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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.

U.S. DEPARTMENT OF HOMELAND
SECURITY, et al.,

Defendants.

Case No. 4:20-cv-09258

**DECLARATION OF MEGHAN D.
MAURUS OF THE TRANSGENDER
LAW CENTER IN SUPPORT OF
PLAINTIFFS' MOTION FOR
TEMPORARY RESTRAINING ORDER,
PRELIMINARY INJUNCTION AND
STAY UNDER 5 U.S.C. § 705**

1 I, MEGHAN DUPUIS MAURUS, declare:

2 1. I am an attorney who has been licensed to practice in the State of New York since
3 2009. I am also a member in good standing of the bar of the U.S. District Court for the
4 Southern District of New York. My practice consists exclusively of federal immigration
5 matters. I graduated from Benjamin N. Cardozo’s School of Law in 2008 and am the Legal
6 Coordinator and Supervising Attorney of the Transgender Law Center’s Border Project, a
7 Plaintiff in the above-captioned case. I also am a member of the National Lawyers Guild
8 Immigrants’ Rights Project and am on the Steering Committee of the National Lawyers Guild’s
9 Mass Defense Project. I participate in a number of coalitions, such as the United Nations High
10 Commissioner for Refugees (“UNHCR”) legal working group, the UNHCR protection legal
11 working group, and a LGBTQ coalition group. Over the years, I have given many presentations
12 about immigration as it affects both LGBTQ asylum seekers and border policy. During the
13 past approximately two years, I have lived and worked on the northern Mexican/Southern
14 United States border working with and representing people who have been forcibly displaced
15 from their home countries, many of whom are seeking refuge in the United States.

16 2. The Transgender Law Center (“the Center” or “TLC”) is a 501(c)(3) non-profit
17 corporation founded in 2002. Our headquarters is in Oakland, California, and we have satellite
18 offices in Tijuana, Mexico; Atlanta, Georgia; and New York, NY.

19 3. My role at TLC is to coordinate and serve as the organization’s representative in
20 our Border Project, which is a multi-organizational coalition project aimed at assisting LGBTQ
21 people who are fleeing persecution in their home countries by connecting them to medical,
22 mental health, humanitarian, legal and other services and activities.

23 4. As the legal coordinator and supervising attorney, I am in constant, regular
24 communication with colleagues, staff, project partners, community partners, clients, and
25 volunteers who provide our array of essential services to LGBTQ immigrants. In particular, I
26 coordinate partnerships with other non-profits who also provide legal and social services to the
27 immigrant and LGBTQ communities. I also represent some the Project’s clients
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1 in their immigration proceedings.

2 **The Transgender Law Center’s Mission and Clients**

3 5. The Transgender Law Center is the largest national transgender-led organization
4 advocating for a world in which all people are free to define themselves and their futures.
5 Grounded in legal expertise and committed to racial justice, we employ a variety of
6 community-driven strategies to keep transgender and gender nonconforming people alive,
7 thriving, and fighting for liberation. Our advocacy and precedent-setting litigation victories—
8 in areas including employment, prison conditions, education, and healthcare as well as
9 immigration—protect and advance the rights of transgender and gender nonconforming people
10 across the country. Through our organizing and movement-building programs, the Transgender
11 Law Center assists, informs, and empowers thousands of individual community members each
12 year and builds towards a long-term, national, trans-led movement for liberation.

13 6. While our work with forcibly displaced LGBTQ persons has existed for a number
14 of years, our participation in the Border Project is a little over a year old, following its launch
15 after years of planning, and fundraising to create an efficient way to serve the exceptionally
16 vulnerable members of our communities who are fleeing persecution in other countries.

