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* Application for admission *pro hac vice*
pending.
** Application for admission *pro hac vice*
forthcoming.

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

IMMIGRATION EQUALITY, et al.,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF
HOMELAND SECURITY, et al.,

Defendants.

Case No. 4:20-cv-09258

**DECLARATION OF AARON C.
MORRIS, EXECUTIVE DIRECTOR
OF IMMIGRATION EQUALITY, IN
SUPPORT OF PLAINTIFFS’
MOTION FOR TEMPORARY
RESTRAINING ORDER,
PRELIMINARY INJUNCTION, AND
STAY UNDER 5. U.S.C. § 705**

1 I, Aaron C. Morris, upon my personal knowledge, hereby declare as follows:

2 1. I am the Executive Director of Immigration Equality, a registered 501(c)(3) non-
3 profit that is headquartered in Brooklyn, New York.

4 2. I submit this declaration in support of Plaintiffs' Motion for a Temporary
5 Restraining Order, Preliminary Injunction, or Stay to prevent the rule entitled *Procedures for*
6 *Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review*, 85 Fed. Reg.
7 80, 274 (Dec. 11, 2020), published by the United States Department of Justice's Executive Office
8 for Immigration Review and the United States Department of Homeland Security (the "Final
9 Rule"), from taking effect. Through its multitude of drastic regulatory changes, the Final Rule
10 seeks to severely curtail, if not eliminate, the ability of most asylum applicants to obtain asylum
11 or another form of relief from life-threatening persecution. As such, the Final Rule will irreparably
12 harm Immigration Equality and its clients.

13 3. I am an attorney who has been licensed to practice law in the State of New York
14 since 2006. I am also a member in good standing of the bars of the U.S. Courts of Appeals for the
15 First, Third, Fourth, and Ninth Circuits, and for the U.S. District Court for the Southern District of
16 New York. I graduated from American University's Washington College of Law in 2005. I am a
17 member of the American Immigration Lawyers Association and the LGBT Bar Association. For
18 several years, I served as the Secretary of the Special Committee on AIDS for the New York City
19 Bar Association, and was a member of the Association's LGBT Committee for two years. From
20 2005-2007, I was a staff attorney in the Office of Legal Affairs for the U.S. Court of Appeals for
21 the Second Circuit. I am the co-author of *The Gay Bar: The Effect of the One-Year Filing Deadline*
22 *on Lesbian, Gay, Bisexual, Transgender, and HIV-Positive Foreign Nationals Seeking Asylum or*
23 *Withholding of Removal*, 8 N.Y. City L. Rev. 233 (2005) (with Victoria Neilson).
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1 4. Prior to assuming my current position, I served as Staff Attorney, Senior Staff
2 Attorney, and then Legal Director of Immigration Equality. I have practiced immigration law for
3 over fifteen years and have represented or supervised the representation of many hundreds of
4 clients before the United States Citizenship and Immigration Services (“USCIS”) and Executive
5 Office for Immigration Review (“EOIR”).

6 5. As Executive Director of Immigration Equality, I manage all departments of the
7 organization, including the legal department where I oversee all services and programming. I am
8 in regular communication with Immigration Equality’s Legal Director and legal staff who provide
9 representation to lesbian, gay, bisexual, transgender, queer,¹ and HIV-positive immigrants
10 (together with LGBTQ, “LGBTQ/H”), including hundreds of asylum seekers each year.²

11 **Immigration Equality’s Mission and Activities**

12
13 6. Immigration Equality is a national organization whose mission is to promote
14 equality and justice for LGBTQ/H immigrants and families through direct legal services, policy
15 advocacy, and impact litigation. In more than 70 countries, it is either a crime or profoundly
16 dangerous to be LGBTQ. For more than 26 years, Immigration Equality has worked to secure
17 safety and freedom for LGBTQ/H individuals fleeing persecution, as well as to reunite LGBTQ
18 bi-national couples and families. In order to effectuate its mission, Immigration Equality runs a
19 pro bono asylum program, provides technical assistance to attorneys, maintains an informational
20 website, and fields questions from LGBTQ and HIV-positive individuals from around the world.
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23 ¹ There are many terms for the great diversity of how people articulate their sexual orientation or
24 gender identity, including, people who are gay, lesbian, bisexual, transgender, intersex, queer, and
25 gender non-binary. Rather than trying to list of all of the many different ways someone might
26 describe their own sexual orientation or gender identity, we will refer to all of these identities
27 together as “LGBTQ.”

28 ² Throughout this Declaration I frequently use the term “asylum seeker,” but the term should be
construed to encompass those seeking withholding of removal or CAT protection as well where
the Final Rule also affects those forms of protection.

1 Additionally, through education, outreach, and advocacy, Immigration Equality works to change
2 the laws that unfairly impact LGBTQ and HIV-positive immigrants. Immigration Equality
3 regularly represents and provides mentoring to pro bono attorneys representing asylum seekers.

4 7. Immigration Equality’s client population is uniquely vulnerable. They live under
5 the threat of deportation, poverty, and homelessness, and many live with trauma-related mental
6 health issues. Ninety-nine percent of our clients live at or below 250% of the federal poverty level
7 and approximately 44% are under the age of 30. Our clients reside throughout the United States
8 and come from all parts of the world with current clients primarily from the following countries:
9 Jamaica, Russia, Nigeria, Honduras, Venezuela, Mexico, El Salvador, Uganda, Guyana, and
10 Ecuador.
11

12 8. Legal services are the foundation of our programming, and since 1994 we have
13 provided advice and legal assistance to thousands of LGBTQ/H immigrants, binational couples,
14 and families. Immigration Equality currently has a nine-person legal team consisting of one part-
15 time and three full-time staff attorneys, three paralegals, one Board of Immigration Appeals
16 (“BIA”) accredited representative, and a Legal Director. This team, a network of pro bono
17 attorneys, and I, provide the services set forth below.
18

19 *Immigration Equality’s Direct Representation Services*

20 9. Immigration Equality’s in-house legal team and its network of pro bono attorneys
21 have assisted, advised, and represented thousands of LGBTQ/H immigrants with matters before
22 the USCIS, EOIR, U.S. Immigration and Customs Enforcement (“ICE”), the BIA, and federal
23 courts. Immigration Equality’s legal services focus primarily on LGBTQ/H asylum, withholding
24 of removal, and Convention Against Torture (“CAT”) claims, and related applications and benefits,
25 such as work authorization, adjustment of status, and naturalization applications. Through its
26 programming, Immigration Equality has helped over 1,200 LGBTQ/H asylum seekers win asylum,
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1 withholding of removal, or relief under the CAT. Immigration Equality clients have maintained a
2 remarkable success rate, prevailing on adjudicated cases approximately 99% of the time.

3 10. Over the last twelve months, Immigration Equality has provided representation to
4 a total of 793 individuals across 28 states. As of November 23, 2020, Immigration Equality had
5 639 open matters comprised of twenty-one in-house cases being handled entirely by Immigration
6 Equality staff (the “In-house Program”) and 618 cases placed with volunteer attorneys (the “Pro
7 Bono Program”). Of these matters, around 520 are asylum, withholding of removal, and/or CAT
8 cases. And of those matters, approximately 420 are affirmative proceedings before USCIS.
9 Approximately 100 cases are defensive proceedings before EOIR. In addition, Immigration
10 Equality has accepted an additional 31 asylum seekers into its Pro Bono Program and is in the
11 process of placing these cases with pro bono counsel. Around fifteen clients in the Pro Bono
12 Program have not yet filed their I-589, Application for Asylum and Withholding of Removal
13 (“Asylum Application”).
14

15 11. Immigration Equality’s Pro Bono Program is comprised of a network of volunteer
16 attorneys from over 140 law firms in more than 150 offices nationwide. In order to participate in
17 the Pro Bono Program, volunteer attorneys generally attend a live, virtual, or pre-recorded asylum
18 training given by Immigration Equality staff. Once an attorney has been onboarded and has
19 selected a pro bono case to take on, an Immigration Equality staff attorney conducts a detailed
20 strategy call with the attorney to discuss the law and specifics of the particular case. Immigration
21 Equality staff then provide in-depth mentorship to the pro bono attorney throughout the pendency
22 of the case by answering questions, providing resources, and reviewing materials and submissions
23 to USCIS and the immigration courts. On occasion, Immigration Equality staff mentor attorneys
24 handling cases before the BIA or circuit courts.
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1 12. In addition, Immigration Equality has assembled a library of materials that it
2 provides to pro bono attorneys in order to facilitate its Pro Bono Program. These materials include
3 presentations on the state of the law and the asylum process, sample affidavits and briefs, template
4 motions, and other sample and template submissions for both affirmative and defensive
5 proceedings. For significant changes in policy or the law, Immigration Equality sometimes issues
6 updates and practice advisories to ensure that pro bono partners and other stakeholders have access
7 to up-to-date information. For example, Immigration Equality recently issued a practice advisory
8 on a regulation that changes eligibility criteria for work authorizations for asylum seekers.³
9

10 13. To participate in Immigration Equality's Pro Bono Program, clients are first
11 screened by Immigration Equality's paralegal team to determine potential eligibility for asylum or
12 other humanitarian relief, as well as financial eligibility for Immigration Equality's services. All
13 of Immigration Equality's services are offered free of charge. With some limited exceptions,
14 Immigration Equality only represents individuals who make less than 250% of the federal poverty
15 guidelines and who identify as LGBTQ/H. If eligible for services, potential clients then meet with
16 an Immigration Equality staff member for an intake interview. Once accepted into the Pro Bono
17 Program, staff meet with clients to explain the asylum process and client responsibilities. At the
18 conclusion of a client's matter, whether they participated in the Pro Bono Program or In-House
19 Program, Immigration Equality staff meet with the individual to provide information on the
20 benefits conferred pursuant to their relief. Staff members are trained on each stage of the process,
21 and various written materials and scripts are used to ensure consistency and quality.
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26 ³ Immigration Equality, *New Rules Restrict Access to Work Permits for Asylum Seekers* (July 14,
27 2020), available at [https://immigrationequality.org/wp-content/uploads/2020/07/NEW-RULES-
28 RESTRICT-ACCESS-TO-WORK-PERMITS-FOR-ASYLUM-SEEKERS-final.pdf](https://immigrationequality.org/wp-content/uploads/2020/07/NEW-RULES-RESTRICT-ACCESS-TO-WORK-PERMITS-FOR-ASYLUM-SEEKERS-final.pdf).

