6% decline from FY 2016.[5] The asylum grant rate for Central Americans has declined even more steeply to 13.3%—a 50% decline from FY 2016.[6] For those caged in detention facilities, where myriad barriers frustrate efforts to access counsel and basic legal information, circumstances are even more dire. Only 30% of detained immigrants are represented.[7] This means that thousands of detainees without legal representation rely on legal services organizations like American Gateways for *pro se* assistance with completing their I-589 applications. For the reasons discussed herein, among others, the proposed changes to the Form I-589 would *increase* rather than minimize the burden of the collection of information, making it exceedingly difficult for American Gateways and other legal services organizations to provide effective *pro se* assistance to asylum seekers.

A. The Form I-589 should not require individuals to articulate "the definition and boundaries of the alleged particular social groups" to which they belong.

Part B.1 of the Proposed Form I-589 instructs applicants "claiming membership in a particular social group(s)" to "identify the particular social group(s)." Proposed Form I-589 at 5. American Gateways staunchly opposes any requirement that applicants identify the particular social groups (PSGs) to which they belong on the Form I-589, as this requirement would encourage adjudicators to deny meritorious claims without any hearing and result in the inadvertent waiver of meritorious claims "for all purposes under the Act, including on appeal." *See* Proposed

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[3] TRAC Immigration, *Record Number of Asylum Cases in FY 2019* (Jan. 8, 2020), https://trac.syr.edu/immigration/reports/588/.

[4] *Id.*

[5] Human Rights First, *Fact Sheet* (June 2020), https://www.humanrightsfirst.org/sites/default/files/AdministrationDismantlingUSAsylumSystem.pdf. USCIS has not released data for the first quarter of FY2020. As of FY 2019, the asylum grant rate for affirmative asylum claims adjudicated before USCIS was 30.7%—a decline of 28.8% since FY 2016. *Id.*

[6] *Id.*

[7] TRAC Immigration, *Who is Represented in Immigration Court?* (Oct. 16, 2017), https://trac.syr.edu/immigration/reports/485/.

Instructions at 3. This is especially true if the Departments succeed in implementing their unlawful proposal to establish blanket rules barring certain PSGs. *See* 85 Fed. Reg. 36264, 36291 (Proposed 8 C.F.R. § 208.1), 36300 (Proposed 8 C.F.R. § 1208.1).

Experienced immigration attorneys struggle to craft legally cognizable PSGs. For most *pro se* applicants, having to identify the PSGs to which they belong would be an insurmountable barrier to stating a viable claim. Over the course of more than three decades, American Gateways has provided *pro se* assistance to thousands of asylum seekers, and very few of those individuals have been able to identify the PSGs on which their claim was based, especially in cases involving persecution perpetrated by gangs, intimate partners, or other private actors. Requiring applicants to articulate and define PSGs on the Form I-589 is particularly concerning in light of the Departments' proposed substantive changes to the governing regulations, which include a non-exhaustive list of several bases that would "generally be insufficient to establish a particular social group." 85 Fed. Reg. 36264, 36279. Among the PSGs that would be barred except in "rare circumstances," *see* 85 Fed. Reg. 36264, 36279, are those "consisting of or defined by" "interpersonal disputes" or "private criminal acts." 85 Fed. Reg. 36264, 36291 (proposed 8 C.F.R. § 208.1(c)), 36300 (proposed 8 C.F.R. § 1208.1(c)). Applicants with no prior knowledge of U.S. immigration law cannot be reasonably expected to craft PSGs that fit within the impermissibly narrow standards proposed by the Departments or to explain why the harm they experienced at the hands of non-state actors nonetheless qualifies because such "interpersonal" or "private" violence is deeply rooted in societal, cultural, religious, and legal norms and biases that are, in turn, further exacerbated by rampant impunity. *See, e.g.*, *Alvarez Lagos v. Barr*, 927 F.3d 236, 250 (4th Cir. 2019) (reversing immigration judge's finding that the petitioner failed to establish a nexus to her PSG of "unmarried mothers living under the control of gangs in Honduras" and citing to "very patriarchal" and "*machista* culture" that renders unmarried women "especially vulnerable to gang violence"). The proposed PSG question also conflicts with the affirmative obligation of immigration judges to seek clarification of a PSG's boundaries not clearly defined by the applicant. *See, e.g.*, *Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. 189, 191 (BIA 2018) ("If an applicant is not clear as to the exact delineation of the proposed social group, the Immigration Judge should seek clarification . . . .").