17 7. The Border Project’s mission is to work through coalitions to nurture more
18 effective case management, humanitarian aid, direct legal services, and holistic case
19 management for LGBTQ asylum seekers. TLC’s main role in the Project is to provide legal
20 information and case preparation for refugees in Mexico and then legal representation after
21 they enter the United States. One of our primary goals is to provide efficient and effective legal
22 assistance to as many LGBTQ refugees as possible. At times we take on cases, but we also
23 strive to prepare individuals through workshops and exercises to represent themselves. We aim
24 to teach and prepare people so they can succeed through at least part of the legal process on
25 their own, so that we can focus less on time-intensive direct representation. We arrange for
26 translation of evidence, give workshops about what a final hearing looks like, walk people
27 through a basic primer on asylum law, and other pertinent topics. This Final Rule will require a
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1 shift in our focus from that work of efficient assistance to many people, to full representation
2 of many fewer. The Final Rule makes it virtually impossible for non-lawyers to avoid
3 procedural pitfalls that would cause many individuals with valid asylum claims to fail for
4 procedural reasons. This would fundamentally limit our ability to achieve our mission.

5 8. Our clients come from diverse countries throughout the world including African
6 nations, Russia, Central American countries, Mexico, and Caribbean countries. They speak
7 many languages. Despite their differences, they have the unfortunate commonality of having
8 endured violence and systemic discrimination due to their sexual orientation, gender identity,
9 and/or HIV+ status in their countries of origin. This abuse, and threats of even worse treatment
10 if they remained, forced them to flee their countries of birth and seek safety elsewhere.

11 9. We learn about new clients in multiple ways. We receive referrals from other
12 organizations and shelters, and we often hear from clients through word of mouth. We provide
13 anyone LGBTQ identified with legal information, an intake, and some assistance. Our goal is
14 to ensure that all LGBTQ persons who seek asylum in the United States have legal information
15 and representation if they need it, together with other essential support until they can attain
16 safety and self-sufficiency. However, we are still a small staff with limited resources.

17 10. Our legal program does an intake and informational session about asylum. We
18 also screen clients for other potential forms of relief, and for immediate legal, medical, and
19 mental health needs. We have a three-part workshop series that teaches basics about U.S.
20 asylum law, border policies, detention, sponsorship in the U.S., and other topics. We assist in
21 the preparation of asylum applications, finding sponsors, writing declarations, preparing parole
22 packets, and other immediate legal needs.

23 11. When an individual crosses into the United States, we advocate with Customs and
24 Border Protection (“CBP”) and Immigration and Customs Enforcement (“ICE”) for release and
25 treatment in accordance with our client’s gender. We represent clients in credible and
26 reasonable fear interviews, advocate for basic medical and mental health care, and provide
27 representation in removal hearings. When we cannot represent people directly, we often are
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1 able to connect them to pro bono legal services. When an individual is released, we try to
2 connect that person with our community partners to assist with post-detention support. We
3 also assist with changes of address and venue as necessary.

4 12. During the time people wait at the border, we provide updates and answer
5 questions regarding how the ever-changing border policies are likely to affect an individual's
6 case. We often must go back and ask them additional questions; for example, when the third
7 country asylum ban was in effect, we had to conduct additional interviews and ask about when
8 they had requested a number on the government's metering list.

9 13. Beyond Tijuana, Mexico, we often receive calls from LGBTQ identified
10 individuals in other parts of the United States who lack legal representation. Those individuals
11 get in touch with us from a hotline or community referral, and we try to provide them similar
12 supportive services. Some are already in U.S. detention facilities, such as Imperial Valley
13 Detention Center and Otay Mesa Detention Center. In those instances, we can provide *pro se*
14 support, limited representation, referral to local organizations, or full representation.

15 14. We also regularly provide technical assistance to attorneys, advocates, and asylum
16 seekers in other locations along the border and throughout Mexico and the United States on
17 border policies, LGBTQ immigration issues, and human trafficking.

18 15. Since its inception in November 2019, our Border Project has provided our varied
19 services to approximately 150 people. A little over 50% of our participants who have entered
20 the United States have entered through a port of entry, and the other 50% enter without
21 inspection ("EWI"). Our clients represent a broad spectrum of nations. In 2020, we engaged
22 with approximately 8 people from Russian-speaking nations, 15 from Mexico, two from South
23 American countries, two from African nations, one from Iran, 11 from Jamaica, 10 from Cuba,
24 and 87 from Central American nations.