Immigration Equality's Detention Program

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2 14. Immigration Equality runs a detention program which provides legal services and
3 advocacy to LGBTQ/H immigrants in detention facilities (the "Detention Program"). Through this
4 program, Immigration Equality provides pro se advice and materials to asylum seekers on their
5 merits applications and hearings; prepares individuals for credible and reasonable fear interviews;
6 represents detained individuals in parole applications, on bond motions, and in custody
7 redetermination interviews; assists asylum seekers with a variety of pro se filings, such as Asylum
8 Applications; and provides general advocacy to improve conditions of confinement, such as
9 reporting on unlawful and dangerous conditions.
10

Immigration Equality's Training, Technical Assistance, and Written Resources

11
12 15. Immigration Equality offers technical assistance to other attorneys representing
13 LGBTQ/H asylum seekers through written materials, trainings, and consultation. For example,
14 Immigration Equality has written a comprehensive, 75-page manual on the preparation of asylum
15 claims related to sexual orientation, gender identity, and HIV-status, and publishes this manual
16 online (the "Asylum Manual").⁴ The Asylum Manual provides a detailed overview of the history
17 of LGBTQ/H asylum, the current state of the law, and a step-by-step guide to the asylum process.
18 In addition, Immigration Equality provides additional content on its website about asylum and
19 other related LGBTQ/H immigration topics, including chapters on asylum eligibility criteria, the
20 one-year filing deadline, criminal bars to asylum, persecution, the credible and reasonable fear
21 process, relevant case law, alternative forms of relief (such as withholding of removal and relief
22 under the CAT), and the application process.⁵ Immigration Equality's Asylum Manual and legal
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26 ⁴ Immigration Equality, *Asylum Manual*, <https://immigrationequality.org/asylum/asylum-manual/>
(last visited Dec. 10, 2020).

27 ⁵ Immigration Equality, *Legal Help*, <https://immigrationequality.org/legal/legal-help/> (last visited
28 Dec. 10, 2020).

1 content are widely used resources. For instance, in the two-year period from November 30, 2018
2 to November 30, 2020, the substantive legal content on Immigration Equality’s website was
3 viewed 814,018 times.

4 16. Immigration Equality has developed trainings for other non-profits, legal service
5 providers, bar associations, and other groups on LGBTQ/H asylum issues. In addition,
6 Immigration Equality has provided training on LGBTQ/H asylum issues to asylum officers within
7 USCIS and to immigration judges in New York. All of these endeavors involve creation of training
8 materials and preparation on the part of Immigration Equality staff.

9
10 *Immigration Equality’s Pro Se Programming*

11 17. Immigration Equality cannot fully represent all eligible LGBTQ/H immigrants who
12 request our assistance through our In-House Program and Pro Bono Program. In order to serve as
13 many LGBTQ/H refugees as possible, Immigration Equality has developed pro se materials and
14 limited representation programming through which Immigration Equality provides limited
15 assistance to otherwise unrepresented applicants. For example, Immigration Equality assists
16 asylum applicants in filing barebones Asylum Applications, provides LGBTQ/H asylum seekers
17 with general “Know Your Rights Materials,” and guides pro se asylum seekers on how to file
18 certain documents, such as work authorization applications, motions to change venue, and address
19 change documents. In connection with these efforts, Immigration Equality has developed written
20 materials and guides that are specifically targeted to pro se applicants. Some of these documents
21 are translated into multiple languages.
22

23
24 *Web and Telephone Inquiries*

25 18. Immigration Equality answers thousands of phone calls and online inquiries
26 annually regarding LGBTQ and HIV-related immigration issues. More specifically, individuals
27 seeking immigration advice and assistance can submit questions by phone and through an online
28

1 portal. These inquiries are answered by Immigration Equality staff and volunteers.⁶ Immigration
2 Equality trains staff and volunteers on the law and asylum process and has developed a library of
3 template responses that provide individuals with basic information on LGBTQ/H immigration and,
4 in particular, asylum, withholding of removal, and CAT claims.

5 19. Immigration Equality has a toll-free hotline for exclusive use by detained people
6 (the “Detention Hotline”). During specified times, detained immigrants can call our Detention
7 Hotline and speak with a paralegal or attorney regarding their immigration case. If the caller
8 qualifies for our services or needs assistance with a parole or bond application, our team provides
9 basic information and then completes an “inquiry form” where Immigration Equality staff collects
10 biographical information as well as specific information on the potential client’s asylum or other
11 claim for relief. Non-detained individuals seeking help or otherwise interested in our services can
12 call our main phone line during designated hours for inquiries. Immigration Equality has
13 responded to over 2,352 web and telephone inquiries in the past two years and has received more
14 than 5,400 calls on the Detention Hotline.
15

16
17 *Immigration Equality’s Country Conditions Library*

18 20. In order to prevail on their claims, asylum seekers must submit evidence to establish
19 their well-founded fear of persecution in their country of origin. This evidence often takes the form
20 of country conditions materials containing reports from national and international human rights
21 and governmental organizations, and news articles describing the types of harm the applicant
22 suffered in the past or fears in the future. Immigration Equality has used its expertise to develop a
23 library of country conditions materials that it makes available to attorneys representing LGBTQ/H
24 individuals and asylum seekers who are proceeding pro se. Immigration Equality has recently
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27 ⁶ Immigration Equality, *Contact our legal team*, <https://immigrationequality.org/contact-our-legal-team/> (last visited Dec. 10, 2020).
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1 made over fifty country conditions packets available on its website and dozens more are available
2 upon request.⁷ Since creating its Country Conditions webpage several months ago, Immigration
3 Equality has already received nearly 500 page views. In addition, Immigration Equality routinely
4 sends these packets to LGBTQ/H individuals in detention and to outside attorneys. We do not
5 precisely track this, but in the past two years, Immigration Equality sent at least 100 country
6 conditions packets. Each country conditions packet consists of an index followed by print outs of
7 the cited articles and reports. These country conditions packets are often voluminous. For example,
8 Immigration Equality’s country conditions packet on the persecution of LGBTQ/H people in
9 Russia is 836 pages.⁸

11 *Immigration Equality’s Policy Advocacy*

12 21. Immigration Equality, along with the Immigration Equality Action Fund, which is
13 an affiliated 501(c)(4) organization, works in coalitions to advance bills and administrative policies
14 that serve our clients, and educate policymakers on the particular dangers that LGBTQ/H
15 immigrants face.

17 *Immigration Equality’s Impact Litigation*

18 22. Through impact litigation, Immigration Equality challenges unlawful and
19 discriminatory policies and laws affecting LGBTQ/H immigrants. For example, we have sued the
20 U.S. Department of State on behalf of four same-sex couples—including two bi-national
21 couples—whose children were denied U.S. citizenship from birth. In the past, we also filed a
22 district court challenge to the Defense of Marriage Act and filed mandamus actions to compel the
23 government to interview asylum applicants who had waited years for a chance to have their
24

25 ⁷ Immigration Equality, *Country Conditions*, <https://immigrationequality.org/legal/legal-help/resources/country-conditions-index/> (last visited Dec. 10, 2020).

26 ⁸ Immigration Equality, *Russia Country Conditions Index*, <https://immigrationequality.org/wp-content/uploads/2020/06/Russia-2019-LGBT-Index-and-Exhibits.pdf> (last visited Dec. 10, 2020).

1 applications adjudicated. Immigration Equality also routinely files amicus briefs with the BIA and
2 Circuit Courts on behalf of LGBTQ/H asylum seekers.

3 **The Final Rule’s Impact on Immigration Equality’s Clients**

4 23. As set forth in detail below, the Final Rule is a vast departure from prior precedent
5 and will cause irreparable harm to Immigration Equality and the LGBTQ/H asylum seekers we
6 serve. The Final Rule’s purpose appears to be to force the denial of almost all asylum cases in the
7 United States, including those for LGBTQ/H people. The accounts throughout this affidavit
8 concern real individuals who have cases currently pending or who have cases already granted relief,
9 but who would likely be denied relief under the Final Rule. For example:
10

11 a. Mia⁹ is an HIV-positive, transgender woman from Jamaica. At 16, Mia was gang raped.