Furthermore, the Proposed Instructions neither define "particular social group" nor elaborate on the level of detail that must be included in the written application. Directing applicants to consult 8 C.F.R. §§ 208.1 and 1208.1 for the applicable definition of "particular social group" is neither useful nor appropriate (not to mention that the proposed regulations also fail to define key terms, including "interpersonal disputes" and "private criminal acts"). *See* Proposed Instructions at 3. Most *pro se* applicants—especially those who are detained—cannot even access the Code of Federal Regulations, much less understand the ill-defined legal terminology contained therein. Even still, the proposed regulations themselves do not elaborate on the level of precision that is required before a PSG will be cognizable, leaving applicants, as well as their legal representatives, to guess just how exact their delineation of a PSG must be to survive summary dismissal under the Proposed Rule.

Many asylum seekers whom American Gateways serves are unrepresented at the time they file their I-589 application but are later able to secure representation for their final hearing. In these circumstances, individuals quite appropriately rely on their counsel to articulate the PSGs on which their claim is based. If the PSG question is added to the Form I-589, as proposed, many individuals

who have suffered severe persecution (especially at the hands of non-state actors) will be returned to the persecution from which they fled without their claims ever having been heard.

B. The Form I-589 should not require individuals to make complex legal determinations regarding the agents of their persecution, the inability or unwillingness of their government to protect them, or the "nexus" between their persecution and the protected grounds.

American Gateways objects to Parts B.1.A.3, B.1.A.4, B.1.B.2 and B.1.B.3 of the Proposed Form I-589 because they unfairly ask applicants to make complex legal determinations that can be more appropriately and adequately addressed by pre-hearing briefs and oral testimony. Quite obviously intended to prevent applicants from surviving summary dismissal of their claims under the Proposed Rule, the addition of these questions will also impede the ability of thinly-resourced legal services organizations like American Gateways to effectively assist unrepresented asylum seekers with laying out the basic elements of their claim on the Form I-589.

The current Form I-589 asks applicants for asylum and withholding of removal to describe any harm, mistreatment, or threats they have experienced in the past or fear experiencing in the future. With guidance from legal services providers like American Gateways, many *pro se* applicants can answer these fact-based questions about their own experiences. The Proposed Form I-589, on the other hand, includes questions that implicate complicated relationships among state and non-state actors that enable persecutory conduct to flourish. Questions regarding whether the agent(s) of an individual's harm were government actors, whether an individual's government was or is unwilling or unable to protect her, and whether a sufficient nexus exists between the harm an individual experienced or fears experiencing, on the one hand, and a protected ground, on the other hand, are not only laden with legal terms of art, but cannot be adequately answered by individuals who are not familiar with the dense and ever-changing body of asylum law that challenges the minds of attorneys and adjudicators alike.

Furthermore, when considered alongside the Departments' proposal to (1) categorically narrow the universe of conduct that amounts to persecution, *see* 85 Fed. Reg. 36264, 36291-92 (proposed 8 C.F.R. § 208.1(e)), 36300 (proposed 8 C.F.R. § 1208.1(e)), and (2) enumerate circumstances that generally will not satisfy the "nexus" requirement, *see* 85 Fed. Reg. 36264, 36292 (proposed 8 C.F.R. § 208.1(f)), 36300 (proposed 8 C.F.R. § 1208.1(f)), it is abundantly clear that the proposed questions would function as a trap for most *pro se* applicants, especially those who are persecuted by family members, acquaintances, or members of criminal enterprises. Consider, for example, the following cases in which American Gateways assisted detained asylum seekers with completing their I-589 applications *pro se*:

- Ms. S is a lesbian from Georgia. For years, she tried to hide her sexual orientation. She was forced into a violent marriage with her ex-husband who repeatedly assaulted her throughout their marriage. Ms. S eventually left and divorced him, but when he found out that she was a lesbian, he began to stalk and threaten her and on occasion beat her until she lost consciousness. Ms. S's husband took her child from her. He also sent men to attack her. These men warned Ms. S to stay away from her daughter so that she did not "taint" her. Ms. S tried on several occasions to report the attacks to the police, but was refused help once they discovered that she was a lesbian. Although Ms. S's ex-husband was able

to continue with his threats and attacks against her with impunity because of her sexual orientation, an immigration judge might nonetheless deny her claim at the application stage if the proposed changes to Form I-589 are implemented, reasoning that Ms. S could not establish the "nexus" element of her claim because she had an "interpersonal" relationship with her persecutor.