25 **Impact of New Asylum Regulations on the Transgender Law Center**

26 16. These new asylum regulations frustrate the mission of our Border Project, impose
27 a significant burden on our work, and have already begun to cause us irreparable harm.
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1 Because of these new regulations, we have had to divert and will continue to divert significant
2 resources from other organizational programs to help the clients of our Border Project. Even
3 with doing so, however, we are able to serve far fewer people.

4 17. The new regulations represent a fundamental recasting of the rules governing our
5 practice. As a result of these change, we will need to allocate a significant amount of staff time
6 and resources to learning the new regulations, conveying that information to our clients,
7 revising our training materials, and fundamentally changing our operations to continue to
8 advance our mission. However, because the new Rule will make it much more difficult for
9 LGBTQ asylum seekers to access asylum and will create confusion and legal barriers
10 especially for those who plan to represent themselves, we already recognize an urgent need for
11 increased funding to bring on more attorneys and legal workers to assist people who are fleeing
12 persecution based on their LGBTQ identity and have claims to asylum in the United States.

13 *Effects on Our Mexico Program*

14 18. Because of the new regulations, we will have to dedicate significant amounts of
15 time to changing how we work with our clients. We will change our intake form, change how
16 we conduct basic information sessions, review each pending file and meet with all of our
17 current clients to counsel them on the new challenges for their cases. We also will have to
18 make fundamental changes to our case preparation and advocacy for our clients, which will
19 take significant time and resources because the new rules require so much more information at
20 the initial stage of the process and disallow so much of the probative evidence usually used to
21 substantiate our clients' claims. We will have to develop new legal strategies for cases and
22 retrain our staff and volunteers.

23 19. Each client who chooses to apply for asylum in the United States in the near
24 future will require significant additional time and effort in every aspect of their case, from
25 initial preparation to CFI representation, to hearings before a judge. Where our Tijuana
26 program was designed to assist substantial numbers of people in an efficient manner by helping
27 with the barebones of their asylum applications, teaching them some basics about asylum law,
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1 matching them with sponsors, assisting them when they enter the United States through release
2 efforts, and only occasionally representing them in their removal proceedings or placing them
3 with a pro bono attorney, we now will have to put significantly more hours into case
4 preparation and direct representation. To assist just our current clients, we will have to direct a
5 lot of resources into altering our program.

6 20. Because we now will need to invest a significant amount of time in preparing
7 each case, including screening individuals for other forms of relief, we will be less able to take
8 on cases in the United States for those with whom we already had worked prior to their
9 entering the United States. And, we are unlikely to have time to provide training and technical
10 assistance to attorneys representing LGBTQ persons elsewhere in the United States.

11 21. Since the new regulations were published, our staff already have spent many
12 hours analyzing the new rule, identifying project participants who need additional support,
13 setting up information sessions regarding the new rule, and strategizing with staff regarding
14 next steps. We have created a presentation for clients and will be communicating the
15 information one-by-one to each of our more than 150 clients.

16 22. The new regulations change drastically the evaluation of whether an individual is
17 eligible for asylum and the relative strength of their case. Many of the categories of evidence
18 have been unjustifiably excluded, and unwarranted bars have been imposed. But the new
19 rules provide exceptions to some of the new regulations for individuals who have been subject
20 to human trafficking, which tragically is the case for a disproportionate number of our clients.
21 Screening for these facts usually requires more in-depth interviewing, which often is time
22 consuming and requires special training to be done well. In light of this, we will need to re-
23 train staff on how to conduct client interviews and then advise current and future clients on the
24 strengths and weaknesses of their cases.

25 23. For our three-part workshop series for clients, the Final Rule will force me to
26 spend a significant amount of time and resources on revising the written materials and the
27 workshops themselves, which will take my time away from working with new project
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1 participants.