12 When Mia told their family what had happened, Mia was accused of “being gay” as a
13 result of the rape and thrown out of the family home. Without a place to live, Mia was
14 forced to live on the street in a storm drain with a group of homeless LGBTQ youth
15 where the police and homophobic community members routinely harassed, threatened,
16 and beat them. Mia witnessed one of their friends being brutally stabbed to death and
17 three others being shot. Mia discovered they were HIV-positive when they were 18
18 years old. On one occasion when they went to seek treatment at a clinic, a group of men
19 who shouted homophobic slurs at them viciously attacked Mia. The men seriously
20 injured Mia, who then needed stitches on their face and leg. Four of their fingers were
21 left permanently disfigured. Mia eventually fled Jamaica and after an arduous journey
22 arrived at the United States/Mexico border. At the border, Mia was given a number and
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26 ⁹ Any Immigration Equality clients named in this declaration and in the Complaint filed in the
27 above-captioned action on December 21, 2020 (the “Complaint”) are referred to by pseudonyms to
28 protect their safety and preserve confidentiality. Minor details have also been changed to preserve
confidentiality.

1 forced to wait in Mexico for over three months to request asylum. In Mexico, Mia was
2 homeless for some time and suffered further persecution (including being attacked and
3 robbed) on account of their gender identity. Mia eventually made it to the United States
4 and was granted asylum. Under the Final Rule, Mia's application would likely be
5 denied under a number of provisions, such because they did not apply for asylum in
6 Mexico, even though they would not be safe there.

7
8 b. Nakiesha, an engineer from Guinea, was 33 years old when she gave birth to her
9 firstborn child, an intersex baby. She believed her child was a son, and tried to raise
10 him away from her extended family because she knew they would not accept him. One
11 day, one of Nakiesha's female relatives changed the baby's diaper and discovered his
12 intersex identity. News spread quickly, and Nakiesha's family declared the baby to be
13 satanic and demanded that he be killed. They also informed Nakiesha that they would
14 forcibly abort any new pregnancies she might have. When Nakiesha refused to murder
15 her own son, her family deemed her to be satanic too and demanded her death as well.
16 She fled to the United States where she applied for, and was granted, asylum.
17 Nakiesha's application would likely be denied under the Final Rule because the
18 persecution she suffered would be viewed as interpersonal animus in which the alleged
19 persecutor did not target other members of her particular social group. Under the Final
20 Rule, this would be generally insufficient to qualify for relief.

21
22
23 c. Ariana, a 23-year old transgender asylum seeker from El Salvador, entered the United
24 States without inspection after traveling through Mexico and Guatemala. While in El
25 Salvador, police harassed and repeatedly detained her on false charges as a means of
26 terrorizing her because of her gender identity. On one such occasion, the police falsely
27 accused her of stealing money from a gas station. The police briefly detained her at a
28

1 police station where they stripped her naked and placed her in a cell with approximately
2 100 men. The men detained with her then gang raped her as the police looked on and
3 laughed. At no time did any of the officers intervene. Ariana was granted asylum in the
4 United States. Ariana’s application would likely be denied under multiple provisions
5 of the Final Rule, including several adverse discretionary factors because she entered
6 without inspection, did not seek asylum in any of the countries she transited through,
7 and transited through more than one country en route to the United States. In addition,
8 if the Final Rule is interpreted to bar gender identity claims under the new Nexus
9 provision, which instructs that claims based on “gender” will generally not be sufficient
10 to establish nexus, her claim could be denied on that ground as well.

11
12 d. Nasir is a gay man from Mauritania who grew up knowing he was different. One day,
13 his mother caught him alone with another man and told his uncles that he was gay. His
14 uncles came to the house immediately, beat Nasir, and threatened to call the police to
15 handle “faggots like him.” Soon after, his family sent him to a madrassa (Islamic
16 school) in a remote part of the country, to live under an Imam’s guidance and “re-learn
17 the teachings of Islam.” If he didn’t cooperate, his uncles said they would call the
18 police on him. Nasir knew he had no choice. In Mauritania, same sex relationships
19 between men are punishable by stoning and Nasir knew that gay men were often “sent
20 away” to be disappeared. Having little choice, he decided to go to the madrassa. He
21 lived as a servant to the Imam and was beaten and humiliated in front of the other
22 students regularly. Luckily, one day, he escaped and hitchhiked back to the city. When
23 his uncles found out he was back, they kidnapped him and beat him severely. After this
24 incident, Nasir knew he had to leave Mauritania or be killed, so he fled to the United
25 States where he was granted asylum. Nasir’s application would likely be denied under
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28

1 the Final Rule because the persecution he suffered from family and community
2 members would be viewed as interpersonal animus or retribution which is generally
3 insufficient to qualify for relief. Further, the fact that same sex relationships are
4 punishable by stoning would not of itself constitute persecution unless Nasir could
5 produce credible evidence that those laws would be applied to him personally.

6 24. All of the individuals above would likely be denied asylum protection under one or
7 more of the provisions below.

8
9 *One-Year Filing Deadline*

10 25. An asylum seeker must generally apply for asylum within one year of entry in the
11 United States, but this deadline is waived where “the alien demonstrates ... either the existence of
12 changed circumstances which materially affect the applicant’s eligibility for asylum or
13 extraordinary circumstances relating to the delay in filing an application.” 8 U.S.C. §§
14 1158(a)(2)(B), (D). The Final Rule essentially eliminates the exceptions to the one-year filing
15 deadline and mandates a discretionary denial of asylum to applicants who have “[a]ccrued more
16 than one year of unlawful presence in the United States prior to filing an application for asylum.”
17 8 C.F.R. §§ 208.13(d)(2)(i)(D); 1208.13(d)(2)(i)(D). This provision of the Final Rule will have
18 dire consequences for Immigration Equality and its clients. Many of Immigration Equality’s clients
19 file applications beyond the one-year filing deadline and rely on an exception in order to assert
20 their claim. Among Immigration Equality’s current clients, at least 42 did not file within one-year
21 of arriving in the U.S. and are filing under an exception to the deadline.

22
23
24 26. Deadline exceptions are particularly important to LGBTQ/H asylum seekers, many
25 of whom struggle to find acceptance in their identity for years after arriving in the United States.
26 Many are terrified of coming out or have fled violence because they were outed. Many others live
27 with severe psychological trauma manifesting as post-traumatic stress disorder, anxiety, or severe
28

1 depression. An applicant who enters the United States identifying as cisgender¹⁰ may begin to
2 transition after the one-year deadline and then develop a well-founded fear of persecution on the
3 basis of their transgender identity. The process of transitioning can take years, and before the Final
4 Rule, Immigration Equality clients often successfully argued that such transitioning constituted
5 “changed circumstances” justifying an exception to the one-year bar. The same is true for refugees
6 who discover they are HIV-positive after being in the United States for more than one year. In
7 short, the Final Rule will result in discretionary denials for many LGBTQ/H people because they
8 did not seek asylum on the basis of an identity that they could not even express during their first
9 year in the United States.
10

11 27. This provision would have a severe impact on LGBTQ/H refugees, like the
12 Immigration Equality clients below, who rely upon a changed or extraordinary circumstances
13 exception to the one-year filing deadline:

- 14 a. Orlando is a genderqueer person from Honduras who came to the United States when
15 they were around 8 years old. In Honduras, and as a child, Orlando was raped on
16 account of their perceived sexual orientation. On their way to the United States,
17 Orlando was raped again by someone in Mexico. In the United States, Orlando lived in
18 a very homophobic household. Their stepfather regularly beat them because of their
19 sexual orientation. Because of the constant abuse, Orlando lived with severe mental
20 health issues. Orlando was finally able to leave their house when they started going to
21 college. In college, Orlando began receiving therapy to manage their mental health
22 conditions and was eventually able to come to terms with their LGBTQ identity and
23
24

26 ¹⁰ Cisgender is a term for people whose gender identity matches their sex assigned at birth. For
27 example, someone who identifies as a woman and was assigned female at birth is a cisgender
28 woman.

1 ultimately file for asylum. Under the Final Rule, because Orlando entered when they
2 were 8 years old, they would be denied asylum as a matter of discretion despite the fact
3 that they were a minor when they entered the United States, and despite the fact that
4 Orlando’s mental health conditions prevented them from filing an application for
5 asylum until shortly after they turned eighteen.

6 b. Anita is a transgender woman from Syria who came to the United States when she was
7 a child. In the United States, growing up in a very traditional family, Anita was not
8 allowed to explore her gender identity. Stereotypical views and roles of gender were
9 imposed upon her. She suppressed her gender identity and as a result lived with
10 depression. When Anita was in her mid-thirties, she finally felt free to explore her
11 gender identity and started to transition. Under the Final Rule, Anita would not be able
12 to apply for asylum despite the fact that she had only very recently discovered her
13 gender identity and was finally able to express it.

14
15
16 *The Final Rule’s Exclusion of Gender-Based Claims Will Severely Impact LGBTQ/H
Asylum Seekers*

17 28. The Final Rule also bars asylum claims based on “gender.” 8 C.F.R §§ 208.1(f)(8),
18 1208.1(f)(8). While the Final Rule does not deny that LGBTQ people constitute protected a
19 particular social group, there is a real risk that adjudicators will misconstrue the gender bar to
20 preclude gender identity and potentially even sexual orientation claims.