- M is a young gay man from. As a young child, M was repeatedly raped for several years by his adult cousin, as well as another man who worked on the ranch where M lived. M eventually mustered enough courage to tell his aunt and uncle about the abuse he was experiencing, but they called him a liar. Finally, M decided he could no longer endure the abuse and fled El Salvador using the little money another relative had given him and the clothes he was wearing. Although M was persecuted on account of his sexual orientation, he too would risk summary denial of his claim at the application stage because his principal persecutor was a family member.

- Ms. G is an indigenous woman from Ecuador. She has experienced a lifetime of discrimination, hatred, and abuse because she is indigenous. She was attacked and threatened one night while walking home from her job. A group of men speaking Spanish approached her. They began to mock her because she could not speak Spanish well, and became physically aggressive with her. They then robbed and beat her. Ms. G tried to seek help from the police but was made fun of and turned away. After this first attack, the men continued to seek out Ms. G and attack her. On several occasions, they robbed her of her wages and physically assaulted her. They targeted her because she is indigenous and because the police would do nothing to protect her. Ms. G's experience presents a classic "mixed motive" case whereby her indigenous identity was at least "one central reason" that motivated her perpetrators to repeatedly attack and rob her. Yet, she too would risk summary denial of her claim at the application stage because her persecution involved "private criminal acts."

The Proposed Instructions for additional Part B questions are also woefully inadequate. As previously noted, explaining that the definitions of certain legal terms, such as "nexus," are "available" in the Code of Federal Regulations is virtually meaningless to *pro se* applicants. *See* Proposed Instructions at 3. And even assuming a well-educated individual was able to consult the applicable regulations, the meaning and application of legal terms is not readily apparent in the regulations. In other words, the Proposed Form I-589 and accompanying instructions are wholly inaccessible to the overwhelming majority of *pro se* applicants.

Even with assistance from legal service providers, it would be nearly impossible for unrepresented individuals to complete the Proposed Form I-589 without unwittingly compromising their claims. The Departments' proposal front-loads the Form I-589 with questions that require the application of legal concepts derived from a vast body of case law at a stage in proceedings when individuals are least likely to be represented. The Proposed Form I-589 would thus greatly enhance, rather than minimize, the burden of the collection of information on individual applicants and the legal services providers who assist them, and vastly decrease, rather than enhance, the quality, utility, and clarity of that information. These questions can be more appropriately and fairly addressed by counsel in legal briefs and by applicants through their oral testimony at a hearing with a translator. Unless the Departments propose to provide free legal representation to all applicants

for asylum and withholding of removal upon implementation of the Proposed Form I-589, the proposed changes should be rescinded in their entirety.

C. The Form I-589 should not require individuals seeking protection from torture to explain how the perpetrator of such torture was an official acting in his official capacity or with the acquiescence or consent of an individual acting in his official capacity.

American Gateways also objects to Parts B.1.C.3 and B.1.D.2 of the Proposed Form I-589 because they unfairly ask individuals to engage in sophisticated legal analyses to determine whether the harm they suffered or will suffer amounts to torture under applicable law. These changes, like other proposed changes, would have an inequitable and devastating impact on *pro se* applicants.