2 24. We are a small staff of one attorney (myself), one part-time legal assistant, and a
3 limited amount of time from our legal director. This new regulation will create a sandwich
4 effect for me. On the one hand, we need to educate, review and re-advise our sixty-plus
5 individuals in Mexico in light of the new rules. On the other hand, we need to educate, review,
6 make new plans, and act accordingly for the thirty-plus individuals in the United States,
7 including those who have not yet filed an asylum application. Because of the profound changes
8 in the rules, I will need to spend most of my waking hours adjusting the program to these
9 changes, foregoing other important work and personal plans. Further, our legal director was
10 only intended to provide supervision of the overall project, and now is having to play a much
11 more significant role, specifically by providing trafficking expertise, broader immigration law
12 expertise, and strategizing. She has shared with me that the extra time we need her to devote to
13 the Border Project has had to be diverted from other case work for which she is responsible.

14 25. The Transgender Law Center does not charge for our services. Due to the
15 profound changes the new regulations make to asylum law, we anticipate not being able to
16 accept new clients for a period of time after the regulation's effective date in order to change
17 how our program functions. Once we have done so, however, we will not be able to serve
18 nearly as many clients as we could per our Border Project's original design and functioning.
19 This impedes our ability to accomplish our mission of serving LGBTQ asylum seekers. By
20 limiting the number of asylum seekers we can serve, the new regulations will also affect our
21 revenue and funding stream. We receive funding from foundations and individual donors,
22 some of whom are motivated to support our Project because it has been so effective, helping
23 impressive numbers of clients in an efficient manner. The draconian changes in these
24 regulations inevitably will decrease our client numbers, their success rate, and our
25 funding. Given the barriers and uncertainties created by the new rules, some clients and
26 would-be clients certainly will pursue options other than asylum in the United States, even if
27 those options offer less safety. Others will try for asylum in the United States and *should*
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1 qualify given what they have experienced, but many simply will not succeed. If fewer of the
2 potential clients who come to us have cognizable cases, we will file fewer cases; and if fewer
3 of those cases succeed, our overall mission will suffer. And if our innovative, efficient
4 program is significantly thwarted, our funding will decrease. Less funding will require us to cut
5 services, which will mean serving even fewer clients. Meanwhile, our remaining staff will have
6 to devote significant time to seeking alternatives for clients who continue to face persecution
7 whether or not our U.S. asylum system has largely stopped honoring its commitments under
8 our domestic laws, our international law agreements, and our stated national values.

9 26. Our clients are all LGBTQ identified. They are all fleeing systemic discrimination
10 and often horrific acts of violence. The policies put into place over the past decades have
11 created a gauntlet from their countries of origin to the United States. Each obstacle makes it
12 less likely a person survives without injury, but our clients still come because they
13 are escaping often terrifying, life threatening abuse.

14 27. At the border between Mexico and the United States, each Port of Entry has
15 created lists on which refugees must sign up and then wait. As of March 2020, the length of
16 the list forced people to wait at least 6 to 8 months. Many of our clients spent upwards of a
17 year in Mexico, during which time most faced unrelenting persecution in this transit
18 country. Fifty-seven assassinations of transgender women have been reported to have taken
19 place in Mexico in 2020 alone,¹ with the full number likely to be higher. Moreover, since
20 March 2020, the border has been completely cut off to people crossing via the created lists,
21 leaving LGBTQ people stuck in dangerous conditions. But, although they struggle, are
22 attacked, and sometimes seriously injured, turning back is not an option given the danger from
23 which they fled.

24 28. As a result, although many people in this situation start off with every intention to
25 wait until the border is open, or until their number is called, they find themselves unable

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27 ¹ *Jamie Wareham*, Forbes, <https://www.forbes.com/sites/jamiewareham/2020/11/11/350-transgender-people-have-been-murdered-in-2020-transgender-day-of-remembrance-list/?sh=3608384a65a6> (last visited December 10, 2020).
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1 to wait because of what they are experiencing in Mexico. The desire to survive causes some to
2 choose to cross outside of ports of entry, which means crossing irregularly, or Entering
3 Without Inspection (“EWI”). Even when individuals understand it is harder to win
4 asylum when they take this route, many believe they have no other option for survival.

5 29. Because their fear and belief that they have no reasonable alternatives is well
6 grounded, having sought safety this way should not defeat their asylum claims. However, the
7 new regulations mean it will be much harder for them to succeed, and we will need to provide
8 more intense and elaborate legal representation for each person. This again will mean we will
9 not be able to help as many people unless we are able to fund more staff positions, which
10 seems very unlikely at least in the near term. This frustrates the mission of our organization
11 because our ability to provide legal help to vulnerable transgender people who are trying to live
12 their lives safely and authentically will become so limited.