21
22 29. Immigration Equality with its pro bono partners has represented hundreds of
23 transgender asylum seekers. These individuals have won their cases nearly 99% of the time. This
24 is because transgender people who are attacked because of their gender identity meet the definition
25 of a refugee and qualified for asylum protection. Thus, if adjudicators wrongfully interpret this
26 provision to bar gender identity asylum claims, it would result in the return of transgender people,
27
28

1 like the clients below and referenced throughout this declaration, to countries where their lives are
2 in mortal danger:

3 a. Alexandra, a trans woman from Mexico, was kidnapped and repeatedly raped and
4 tortured by gang members because of her gender identity after they spotted her wearing
5 women’s clothing at a fundraiser she was organizing for children with leukemia. The
6 gang members abused her so severely that she had to undergo two rectal surgeries to
7 repair her injuries.
8

9 b. Anahita is a transgender woman from Honduras. In 2008, Anahita was walking home
10 when a number of police officers in plain clothes approached her. They asked her where
11 she was going. The police officers took her to a remote area and raped her. They then
12 put a gun to her head and told her that if she ever told anyone about the rape, they would
13 kill her and her family.
14

15 30. Ninety-eight percent of Immigration Equality’s current asylum clients identify as
16 LGBTQ, and 59 clients specifically identify as transgender or non-binary. Under the Final Rule,
17 all of these clients could potentially be denied asylum relief for presenting gender-based claims
18 depending on how the term “gender” is interpreted by adjudicators. Notably, despite our
19 comments on the Notice of Proposed Rulemaking directly asking for clarification around this point,
20 the government failed to address this issue in the Final Rule or its Preamble.
21

22 *The Final Rule’s Limitation on Consideration of Claims Based on Personal Animus or
Retribution Will Harm LGBTQ/H Applicants*

23 31. The Final Rule bars asylum or withholding of removal for persecution based on
24 “personal animus or retribution,” 8 C.F.R. §§ 208.1(f)(1), 1208(f)(1). Significantly, the Final Rule
25 does not provide guidance on distinguishing “personal animus” from persecution on the basis of a
26 protected characteristic. Similarly, the Final Rule would also exclude “interpersonal animus in
27 which the alleged persecutor has not targeted, or manifested an animus against, other members of
28

1 an alleged particular social group in addition to the member who has raised the claim at issue.” 8
2 C.F.R §§ 208.1(f)(1)(ii), 1208(f)(1)(ii) (proposed).

3 32. The persecution of LGBTQ/H people is frequently acutely personal and regularly
4 committed by private actors close to the applicant. Sometimes the persecutor actually believes that
5 the persecution is to help the LGBTQ refugee. For instance, sometimes family members use
6 conversion therapy, beatings, or corrective rape in a perverse effort “to cure” the applicant from
7 being LGBTQ. Sometimes, the applicant may be the first LGBTQ individual a persecutor has met.
8 If so, that family member may never have manifested animus against other LGBTQ individuals.
9 The Final Rule creates the perverse result in which a persecutor targeting an LGBTQ individual
10 on account of that individual's sexual orientation or gender identity is not enough on its own to
11 establish an asylum claim. As a practical matter, it would be impossible for a survivor of
12 persecution to know all of the actions of their persecutor. It is also unrealistic to expect someone
13 in danger of persecution to prove that their attackers persecute similarly situated people before
14 fleeing for safety.
15

16
17 33. This provision of the Final Rule will likely foreclose many Immigration Equality
18 clients who have endured horrific persecution because of their LGBTQ/H status from obtaining
19 asylum despite their meritorious claims. For example, the following Immigration Equality clients
20 would likely no longer qualify for relief because they do not have evidence that the people who
21 persecuted them also persecuted others:

- 22
23 a. Mikhail, a gay man from Russia, used an online dating app to meet another man for a
24 date. Despite taking precautions to ensure the date was legitimate, several men
25 kidnapped Mikhail, and took him back to his own apartment where they stripped him
26 naked, beat him, and tied him to a radiator. While he was restrained, the perpetrators
27 continued to physically assault him while they ransacked his apartment and robbed him.
28

1 Then, they forced him to transfer money to them via online banking. While Mikhail
2 was still naked, bleeding from the physical assault, and tied to his radiator, the
3 perpetrators took video footage of him where they forced him to state his full name,
4 street address, and admit that he was “a faggot.” They took screenshots of his contacts
5 and threatened to send the video to all of his contacts, employer, and post it online if
6 he went to the police. When Mikhail later went to the hospital, and tried to report the
7 incident to the police, the police mocked him. They also told him that it was his fault
8 that he was assaulted, and said that Russia would be better without people like him.
9

10 b. Nakiesha, an engineer from Guinea, was 33 years old when she gave birth to her
11 firstborn child, an intersex baby. As discussed above, her family declared the baby to
12 be satanic and demanded that they both be killed. She fled to the United States where
13 she applied for, and was granted, asylum.
14

15 c. Tariq is a transgender man from Egypt. In his twenties, he fell in love with a young
16 woman named Najila, and the two developed a romantic and intimate relationship that
17 lasted several years. Then, Najila’s family discovered that the two were more than just
18 friends, and beat Najila severely. Next, her male relatives locked Najila into the
19 basement of their home. Tariq tried several times to help free her, including by calling
20 the police, but the police told him “this is a family matter.” Eventually, Tariq fled for
21 his own life to the United States, where he was granted asylum. Months later, Najila’s
22 mother snuck a phone into the basement so her daughter could have some
23 communication with the outside world. Tariq and Najila reconnected and said goodbye.
24 Because Najila is not allowed out of her home without a male escort at all times, she
25 has never been able to leave Egypt.
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1 34. Nearly all of our current asylum clients would be impacted by these provisions of
2 the Final Rule. We do not specifically track whether clients’ claims are based on personal animus,
3 but most, if not all involve some sort of private actor harm that the government is either unable or
4 unwilling to control.

5 *The Final Rule’s Limitation on Consideration of “Particular Social Group” Claims on*
6 *Appeal or in Motions to Reopen or Reconsider Will Harm LGBTQ/H Applicants*

7 35. Under the Final Rule applicants are barred from seeking asylum based on
8 membership in a particular social group (“PSG”) if they did not immediately raise and adequately
9 define the boundaries of that PSG in their initial application. This unprecedented bar would require
10 applicants to immediately and clearly articulate every cognizable PSG before the Immigration
11 Judge or forever lose the opportunity to present it, even on a motion to reopen where an applicant
12 relied on ineffective counsel. The rule does not even allow an exception for applicants who failed
13 to disclose PSG claims because they were relying on *notarios* and other disreputable agents who
14 hold themselves out as attorneys when they are not.

15 36. This requirement poses particular barriers to LGBTQ/H asylum seekers. For those
16 applicants, the Final Rule essentially gives applicants a single, fleeting opportunity to declare
17 themselves as members of a persecuted PSG, which is a nuanced legal issue not easily understood
18 by non-lawyers. This provision is fundamentally at odds with how LGBTQ/H identity works for
19 many asylum seekers. Coming to terms with LGBTQ/H identity is a process: First, many refugees
20 come from repressive countries with governments and non-governmental institutions that ostracize
21 and harm LGBTQ/H people. In these countries, even talking about LGBTQ/H identity can be life
22 threatening. Because of this, LGBTQ/H people may initially suppress their own identity and
23 internalize anti-LGBTQ/H phobia. Often, it can take years to break through the shame and self-
24 loathing that severe stigma causes.
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1 37. The effect of this stigma is that some individuals do not initially have the ability to
2 express their LGBTQ/H status as a particular social group. Often, the asylum process is the first-
3 time applicants ever discuss their experiences. And even then, such applicants often are only able
4 to do so after spending a substantial amount of time in the United States, where they have had a
5 much more positive and supportive experience.

6 38. Furthermore, understanding one’s sexual orientation or gender identity is a process
7 that often takes place over a period of time. For example, a person assigned female at birth may
8 first interpret their masculine attributes as an indication that they are lesbian or bisexual, and may
9 only later come to understand that they are a transgender man. This does not mean that a person’s
10 identity is mutable—rather, it shows how unrealistic it can be for many people with an evolving
11 identity to label themselves in a way that places them in the legal construct of a PSG at the moment
12 they arrive in the United States.