Proposed Part B.1.C.3 would require an individual to first determine whether the person who tortured him was "acting in an official capacity" and, if not, explain (1) whether the harm "was inflicted by or at the instigation of, or with the consent or acquiescence of, a public official acting in an official capacity or other person acting in an official capacity," (2) whether the government or a public official acting in an official capacity or other person acting in an official capacity had awareness of the harm" and "acted to prevent such harm," and (3) whether there is any connection between the government or a public official or other individual acting in an official capacity, on the one hand, and the individual who caused harm to the individual, on the other hand. *See* Proposed Form I-589 at 7. Proposed Part B.1.D.2 would require the same information with respect to torture that an individual fears may occur in the future. *See id.* at 7-8. Effectively conceding that the proposed questions would be incomprehensible to most applicants, the Departments attempt to define the terms "acting in an official capacity" and "acquiescence" in the proposed instructions. *See* Proposed Instructions at 4. Yet, the instructions themselves are dense; relying on legal concepts rather than plain language, they add no further clarity. For example, the instructions explain that "[t]orture inflicted by a public official who is not acting under the color of the law ('rogue official') is not considered torture inflicted by or at the instigation of, or with the consent or acquiescence of a public official." *Id.* However, the Proposed Instructions (like the Proposed Rule itself) do not define "under color of law." It is patently unreasonable to expect that any *pro se* applicant will have read and understood the applicable case law setting forth the "under color of law" analysis applicable to CAT claims. Similarly, the Proposed Instructions define "acquiescence" using obscure legal terms. A *pro se* applicant cannot reasonably be expected to comprehend what it means for a public official to have "awareness" of the torture or to have "breach[ed] his or her legal responsibility to intervene to prevent" the torture. *See* Proposed Instructions at 4. In fact, the proposed questions are so complex that they can only be effectively answered by experienced immigration attorneys. The fact that the Departments identify individuals seeking asylum, *not* immigration attorneys, as the "[a]ffected public who will be asked or required to respond" to the Proposed Form I-589, 85 Fed. Reg. 36264, 36290, only underscores that the proposed changes are ill-suited for inclusion on the Form I-589.

American Gateways staff have assisted several torture survivors with completing I-589 applications. Most of these individuals have a difficult time distinguishing between the colloquial concept of torture and the legal definition of torture, and they struggle to answer the more basic question of whether they fear being tortured if returned to their home country. If presented with even more complicated questions, as proposed, many applicants would not be able to complete the

Form I-589 even after having received basic legal education from a provider like American Gateways. Legal service providers would have to devote more time to working with each applicant individually to complete the Form I-589, thereby reducing the number of individuals they can serve. This would result in more individuals completing I-589 applications with no legal assistance at all. For those applicants, the burden of completing the Proposed I-589 would be so great as to prevent them from ever having the opportunity to fairly present their claims. At the same time, the quality, utility, and clarity of the information contained in applications completed with no legal assistance would suffer.

The structure of the proposed questions regarding torture is also confusing and would cause applicants to provide either too much or too little information. If an applicant were to conclude that the individual who tortured her was acting in an official capacity, the Proposed Form I-589 does not clearly indicates that she is not also required to explain whether a public official or other person acting in an official capacity consented or acquiesced to her torture. On the other hand, if an applicant incorrectly concludes that the individual who tortured her was acting in an official capacity, she may inadvertently fail to answer the questions regarding consent or acquiescence. When information-collection instruments such as the Proposed Form I-589 fail to clearly identify which questions an applicant is required to answer, the collection of incomplete or irrelevant information is virtually guaranteed. Such a result benefits no one.

D. The Form I-589 should not require individuals to provide additional detail regarding whether they or their family members had an opportunity to legally reside in a third country through which they traveled prior to arriving in or entering the United States.

The existing Form I-589 requires applicants to provide detailed information about whether they or certain family members traveled through or resided in any third country before entering the United States, as well as whether they or their family members applied for refugee status or asylum in any third country. The Proposed Form I-589 would require individuals to also indicate (1) whether they or their family members applied for any lawful status other than refugee status or asylum and (2) whether they had an opportunity available to reside in any permanent or non-permanent legal immigration status in a third country through which they traveled. *See* Proposed Form I-589 at 10. These additional questions assume that asylum applicants know about the asylum and refugee systems in the countries through which they and/or their families may have only briefly transited on their way to the United States. That assumption is false. American Gateways serves several non-Spanish speaking asylum seekers (e.g., Cameroonians, Eritreans, Georgians) who enter the United States at the southern border. Most, if not all, of these individuals lack any knowledge of having had an opportunity to seek asylum elsewhere, including in Mexico, because they did not have access to interpreters who could explain to them, in a language they understood, what legal protections were available and how they could apply for such protections. In several instances, individuals whom American Gateways has assisted were detained by Mexican immigration authorities but were never informed that they could seek asylum in Mexico, much less provided with instructions on how to access the Mexican asylum system. Adding questions to the I-589 that few applicants would be able to answer, and even fewer would be able to answer accurately, would create unnecessary burdens for asylum seekers without enhancing the performance of agency functions. The additional questions regarding lawful status in third countries should therefore be rescinded.