13 *Impacts on Our Clients in the United States*

14 30. Many of those our Project serves who are in immigration detention centers in the
15 United States are currently being supported as *pro se* litigants while we try to secure *pro*
16 *bono* counsel for them. We will need to prepare clients in Mexico for what the new
17 asylum process looks like (the Project’s core mission), while also spending significant hours
18 on a thorough “re-intake” to consider whether they have any parallel claims for relief and
19 whether any of the new asylum bars are applicable, to quickly file an asylum application for
20 some of them, to re-strategize many cases, and to accelerate our searches for permanent
21 counsel. We also will need to work with those counsel to prepare the clients for testifying,
22 prepare country condition reports in light of the new limitations, and in some cases gather more
23 medical and other evidence to substantiate the asylum claims. In many cases we will be
24 preparing individuals for upcoming hearings which, due to the new regulations, may only
25 allow for withholding of removal and CAT-only proceedings. The task is daunting for our
26 small staff, but we know it is necessary to save lives.

27 31. In the time between when the new asylum regulations were published on
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1 December 11, 2020 and the stated effective date of January 11, 2021, we will have had to shift
2 resources and staff time to file cases under the prior rules. We usually do much of the
3 preparation work with our clients before they enter the United States. We then advocate for
4 their release and represent them in bond hearings after they have entered the United States.
5 While we sometimes take on cases for individuals who have been detained and complex cases
6 for those who have been released, we do our best to find *pro bono* representation through a
7 Project partner or other method. Due to these new rules, we need to file an i589, Application
8 for Asylum, withholding of removal, and protection under the Convention Against Torture for
9 at least twelve clients before January 11, 2020 to assure that they will be subjected to the new
10 rules to the least extent. This is a huge diversion of staff time and organizational resources.

11 32. Due to the new regulations, it is likely that more of our clients will be put into
12 detention in the United States. It is much more time-consuming to work with them when they
13 are in detention given the complications in communicating with them. This is particularly true
14 during COVID-19 restrictions. Detention centers are sites of high numbers of COVID-19
15 cases. To do this work, I will need to make safety determinations or whether, and how, I can
16 visit these clients in detention centers or communicate with them through hard-to-get legal
17 calls over scratchy, unreliable phone lines. This will take up a significant amount of time and
18 divert me from our Project's core mission of working with the people in Mexico who also need
19 legal information and case work. The situation doubtless will force us into difficult choices
20 about who will receive our legal services.

21 33. Moreover, clients who have already applied for asylum will have to wait longer
22 for follow ups, help with work authorization applications, or assistance with other aspects of
23 their cases. We will be less able to take on new clients, regardless of the urgency of their
24 situations. We currently are working with over two dozen individuals in the United States. We
25 will need to expend a significant amount of time determining what immediate steps can be
26 taken on their behalf prior to January 11, 2021, to mitigate the effects of the rule changes for
27 them. This will probably result in us needing to turn away anyone additional who contacts us
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1 requesting assistance, which is contrary to our mission to provide at least basic assistance and a
2 referral for LGBTQ people in the United States when they are in urgent need.

3 34. Further, under the new rule, relief will be difficult to win even for clients with
4 meritorious cases. We will go through each of those cases and review everything that has been
5 done, and probably will add additional information. In most cases, doing this will require us
6 first to walk the client through the changes to the law and explain the implications for their
7 cases. This additional time, again, will mean we are unable to take on additional cases which
8 will frustrate our mission to support LGBT migrants and could lead to a decrease in funding if
9 we are working with fewer people than we projected.

10 35. The shift in priorities also forces us to cut back on the case management services
11 we are providing for our clients who are released. At present, we provide a number of hours
12 per client to assist them with basic needs and referrals. Given the dramatic increase of hours
13 needed to alter and then manage the changed legal program, to reassess and re-advise clients,
14 and to do the increased case work that will be required, we will no longer be able to meet
15 individually with clients to assess their needs and make individualized referrals. To do so, we
16 would need a dramatic increase in funding which we do not anticipate receiving given the
17 current challenges of funding immigration work.