13 39. In addition, although the distinction between sexual orientation and gender identity
14 is generally understood in the United States, many countries and cultures do not utilize the same
15 vocabulary or cultural constructs to recognize this distinction. For example, some transgender
16 clients may identify themselves as gay because the vocabulary and cultural norms of their countries
17 may not rigidly distinguish between gay and transgender identities. As such, some transgender
18 asylum seekers may need some time to learn the terminology necessary to accurately articulate
19 their identity to an immigration judge. Given this, the Final Rule would unfairly preclude relief for
20 many people who could not immediately articulate a PSG that accurately encompasses their
21 identity.
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25 40. Further, many LGBTQ/H refugees fleeing hostile countries may not feel
26 comfortable immediately disclosing their status to authority figures. Disclosing one’s LGBTQ/H
27 status may be fraught with denial and shame, particularly in a climate of social stigma and violence.
28

1 In a hostile country, every single disclosure to an additional person—whether a family member, a
2 doctor, a police officer, or an immigration official—poses the real possibility of further violence.
3 Often, authority figures are themselves agents of persecution against others based on sexual
4 orientation or gender identity. Given the trauma and shame sometimes associated with persecution
5 on account of sexual orientation or gender identity, many refugees are unable or unwilling to
6 immediately reveal their LGBTQ/H status. For example:

- 7
- 8 a. Immigration Equality client, Isis, is from Honduras. She always knew that she was a
9 lesbian, however, due to the persecution she suffered at the hands of her family and
10 community members because of her sexual orientation, she was deeply closeted when
11 she came to the United States. She also suffered from Post-Traumatic Stress Disorder
12 because of the persecution she endured. In Honduras, Isis was well aware that
13 LGBTQ/H people were persecuted by the police. Thus, when she arrived in the United
14 States, she was terrified to let immigration officials know about her sexual orientation.
15 This Final Rule would penalize traumatized refugees, like Isis, who are unable to
16 immediately disclose their sexual orientation for fear of abuse.
- 17
- 18 b. Henry is an HIV-positive man from Ghana. When he was in his late teens, his older
19 brother developed terminal symptoms related to AIDS. It was readily apparent that his
20 brother was very ill because he was emaciated and had developed skin lesions. Henry’s
21 family felt shame and anger at the stigma their household experienced because of his
22 older brother’s illness. One day, Henry went to his brother’s bedroom to check on him
23 and found that his family had poisoned him to death. It was the same poison they used
24 on feral dogs. They then buried his brother that same day with no funeral, and no one
25 discussed the death. When Henry discovered that he was also HIV-positive, he fled to
26 the United States. He lived here for many years before he could come to terms with his
27
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1 HIV status. Only after extensive therapy regarding trauma and self-acceptance was he
2 able to disclose his HIV status to an immigration official.

3 41. Immigration Equality has also heard from LGBTQ/H asylum seekers who were
4 never informed by their attorneys that they could seek asylum on the basis of their gender identity,
5 sexual orientation, or HIV status. Even worse, Immigration Equality recently assisted an asylum
6 seeker who was specifically advised by an attorney *not* to claim asylum based on their LGBTQ/H
7 identity even though they had a strong claim. The Final Rule would likely foreclose these refugees
8 from obtaining relief, even where they were wrongly advised by counsel or those pretending to be
9 counsel unless the applicant can establish that the attorneys conduct was egregious and not a
10 strategic choice.
11

12 *The Final Rule's Pretermission of Claims Will Harm LGBTQ/H Asylum Seekers*

13 42. The Final Rule requires immigration courts to irrevocably “pretermite and deny” all
14 requests for relief from deportation if the refugee fails to establish a “prima facie claim for relief”
15 in the initial application.
16

17 43. Pretermission will affect LGBTQ/H clients in particular. As discussed above,
18 LGBTQ/H individuals fleeing persecution may not (1) immediately identify as LGBTQ/H, (2) feel
19 safe disclosing that they are LGBTQ/H, or (3) understand that their LGBTQ/H status provides a
20 claim for asylum. Indeed, it is often only after a thorough examination with competent legal
21 counsel that many LGBTQ/H refugees fleeing persecution understand that their LGBTQ/H-related
22 persecution can form a claim for asylum.
23

24 44. Most of Immigration Equality’s clients are not well versed in U.S. asylum law, and
25 most are English language learners. Clients sometimes present us with Asylum Applications that
26 they have submitted or drafted that do not make out a prima facie claim even though they have
27 strong, meritorious asylum claims. We are able to work with these individuals to revise or amend
28

1 their applications so that they can obtain relief. Under the Final Rule, these deserving claims would
2 likely be pretermitted before Immigration Equality could assist.

3 *The Final Rule Redefinition of “Firm Resettlement” Will Harm LGBTQ/H Clients*

4 45. The Final Rule radically expands the statutory firm resettlement bar. 8 U.S.C.
5 1158(b)(2)(A)(vi). The Final Rule would find the circumstances below to be categorical bars to
6 asylum eligibility, severely harming Immigration Equality’s clients:

- 7
- 8 a. If an applicant could have resided in a country of transit, even if there is no pathway to
9 permanent status, and even if he or she did not actually apply for any status at all.
10 Notably, there is no exception if the country is unsafe for LGBTQ/H people. This
11 would lead to an unfair result for Immigration Equality clients. For example, a gay
12 Saudi Arabian could be deemed firmly resettled if he had a layover in Kuwait, even
13 though it is unsafe for LGBTQ/H people there. Similarly, a large number of LGBTQ/H
14 people flee persecution in Central and South American countries. These asylum seekers
15 travel north to the United States-Mexican border in order to seek protection in the
16 United States. On their way to the United States, LGBTQ/H asylum seekers pass
17 through countries such as Guatemala, Honduras, and Mexico, all of which have been
18 widely documented as fundamentally unsafe for LGBTQ/H people. Thus, it would be
19 dangerous to remain in those countries, and potentially even more dangerous than their
20 country of origin, yet the Final Rule would require them to do so.
- 21
- 22 b. The applicant physically resided voluntarily, and without continuing to suffer
23 persecution, in another country for a year or more, whether or not the country offered
24 any immigration status (permanent or otherwise). There is no exception to this rule
25 based on the asylum seeker’s inability to leave the third country being the case for their
26 extended stay, nor based on a fear of remaining in the third country. Many LGBTQ/H
27
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1 asylum seekers in unsafe nations hide their identities in order to avoid persecution, but
2 that should never be a requirement to seeking protection in the United States. This too
3 would lead to an unfair result for Immigration Equality clients. For example, if a
4 Colombian transgender woman lived closeted in Venezuela for 18 months under
5 constant fear of being outed before traveling to the United States, she would be barred
6 from asylum despite being at a high-risk of persecution in both Colombia and
7 Venezuela.

8
9 46. What's more, if the government or adjudicator raises the issue of firm resettlement
10 – without having to present any proof that firm resettlement is possible – the burden of proof then
11 falls to the applicant to demonstrate that they could not obtain some immigration status in the third
12 country. This would require LGBTQ/H asylum seekers to conduct research on the law in countries
13 about which they may be completely ignorant and with which they do not share a common
14 language. This will likely be an insurmountable burden, especially on unrepresented and detained
15 LGBTQ/H people resulting in wrongful asylum denials. For instance, Immigration Equality has
16 assisted Russian LGBTQ asylum seekers who traveled to Mexico to apply for asylum at the United
17 States-Mexico border. These asylum seekers typically speak little English and no Spanish. As a
18 result, it would be impossible for them to research law and conditions in Mexico, in Spanish, in
19 order for them later to establish in immigration court that they did not firmly resettle in Mexico.

20
21 *The Final Rule Restricts Asylum for Refugees Who Transit Through Third Countries*

22 47. The Final Rule contains additional limitations on the availability of asylum for
23 applicants who transit through a third country before arriving in the United States. 8 C.F.R. §§
24 208.13(d)(1), (2)(i)(A), (B), 1208.13(d)(1), (2)(i)(A), (B). These factors would result in the denial
25 of asylum for LGBTQ/H applicants, like Immigration Equality's clients, with meritorious cases.
26 For example:
27
28

1 48. **Entry without inspection.** The Final Rule instructs adjudicators to deny asylum to
2 an applicant who enters the United States without inspection, subject to a very narrow exception
3 for entry without inspection “made in immediate flight from persecution or torture in a contiguous
4 country.” Forcing LGBTQ/H asylum seekers to await permission to enter the United States is
5 dangerous. LGBTQ/H asylum seekers have faced threats, harassment, and physical violence in
6 Mexico. In short, they have good reason to enter the United States in order to avoid metering and/or
7 placement into the Remain in Mexico program: they fear for their lives and safety. This provision
8 would result in the denial of asylum for many of the people Immigration Equality serves who
9 entered without inspection for fear of what could happen to them in Mexico. For instance:

- 11 a. Lili is a transgender woman from Central America. Throughout her life, Lili was
12 severely abused and mistreated because of her gender identity and sexual orientation.
13 Lili was gang raped on two separate occasions because she is transgender. Lili fled her
14 country of origin to find safety in the United States. She entered without inspection and
15 was placed in immigration detention. She ultimately won asylum.
16
- 17 b. Aiden is a gay man from Central America, who experienced severe abuse in his country
18 of origin on account of his sexual orientation. As a child, Aiden’s adult cousin
19 repeatedly raped him because Aiden was perceived as gay. As an adult, Aiden was
20 victim of an attempted murder and gang violence due to his sexual orientation. Aiden
21 crossed the border without permission in order to save his life.
22

23 49. The Final Rule would deprive Lili and Aiden of relief despite their meritorious
24 claims simply because they did not enter the United States at a designated port of entry even as
25 they were fleeing for their lives and would likely have been harmed if they stayed too long in
26 Mexico.
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1 50. **Failure to seek protection in country of transit.** The Final Rule enforces three
2 “layover rules” that punish refugees for traveling to the United States in search of asylum.
3 Adjudicators are essentially instructed to deny cases if an asylum seeker passed through another
4 country on the way to the United States and did not seek protection there, or if an applicant has
5 stayed in a single country for more than 14 days.