E. The proposed formatting changes to Form I-589 would also unnecessarily burden *pro se* applicants.

It is well documented that refugees and asylum seekers fleeing persecution in their home countries experience high levels of psychological distress that not only impede their quality of life but also inhibit their capacity to effectively present their claims. It is similarly well documented that the vast majority of asylum seekers are non-English speakers and that many speak indigenous languages. American Gateways submits that the proposed formatting changes to certain parts of the Form I-589 fail to take into consideration these mental-health and language barriers.

The Proposed Form I-589 requires that applicants separately explain the harm, mistreatment, or threats they experienced, when it occurred, and who caused it. *See, e.g.*, Proposed Form I-589, Part B.1.A.1 through B.1.A.3 and B.1.C.1 through B.1.C.3, at 5-6. The detained individuals with whom American Gateways works rarely provide linear answers to questions that appear on the Form I-589 due to trauma, lack of education, and language barriers. Asking them to separately identify what happened, when it happened, and who caused it in separate response boxes would break the flow of their narratives, making it more complicated for American Gateways to obtain the information needed to complete the application. This is especially true of applicants with memory loss, post-traumatic stress disorder, or learning disabilities, as well as of third-language speakers who often do not express themselves in the same manner as those who speak English. The current Form I-589 already collects this same information using a single question that affords individuals the flexibility to articulate their claims without having to arrange their narrative in a particular fashion. The proposed formatting changes are therefore unnecessarily burdensome and should not be implemented.

F. The Form I-589 should not include any questions concerning adverse discretionary factors related to asylum eligibility.

As explained in American Gateways' comments submitted on July 15, 2020, the Departments' proposal to codify several "discretionary factors" that decision makers would be required to consider in determining whether to exercise favorable discretion with respect to an application for asylum is inconsistent with the asylum statute, contravenes congressional intent to afford protection to refugees, and is arbitrary and capricious. All of the proposed factors are objectionable on the ground that they severely infringe upon the ability of decision makers to *grant* discretionary relief to asylum seekers, as Congress intended. Indeed, the discretionary factors fly in the face of decades of case law and the long-standing position of the government that a person who has suffered persecution on account of a protected ground should be granted asylum, unless some particularly egregious circumstance(s) justifies denying relief. The Departments propose just the opposite—that a person who has suffered persecution on account of a protected ground should be denied asylum unless some extraordinary circumstance(s) justifies granting relief. Additionally, several of the proposed factors (e.g., the unlawful-entry and third-country-travel considerations) are plainly contrary to the INA.

Having represented asylum seekers for more than three decades, American Gateways believes that the fair adjudication of asylum claims requires a careful analysis of each asylum seeker's individual circumstances. Moreover, American Gateways, along with its clients, has an interest in the preservation of an asylum system that does not arbitrarily deny asylum to refugees. It therefore

stringently objects to the proposed checklist of reasons why decision makers either should or must ordinarily deny asylum. Assuming the Departments improvidently push forward with codifying the adverse "discretionary factors," American Gateways opposes any requirement that applicants be required to answer questions regarding discretionary factors on the Form I-589. Such a requirement would be both unfair and impractical for several reasons, a few of which American Gateways highlights below. As with other sections of these comments, the failure to address the inclusion of any particular "discretionary factor" on the Proposed Form I-589 does not indicate tacit agreement with its inclusion.

First, several of the proposed questions regarding discretionary factors presuppose that applicants have a working knowledge of immigration law. The reality is quite the opposite. Few, if any, *pro se* applicants are familiar with the U.S. legal system and will therefore find the questions confusing and burdensome. Moreover, because the questions require a "yes" or "no" answer, there is an enormous risk that applicants will incorrectly check a box that will damage their credibility or, even worse, cause their claim to be denied without a hearing, in which event they would not even have an opportunity to correct or explain their answers. The Proposed Form I-589 also asks applicants to assess whether they meet certain narrow exceptions, the applicability of which turns on complex legal issues that few applicants will fully understand. Hence, the proposed changes would only further increase the risk that meritorious claims will be denied based on incomplete and inaccurate information. By way of example:

- Proposed Part C.9.A asks individuals if they have "ever unlawfully entered or unlawfully attempted to into the United States." Proposed Form I-589 at 11. Requiring that unlawful entry weigh negatively in every case is fundamentally at odds with INA § 208(a)(1), which unambiguously provides that immigrants are eligible for asylum regardless of how and where they enter the United States. Additionally, "unlawful entry" is a legal term of art that *pro se* applicants are unlikely to understand, particularly in light of the fact that those who present themselves at ports of entry are immediately caged in detention centers as if they had committed a crime or sent across the border to "tent cities" that visiting Congressmen have described as worse than refugee camps in war zones. There is a substantial risk that (1) applicants who entered lawfully will answer "yes" to question 9.A and (2) applicants who entered unlawfully will unintentionally answer "no" to question 9.A. Similarly, the exceptions for those who entered or attempted to enter in "immediate flight from persecution" or those who satisfy the definition of "victim of a severe form of trafficking in persons" are not readily comprehensible, thereby inviting inaccurate answers from individuals who fit within these exceptions.

- Proposed Part C.9.B asks applicants if they "fail[ed] to seek protection from persecution or torture, including refugee status or asylum, in any country through which" they "transited before entering the United States." Proposed Form I-589 at 11. This third-country-transit factor is not only inconsistent with the INA but would produce non-sensical outcomes because it is drafted so broadly so as to encompass anyone who has a layover in a country that is a signatory to the 1951 Refugee Convention, 1967 Protocol, and Convention Against Torture. As previously noted, individuals fleeing persecution are often unaware of opportunities to seek protection in third countries and cannot reasonably be expected to answer "yes" to having failed to seek protections they did not even know exist. Similarly, most applicants are unfamiliar with international agreements regarding refugees

and cannot be reasonably expected to accurately determine whether the countries they passed through, including on layovers, are parties to those agreements. There is therefore a substantial risk that applicants will inadvertently answer this question "no." Moreover, the Proposed Form I-589 does not enumerate the exceptions that apply to this factor. Instead, applicants must consult the Proposed Instructions, which in term contain several references to the regulations themselves. This guidance is wholly inadequate and cannot possibly improve the collection of information, as it imposes inappropriate and insurmountable burdens on applicants without any potential benefit to the proper performance of agency functions.

- Proposed Part C.10.B asks individuals if they "have a conviction or sentence that was reversed, vacated, expunged, or modified." Proposed Form I-589 at 11. The question is overly broad and inconsistent with the proposed regulations, which more narrowly provide that an applicant should ordinarily be denied asylum if she "would otherwise be subject to 8 U.S.C. § 208.13(c) [the asylum bar for convictions of a "particularly serious crime" or "aggravated felony"] but for the reversal, vacatur, expungement, or modification of conviction or sentence unless the [applicant] was found not guilty." Although the Proposed Instructions to Form I-589 capture this qualifying language, there is no reason to omit such language from the Proposed Form I-589. As phrased, the question invites "yes" answers from applicants who have been convicted of minor offenses that do not impact their eligibility for asylum.

- Proposed Parts C.10.E through C.10.G ask individuals whether they have failed to timely file any taxes, satisfy any outstanding tax obligations, or report any income to the Internal Revenue Service. Proposed Form I-589 at 11. This draconian and arbitrary penalty has no place in the asylum regulations or the Proposed Form I-589. Under no circumstances should the failure to pay taxes warrant denying asylum to individuals who have established their refugee status. Furthermore, many *pro se* applicants are unfamiliar with U.S. tax law or otherwise unaware of any obligations to file and pay taxes. The Proposed Instructions, which reference "tax liability under section 1 of the Internal Revenue Code of 1986," fail to adequately explain what tax liability is and when earned income results in reportable tax liability, further underscoring why the Proposed Form I-589 should not inquire about filing and paying taxes in the first instance.

The remaining questions in Parts C.9 and C.10 are objectionable on similar grounds, as they are poorly drafted and assume a working knowledge of immigration law that nearly all asylum applicants lack. Even if the adverse discretionary factors are incorporated into the regulations, as the Departments propose, they should not be incorporated into the Form I-589. Adjudicators cannot responsibly exercise their so-called discretion with respect to the enumerated factors based on "yes" or "no" answers and short written explanations because the application of any given factor turns on detailed legal analyses. Additionally, the information the questions are designed to collect is not integral to any agency functions because asylum applicants have a constitutional and statutory right to a hearing. *See supra* at Section I. Consistent with current practice, immigration judges can fully and fairly explore the bases for an individual's claims, as well as any discretionary factors that may weigh against a grant of asylum, in the context of a full evidentiary hearing.