6 51. These rules make LGBTQ/H refugees unsafe. Many countries that are commonly
7 transited are as dangerous for LGBTQ/H asylum seekers as their country of origin. As noted above,
8 LGBTQ/H asylum seekers from South America often pass through many Central American
9 nations on their way to the United States. At the same time, LGBTQ individuals in El Salvador,
10 Guatemala, and Honduras face extortion, police and immigration agent abuse, corrective rape, and
11 murder (among other abuses). Many if not most LGBTQ/H refugees cannot file for asylum in
12 transit nations. These provisions would impact most of Immigration Equality’s clients and could
13 prevent them from obtaining protection when their cases otherwise clearly merit asylum. For
14 example:
15

16 a. Gogol and Daniel are a gay couple who fled Georgia for the United States after
17 experiencing persecution on account of their sexual orientation. En route, they flew
18 through Kiev, Ukraine. Under the Final Rule, since Gogol and Daniel did not apply for
19 asylum protection in Ukraine, they would be precluded from applying for asylum in
20 the United States, even though Ukraine is a country where homophobia is rampant, and
21 they would be subjected to persecution similar to what they faced in Georgia.
22

23 b. Carmen is a transgender woman from Jamaica who fled severe persecution on account
24 of her gender identity. In coming to the United States, she took a flight from Jamaica
25 to Mexico City and then travelled by bus from Mexico City to Tijuana, where she
26 presented herself at the U.S. Port of Entry. In Mexico, Carmen was physically assaulted
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1 on account of her gender identity. The police who came to the scene sided with the
2 attackers. Luckily, Carmen was able to escape. Under the Final Rule, Carmen would
3 likely be denied asylum because she did not apply for asylum in Mexico before she
4 requested asylum in the United States. This would have been futile in Mexico where
5 she was persecuted because of her gender identity.

6 52. **Fraudulent documents.** With limited exceptions, the Final Rule instructs
7 adjudicators to deny asylum on the basis that a refugee used fraudulent documents to enter the
8 United States. However, if a refugee is fleeing for their life, obtaining official documents may not
9 be possible. This provision would substantially restrict refugees' ability to leave an unsafe situation,
10 and result in the denial of many deserving asylum seekers without serving any legitimate
11 government interest. Immigration Equality has witnessed this first-hand, for instance:
12

- 13 a. Eduardo is a gay, HIV-positive man from Cuba who was persecuted on account of his
14 sexual orientation, HIV-status, and political opinion. He arrived at the United States-
15 Mexico border to apply for asylum but was forced to wait in Mexico pursuant to the
16 metering policy. While in Mexico, Eduardo ran out of his HIV-medication and the
17 Mexican authorities refused to renew his supply of the medication. Desperate and
18 scared for his life, Eduardo asked for assistance from a man who introduced himself as
19 an attorney specializing in humanitarian visas to the United States. Eduardo obtained a
20 visa from this "attorney," so he could enter the United States to apply for asylum and
21 access HIV-medication. The visa turned out not to be valid. However, Eduardo had
22 genuine fear for his life and a strong asylum claim, making it clear that his purpose for
23 entering the United States was to escape persecution.
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25

26 *The Final Rule Restricts Consideration of Cultural Evidence*
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1 53. Under the Final Rule, “evidence offered in support of ... an application which
2 promotes cultural stereotypes about a country, its inhabitants, or an alleged persecutor, including
3 stereotypes based on race, religion, nationality, or gender, shall not be admissible in adjudicating
4 that application.” 8 C.F.R. §§ 208.1(g), 1208.1(g). Cultural stereotypes are not clearly defined in
5 the Final Rule.

6 54. Such a limitation may be read to exclude factually accurate information about
7 cultural attitudes toward LGBTQ/H individuals. Virtually all LGBTQ/H asylum applications rely
8 on evidence of cultural attitudes toward LGBTQ/H people in their country of origin because such
9 evidence is probative, relevant, and widely accepted as reliable by adjudicators. It is difficult to
10 imagine how evidence about cultural attitudes towards LGBTQ/H people would not include some
11 cultural stereotypes, especially where an LGBTQ/H asylum seeker must establish that their PSG
12 meets the definitions of particularity and social distinction.

13 55. For instance, Immigration Equality clients often provide country conditions
14 evidence in the form of an index followed by reports and articles from governmental sources,
15 NGOs and the news media that detail societal attitudes toward LGBTQ/H people in order to
16 support the applicant’s well-founded fear of persecution, like the following:
17

- 18
- 19 a. “Jamaica is a **deeply homophobic society** and there are reports of LGBT persons
20 facing a high level of both physical and sexual violence from nonstate agents (and some
21 rogue state agents) and many live in constant fear.”¹¹
 - 22 b. “Sexual and gender-based violence, including sexual violence, domestic violence,
23 human trafficking, femicide, and violence against LGBTI people, permeates the lives
24

25

26 ¹¹ United Kingdom Home Office, *Country Policy and Information Note: Jamaica: Sexual*
27 *Orientation and Gender Identity* (Feb. 2017), at 5, available at
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/594901/Jamaica_-_SOGI_-_CPIN_-_v2_0.pdf (emphasis added).
28

1 of women and children in El Salvador, Honduras, and Guatemala, disproportionately
2 affecting girls and young women. These forms of violence have deep roots in
3 ‘patriarchal attitudes and a machista culture,’ as well as structural forms of
4 inequality that marginalize women, girls, and LGBTI people, and justify discrimination
5 and violence against them.”¹²

6 c. **“Homophobia and the ‘machismo’ (strong/aggressive masculinity) culture are**
7 **common throughout the region** and sex between men is highly stigmatized. As a
8 result, large numbers of men who have sex with men do not identify as homosexual (or
9 bisexual) and have sex with women as well as men, forming a ‘bridge’ population. As
10 one civil society worker explains, men who have sex with men are often hesitant to
11 reveal how they became infected with HIV.”¹³

12
13 56. All of the above cites are in current Immigration Equality Country Conditions
14 Reports. It seems likely that some (or possibly many) adjudicators would exclude these reports
15 under the Final Rule as impermissible evidence of stereotypes.
16

17 *The Final Rule Imposes a Standard for Assessing the Reasonableness of Internal*
18 *Relocation that will Deny Relief to Bona Fide LGBTQ/H Asylum Seekers*

19 57. When asylum applicants have established they have suffered past persecution, the
20 burden is on the government to show by a preponderance of the evidence that the applicants either
21 no longer have a well-founded fear of persecution or that they can reasonably relocate in their
22 country of origin to an area of safety.
23

24 ¹² KIND (Kids in Need of Defense), *Neither Security Nor Justice: Sexual and Gender-Based*
25 *Violence and Gang Violence in El Salvador, Honduras, and Guatemala* (May, 2017), at 4,
26 available at https://supportkind.org/wp-content/uploads/2017/05/Neither-Security-nor-Justice_SGBV-Gang-Report-FINAL.pdf (emphasis added).

27 ¹³ Avert, *HIV and AIDS in Latin America The Caribbean Regional Overview* (2016), at 5, available
28 at <https://www.avert.org/professionals/hiv-around-world/latin-america/overview> (emphasis added).

1 58. The Final Rule imposes a new standard for assessing the reasonableness of internal
2 relocation that virtually no refugee, including LGBTQ/H asylum seekers, can meet. Under existing
3 regulations, adjudicators may consider numerous circumstances, including “whether the applicant
4 would face other serious harm in the place of suggested relocation; any ongoing civil strife within
5 the country; administrative, economic, or judicial infrastructure; geographical limitations; and
6 social and cultural constraints, such as age, gender, health, and social and familial ties.” 8 C.F.R.
7 § 208.13(b)(3) (current). But the Final Rule purports to “streamline” relevant considerations for
8 internal relocation, instituting a narrow inquiry under a totality-of-the-circumstances test.
9

10 59. For example, under the Final Rule, adjudicators must consider “the applicant’s
11 demonstrated ability to relocate to the United States in order to apply for asylum.” 8 C.F.R. §
12 208.13(b)(3). The provision requires adjudicators to infer from the mere fact an asylum seeker was
13 able to travel to the U.S. that internal relocation in their country of origin was reasonable. By
14 definition, every asylum applicant has been able to travel to the U.S., so this becomes an
15 automatically negative factor in all cases. The Final Rule also assumes that internal relocation is
16 reasonable if the asylum seeker comes from a large country, or if the persecutor lacks “numerosity.”
17 *Id.* Immigration Equality often represents LGBTQ/H asylum seekers who routinely face
18 persecution nationwide in the largest countries in the world who cannot reasonably relocate. For
19 example, LGBTQ/H refugees regularly flee from persecution in Russia, India, Brazil, Mexico, and
20 Saudi Arabia, to name a few, where they face countrywide persecution. Thus, presuming that
21 internal relocation is safe for LGBTQ/H just because of the size of these countries is inconsistent
22 with the reality that these applicants face.
23
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25 60. Further, the Final Rule would require asylum seekers who have already survived
26 persecution to prove that they cannot reasonably relocate if the persecutor is deemed “non-
27 governmental.” 8 CFR §§ 208.13(3)(iv); 1208.13(3)(iv) (proposed). The Final Rule then severely
28

1 limits the definition of government officials to exclude officials and actions performed “absent
2 evidence that the government sponsored the persecution.” This ignores the reality of LGBTQ/H
3 asylum seekers who do not have the luxury of investigating whether a particular government
4 actor’s violent acts were “sponsored by the government” or not. It also ignores the fact that many
5 nations exist with systemic anti-LGBTQ bias. When anti-LGBTQ violence is the norm, evidence
6 of official government sponsorship of persecution is unlikely to exist.

7
8 61. As noted above, the Final Rule also categorically excludes forms of evidence
9 necessary to show why internal relocation would be unreasonable. Namely, it is genuinely unclear
10 how to distinguish impermissible evidence of “cultural stereotypes” from evidence of pervasive
11 cultural bias in a country. For LGBTQ/H applicants fleeing private actor persecution, it creates an
12 impossible scenario. They would need to prove why no other part of the country was safe, without
13 using evidence of cultural norms and persistent abuse, and without referencing their own
14 individual experience.

15
16 *The Final Rule Limits Relief under CAT in a Manner that Will Harm LGBTQ/H Applicants*

17 62. The Final Rule would amend the regulations implementing the CAT, severely
18 limiting relief under the Convention. Under the Final Rule, in order to show that a public official
19 inflicted, instigated, consented to, or acquiesced to torture, an applicant must show that the public
20 official was acting “under color of law.” 8 CFR §§ 208.18(a)(1); 1208.18(a)(1) (proposed).
21 Moreover, under the Final Rule, a public official will not be found to have acquiesced to torture
22 unless the applicant shows that the public official deliberately avoided learning the truth and was
23 “charged with preventing the activity as part of his or her legal duties and [had] failed to intervene.”
24 8 CFR §§ 208.18(a)(7); 1208.18(a)(7).
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1 63. These are insurmountable requirements for Immigration Equality’s clients and
2 many LGBTQ/H people who have been granted relief under CAT could likely not meet the new
3 standard despite having meritorious claims. For instance:

4 a. Sergio is a gay man from Cuba. The Cuban police frequently detain LGBTQ people
5 solely because of their LGBTQ status. Typically, the person is not charged with or
6 accused of any crimes. The only purpose of these detentions is to abuse LGBTQ
7 individuals. The police subjected Sergio to detention on multiple occasions. During
8 one of the detentions, the Cuban police sexually assaulted Sergio. He was released
9 shortly after. He was never charged with any crime or presented with any documents
10 explaining the reason for his detention. It appears that the Final Rule would make
11 Sergio ineligible for CAT because he could not prove that the police officers were
12 acting under the color of law.
13

14 b. Miremba is a lesbian from Uganda. In Uganda, police arrested Miremba for being a
15 lesbian and twice raped her while she was in custody. Miremba was able to escape from
16 prison and flee to the United States. It would not be possible for Miremba to obtain the
17 proof the officers were acting under color of law required by the Final Rule. Therefore,
18 she would be disqualified from CAT, despite the Ugandan police torturing her.
19

20 c. Jaffar is a gay man from Uganda who suffered horrific torture at the hands of the police.
21 The police came to his house, arrested him and his partner, and imprisoned them naked.
22 In prison, the police forced Jaffar to have sex with his partner in front of them and the
23 other detained individuals while the police poured urine on Jaffar. The police then took
24 him to a different cell where they repeatedly injected him with some unknown drugs.
25 Jaffar spent four months in this cell, where the police constantly beat him, without ever
26 seeing a judge. Several years later, the police again arrested Jaffar and sexually
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1 assaulted and tortured him. Under the Final Rule, in order to qualify for CAT relief,
2 Jaffar would have to prove that the officers were acting under the color of law, which
3 likely would be an impossible task under the circumstances.

4 *The Final Rule's Narrow Definition of "Persecution" Will Harm LGBTQ/H Applicants*

5 64. The Final Rule heightens the persecution standard, ignoring the ways many
6 LGBTQ/H refugees are harmed. Specifically, the Final Rule provides a regulatory definition of
7 persecution that imposes a heightened standard requiring that the threats be "exigent" and
8 emphasizing that the harm be "extreme." The Final Rule goes on to identify types of harm that it
9 indicates would not generally constitute persecution, including: "repeated threats with no actions
10 taken to carry out the threats," "intermittent harassment, including brief detentions," and
11 "government laws or policies that are infrequently enforced, unless there is credible evidence that
12 those laws or policies have been or would be applied to an applicant personally." 8 C.F.R. §§
13 208.1(e), 1208.1(e) (proposed). However, the Final Rule does not define "exigent" or "extreme,"
14 and does not address cumulative harm, such as a series of detentions that may be individually brief.
15 Moreover, the government does not give due consideration to the ways harm is experienced by
16 different asylum seekers, such as LGBTQ/H people. Many of the circumstances the Final Rule
17 seeks to exclude are the very ways in which LGBTQ/H people experience persecution.

18 65. "Intermittent harassment and brief detentions" can also rise to the level of
19 persecution. "Intermittent" incidents can quickly become cumulative, amounting to persecution.
20 Indeed, as discussed above, LGBTQ claimants are regularly terrorized and detained as a
21 punishment for their sexual orientation or gender identity. For instance, Immigration Equality has
22 worked with a number of asylum seekers from Cuba who report being repeatedly detained by
23 police for several days at a time. During the detentions, it is common for police officers to threaten
24 LGBTQ/H people with further violence and detention unless they change their sexual orientation
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1 and “act straight.” Such intermittent incidents viewed cumulatively serve to terrorize LGBTQ/H
2 people and can rise to the level of persecution.

3 66. Moreover, applicants should not have to wait until persecutory laws are enforced
4 against them to prove persecution. The Final Rule asserts that persecution does not include “laws
5 or government policies that are unenforced or infrequently enforced” without “credible evidence
6 that those laws or policies have been or would be applied to an applicant personally.” *Id.* As an
7 initial matter, the Final Rule fails to identify the type of “credible evidence” that would be
8 acceptable. The result is devastating to LGBTQ/H asylum seekers. In countries where being
9 LGBTQ carries the death penalty, the fact that LGBTQ people are “infrequently” executed would
10 disqualify these laws as persecutory. LGBTQ relationships are subject to criminal punishment in
11 nearly 70 countries. Of those, 31 carry a sentence of ten years or more in prison, and 12 countries
12 allow the death penalty as a sentence, including death by stoning. Virtually all LGBTQ refugees
13 who come from countries where their identity is criminalized are terrorized by such laws. The
14 consequences for LGBTQ/H refugees would be grave if they waited for an “effort to carry out” a
15 threat before fleeing. For example:
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- 18 a. Leila is a bisexual woman from Bangladesh who was kicked out of school when her
19 sexual orientation was discovered. Shortly thereafter, she spoke out against
20 conservative Islamist groups who were gaining power in Bangladesh. In retaliation for
21 speaking out, she was publicly outed as bisexual. She and her parents immediately
22 began receiving death threats. She could not go to the police because same-sex relations
23 are illegal in Bangladesh and she might be arrested. She knew of other gay
24 Bangladeshis who were outed on Facebook by conservative Islamist groups and
25 subsequently brutally murdered. Accordingly, she fled Bangladesh and sought asylum
26 in the United States.
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1 b. Yasir is a gay man from Yemen. While he tried to live his life deeply in the closet, he
2 was nevertheless very publicly outed. Because Yemeni officials sentence gay men to
3 death, he fled to the United States immediately under threat of arrest. As he had feared,
4 the police then issued a warrant for Yasir's arrest. When he could not be found, he was
5 tried for homosexuality in absentia and found to be guilty. Accordingly, the authorities
6 issued a formal death sentence against Yasir.

7
8 67. If Leila and Yasir had waited for further efforts to be made to carry out the threats
9 against them, they would likely be dead. Notably, the threats that LGBTQ claimants regularly face
10 amount to persistent and conscious terror campaigns, which alone rise to the level of persecution.

11 68. In addition, the Final Rule ignores the well-recognized effect that persecutory laws
12 have merely by being on the books. LGBTQ/H refugees understand this acutely: as discussed
13 above, many countries have harsh anti-LGBTQ/H laws and policies. Persecutory laws dictate the
14 scope of acceptable and unacceptable political and social behavior, and act as official endorsement
15 for persecution against LGBTQ/H people, increasing the frequency and severity of mistreatment.
16 In short, persecutory laws create opportunities for persecutors to prey on a person the law
17 proclaims to be a criminal, knowing that the law will not intervene. Thus, even when the
18 government does not overtly enforce such laws, persecutors are empowered to subject LGBTQ to
19 violence, sexual abuse, and murder. Persecutors also use the laws indirectly to subject LGBTQ
20 people to extortion, job loss, denial of access to healthcare, and loss of parental rights. Moreover,
21 when a person's sexual orientation or gender identity is illegal or criminal, they have no recourse
22 in the law.
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25 69. Whether or not the applicant can prove that the government is likely to enforce the
26 law is beside the point; applicants would not be able to avail themselves of their country's
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1 protection if they fear their own arrest in going to the police. Immigration Equality sees the chilling
2 effect such laws have on LGBTQ refugees' ability to seek protection, for example:

3 a. Iskandar is a gay man who worked for the Lebanese government. In Lebanon, LGBTQ
4 conduct is criminalized. Iskander's ex-partner threatened to out him to his family and
5 to the government if Iskander did not pay him hush money. Iskander was unable to
6 make the payments and decided that he could not risk being outed in Lebanon. Due to
7 his position in the government, he would be tortured and imprisoned if he were
8 discovered to be gay. Additionally, given that his family is extremely religious,
9 Iskander would likely be harmed, and even killed, by his own family, due to
10 government acquiescence to vigilante enforcement of anti-LGBTQ laws. Because
11 LGBTQ conduct is criminalized, he could not seek help from the authorities.
12