Second, the formatting of the questions regarding discretionary factors is confusing and will invite error. To the extent the Departments decline to withdraw the Proposed Form I-589 in its entirety or, alternatively, to strike Parts C.9 and C.10, each of the questions in Parts C.9 and C.10 should be followed by a text box asking individuals to (1) explain their answer and (2) explain whether any exceptions apply. Although applications will still be rife with mistakes because the questions themselves are not appropriate for the respondent population, improved formatting may help some individuals more effectively explain why they have answered a particular question affirmatively or negatively and/or whether they fit within one of the narrowly proposed exceptions.

Finally, the adverse discretionary factors questions would make it incredibly difficult for American Gateways to provide effective *pro se* assistance. The questions are both complex and high-stakes as a mistaken answer could prompt a decision maker to deny an individual's claim. American Gateways staff would have to spend significantly more time with each individual to ensure that each application is as complete as possible, disrupting American Gateways' current service model, increasing its workload, and ultimately reducing the number of *pro se* individuals it can serve.

III. The frivolous asylum warnings contained in the Proposed Form I-589 and accompanying instructions are inadequate.

As explained in American Gateways' July 15, 2020 comments to the Proposed Rule, the Departments' attempt to redefine what constitutes a "frivolous" application is an unjustifiable "anti-fraud" measure that will result in substantial harm to asylum seekers while doing nothing to decrease or deter actual fraud. Without providing any evidence or data showing widespread fraudulent intent among asylum seekers or mountains of frivolous claims, the Departments urge that expanding the definition of "frivolous" to encompass "claims that are patently without substance or merit" or "clearly foreclosed by applicable law" is necessary to "deter" and efficiently "root out" unmeritorious claims and thereby mitigate the administrative burdens on an overwhelmed asylum system. *See, e.g.*, 85 Fed. Reg. 36275-76. Deterring individuals from seeking humanitarian protection—a right enshrined in international law and the INA—is not a valid justification for implementing a rule that would result in the cursory denial of asylum claims, especially those brought by *pro se* applicants. *See* 8 U.S.C. § 1158(a); *see also R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 188-89 (D.D.C. 2015) (granting preliminary injunction against policy of detaining asylum seekers that was intended to send "a message of deterrence to other Central American individuals who may be considering immigration"). And, even if deterring unmeritorious claims were a valid justification—which it is not—the Departments' proposal to harshly punish asylum seekers for not being familiar with the technicalities of U.S. immigration law is a patently irrational and unfair way to achieve that goal.

If the Departments are permitted to expand the contours of "frivolous," they should at least be required to prominently include the new definition—not merely a cross-reference to the Code of Federal Regulations—in the Proposed Form I-589 and the Proposed Instructions. Although the definition will be practically useless to *pro se* applicants, it may still have some utility to the legal representatives (including pro bono attorneys who are not full-time immigration practitioners) of individuals who are fortunate enough to secure representation in connection with completing and submitting their I-589 applications.

IV. The Departments' estimated burden of the collection of information is inaccurate, particularly with respect to *pro se* asylum applicants.

The current estimated public reporting burden for the collection of information in Form I-589 is 12 hours per response, including the time for reviewing instructions, and completing and submitting the form. The Departments estimate that the Proposed Form I-589 would increase the public reporting burden by *150 percent* to 18 hours per response. *See* Proposed Instructions at 16. Aside from the increased burden itself being unnecessary and unreasonable, the estimated response time of 18 hours is wildly inaccurate. The questions included on the Proposed Form I-589 assume that those answering the questions possess an in-depth knowledge of asylum law that even a seasoned attorney who does not routinely practice immigration law could not acquire with 18 hours of diligent study. More importantly, the estimated hour burden per response fails to take into account that the average asylum seeker is a non-English speaker, has limited education, has no familiarity with U.S. immigration law, and has limited access to legal assistance in connection with completing and submitting Form I-589 (even if he is able to secure representation at a later stage of the proceedings). For the average *pro se* applicant, the reporting burden is arguably limitless and certainly greater than 18 hours, as individuals could conceivably spend days, weeks, or even months laboring to understand the questions in the Proposed Form I-589 and the accompanying instructions. Even still, many will find the proposed application impossible to complete.