13 b. Tushar is a gay man from India who was extremely closeted for fear of persecution at
14 the hands of the police and community members. When Tushar mustered the courage
15 to come out to his friends, they turned on him and raped him, while calling him
16 homophobic slurs and telling him "since you are gay, you should enjoy this." Tushar
17 was unable to report this to the police at the time, because if he did, Tushar could have
18 been subjected to 10 years of imprisonment.
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20 c. Soraya is a lesbian from Iran who was extremely closeted. Soraya was sexually and
21 physically abused by an ex-partner. The ex-partner also set Soraya's car on fire.
22 However, given that her ex-partner was a woman, Soraya could not report the abuse to
23 the police. Had Soraya reported the abuse, she would have been outed, and would have
24 been subjected to the death penalty.
25

26 d. Joseph is a gay man from Nigeria where LGBTQ conduct is criminalized, and in some
27 states punishable by death. Joseph was outed at his workplace after he lost his phone
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1 and the security police who found it discovered intimate photos of him and a partner.
2 The police made copies of the photos and used them to extort money from Joseph in
3 exchange for not arresting and outing him. They also made him sign a statement
4 acknowledging that he was gay and had committed a crime. The demands for money
5 kept increasing until Joseph could no longer meet the bribes to assure his safety. He
6 then fled to the United States.

7
8 *The Final Rule Unfairly Diminishes Confidentiality Protections for Asylum-Seekers*

9 70. The Final Rule impermissibly dismantles confidentiality protections for the
10 sensitive, personal, and often dangerous information that refugees must disclose in asylum
11 applications. The Final Rule allows the Government to disclose any of this information to any
12 person, so long as the disclosure relates to any law enforcement investigation or proceeding.

13 71. The Final Rule allows for disclosure of information included in an asylum
14 application under circumstances that are currently protected from disclosure. Release of
15 information can put LGBTQ/H asylum seekers at grave risk of harm. Gender identity, sexual
16 orientation, and HIV status are deeply personal and often difficult to disclose and discuss.
17 Frequently, Immigration Equality clients are remarkably hesitant to disclose sensitive information
18 in an asylum application, even with current confidentiality protections. For example, Immigration
19 Equality represented a client from a former Soviet state who refused to disclose the name of the
20 high-ranking government intelligence official who had kidnapped him and held him as a sex slave
21 because even the smallest possibility of that information being leaked was so disturbing to the
22 client that he preferred to risk a potential denial of his claim over the risk that his persecutor might
23 learn of the disclosure. Furthermore, the disclosure provisions in the Final Rule may well put many
24 LGBTQ/H asylum seekers at great risk. Many Immigration Equality clients have been outed on
25 social media by friends and family who discovered the contents of their applications for asylum.
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1 That exposure has often resulted in threats of physical violence, and sometimes, in death threats.
2 As such, the Final Rule will likely chill many LGBTQ/H asylum seekers from seeking relief they
3 are entitled to.

4 **The Final Rule Frustrates Immigration Equality’s Mission and Diverts Its Resources**

5 72. The Final Rule will severely impact Immigration Equality’s programming and the
6 clients we serve. More specifically, virtually all of our asylum clients will be affected by one of
7 the Transit Bars or by the Nexus Bars (either because our clients are LGBTQ/H or because they
8 suffered harm by private actors). Additionally, many current clients will rely on an exception to
9 the one-year filing deadline and so would likely be ineligible for asylum under the new provision.
10 The myriad other changes under the Final Rule will also impact many of Immigration Equality’s
11 clients. In short, the Final Rule will completely change the nature of our programming and client
12 base by making the LGBTQ/H asylum seeker community we primarily serve largely ineligible for
13 asylum relief.
14

15 73. The publication and impending effective date of the Final Rule has already required
16 Immigration Equality to divert resources from its core activities. As an initial matter, Immigration
17 Equality did not have adequate time to fully respond to the NPRM, which spanned more than 160
18 pages, upended decades of legal precedent, fundamentally changed the asylum system, and was
19 issued in the midst of a global pandemic. During the public comment period, Immigration Equality
20 had closed its offices, was working virtually, and was preparing for a partial furlough of all of its
21 staff beginning in July 2020. During the pandemic, some staff had no external child care, some
22 staff became sick with COVID-19, and others had close family members contract the illness. Given
23 the scope of the changes proposed, Immigration Equality was not able to comprehensively address
24 all provisions of the NPRM within the limited timeframe. Moreover, Immigration Equality had to
25 divert resources away from its programming in order to respond. In addition, Immigration Equality
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1 has already spent time educating and answering questions from clients, pro bono attorneys, and
2 other stakeholders on the Final Rule; developing materials explaining the potential impact of the
3 Final Rule; and developing additional pro se programming to assist the large numbers of clients
4 and potential clients who must apply for asylum before the Final Rule takes effect in order to
5 qualify for relief.

6 74. Going forward, Immigration Equality will have to expend significant resources to
7 adjust to the new regulatory landscape. Namely, Immigration Equality will have to reimagine its
8 Pro Bono Program and In-House Program altogether. For instance, given the drastic limitations on
9 asylum eligibility, affirmative applicants will be chilled from applying. Moreover, the Final Rule
10 will severely limit the number of affirmative asylum seekers we can accept into our program since
11 many will no longer be eligible for relief.

13 75. Under the Final Rule, most clients will now only be eligible for withholding of
14 removal or CAT relief, which have a higher standard of proof than asylum and are more time-
15 consuming cases to handle. Moreover, these cases cannot be brought affirmatively. Immigration
16 Equality's current caseload is approximately 80% affirmative filings. Immigration Equality will
17 be forced to shift resources towards mentoring pro bono attorneys on more difficult defensive
18 proceedings, as well as complicated appeals before the Board of Immigration Appeals and the
19 circuit courts. Moreover, defensive cases are far more difficult to place with pro bono counsel
20 which will mean that Immigration Equality will have to: 1) take more of them in house, reducing
21 our capacity, 2) change the way we cultivate pro bono firms to identify and attract firms interested
22 in defensive cases, and/or 3) provide much more in-depth mentorship to ensure that pro bono
23 attorneys are equipped to take on these more challenging and time consuming matters.
24 Immigration Equality will also have to change the way in which we conduct intake interviews.
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1 76. The Final Rule will impede Immigration Equality’s ability to perform other
2 programmatic activities by diverting resources away from these programs. Immigration Equality
3 is currently engaged in litigation and policy advocacy around improving detention conditions and
4 reversing discriminatory policies that impact LGBTQ/H immigration families. Immigration
5 Equality will have to significantly pull back resources currently devoted to these efforts as well as
6 redirect resources away from Immigration Equality’s Detention Program, online and telephone
7 inquiries, and all non-asylum applications and petitions in order to address the Final Rule and its
8 impact.
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10 77. Additionally, Immigration Equality will have to substantially revise the vast
11 majority of its written resources for virtually all of its programming to reflect the changes in the
12 Final Rule as well as the shift in our programming, such as: 1) sample and template documents in
13 our Pro Bono Program resource library used by hundreds of volunteer attorneys; 2) materials,
14 including scripts and templates, used to intake clients and respond to online and telephonic
15 inquiries from LGBTQ/H asylum seekers; 3) training materials and presentations for staff, pro
16 bono attorneys, USCIS personnel and judges, and outside attorneys on the LGBTQ/H asylum
17 process; 4) materials for pro se applicants; 5) the Asylum Manual and all online content concerning
18 the asylum process; and 6) country conditions materials to the extent they would raise concerns
19 under the Final Rule as comprising “cultural stereotypes” in the way they address cultural attitudes
20 towards LGBTQ/H people. In addition, we will have to train staff on all of the changes and, in
21 turn, train our network of hundreds of pro bono attorneys on the Final Rule.
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24 78. This shift in programming will likely also interrupt Immigration Equality’s funding
25 streams. Approximately 22% of Immigration Equality’s funding in 2019 came from donations
26 from pro bono partner law firms. Generally speaking, the level at which a firm donates to
27 Immigration Equality closely corresponds with the level of engagement in our pro bono program.
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1 If fewer cases are placed with these firms, Immigration Equality will likely see a corresponding
2 dip in funding from these entities.

3 79. In sum, all of Immigration Equality's current programs will be significantly
4 affected, irrevocably damaged, and immediately diverted by the Final Rule. Given the centrality
5 of the asylum process to our organizational work and mission, the Final Rule will force us to turn
6 our attention from the many pressing issues we are currently investigating towards mitigating the
7 effects of the Final Rule on our existing programs and clients.
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9 *[Signature on next page.]*
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1 I hereby declare under penalty of perjury under the laws of the United States of America
2 that the foregoing is true and correct.

3 Executed this 21st day of December 2020 in Brooklyn, New York.

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5 _____
6 Aaron C. Morris
7 Executive Director
8 Immigration Equality
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ATTESTATION PURSUANT TO L.R. 5-1(I)

In accordance with Civil Local Rule 5-1(i)(3), I attest that concurrence in the filing of this document has been obtained from any other signatory to this document.

/s/ Austin Manes
Austin Manes