18 36. It is not an overstatement to say that our border project will need to fundamentally
19 change our legal program. We will serve fewer people at greater expense. We will do our best
20 to mitigate or minimize the impacts of this rule on our current clients. We will drastically re-
21 structure our training program, intake procedure, and case preparation while also educating our
22 clients, volunteers, and community partners, and focusing a greater proportion of our resources
23 on our clients who already are in the United States. Because no one is safe to go *pro se* under
24 this Final Rule, we will need to find more pro bono attorneys for the cases we could have taken
25 ourselves and also for those we previously would have seen as reasonable to proceed without a
26 lawyer. This will be much harder because, under this Final Rule, each case will require more
27 work. Although we will try to recruit and train more pro bono attorneys, the enormity of the
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1 rule changes means we will have to reduce the number of people we can serve directly in both
2 the near term and the longer term.

3 **Impact of Individual Regulations**

4 37. Most of these new regulations deeply affect our clients. The regulations that
5 narrow the one-year filing deadline exception, limit the definitions of “persecution,” “nexus,”
6 and “political opinion,” increase the burden of proof when persecution is committed by private
7 actors, bar the use of “cultural stereotypes” as evidence, seek to limit asylum based on an
8 applicant’s method and manner of entry into the United States, and permit the disclosure of
9 asylum records will be specifically burdensome and harmful to our clients and other LGBTQ
10 asylum seekers. Even to me as a person who has worked in this field for over a decade, these
11 new regulations are confusing. And knowing the realities for many if not most asylum seekers,
12 they actually seem designed to frustrate asylum in the United States as a practical matter.

13 *Impact on LGBTQ/H Clients of Unrealistic Disclosure Requirements*
14 *of a Defined Particular Social Group (PSG)*

15 38. The regulations impose a mandatory waiver of “particular social group” claims if
16 not asserted immediately to an Immigration Judge. If an individual fails to define a clearly
17 cognizable PSG immediately, they waive that PSG on appeal or in a motion to reopen. To be
18 clear, this requires asylum seekers, who may not speak English to understand what the term
19 PSG means and how to define one. This is unreasonable in many cases. I have known of some
20 applicants being asked in their credible fear interview what their PSG is without any context or
21 explanation, but an expectation that the asylum seeker should be able to understand that
22 immigration concept that many attorneys could not define.

23 39. This requirement affects the clients we engage with after they have crossed into
24 the United States. There are two main ways this regulation affects LGBTQ/H refugees more
25 than other refugees. First, many LGBTQ/H asylum seekers have not had an opportunity to live
26 openly with respect to their gender and sexuality without the threat of bodily harm or even
27 death. When they step foot on United States soil and can be supported by community members,
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1 many can breathe and explore who they truly are for the first time in their lives. This has
2 resulted in more than one of our clients who at one point identified as a gay man or lesbian
3 later coming out as a transgender woman or a transgender man. If this process of discovering
4 one's identity is not articulated in precise terms at the right time early in their asylum case,
5 they risk losing their ability to raise it later. But the difficulty for many in complying with such
6 a requirement is due to very nature of their persecution.

7 a. One example is our client, Kristen,² a Jamaican asylum seeker who initially
8 identified as a lesbian woman and used she/her pronouns when I first met her in detention. I
9 represented Kristen in her credible fear interview. Another organization was able to secure
10 her release from detention, and Kristen made her way to Pennsylvania where her sponsor
11 lived. Kristen identified as gay and described the persecution she experienced in Jamaica as
12 stemming from her sexuality. But, after six months in Pennsylvania, Kristen told us that
13 they had come to self-identify using "they/them" pronouns and were more and more
14 embracing the identity of a transman. This was not raised in Kristen's initial appearances in
15 front of an asylum officer, nor the Immigration Judge. This exemplifies the positive
16 progression that can happen when a person is not living with a constant fear of death, but
17 which is largely foreclosed by these new regulations.

18 40. Second, many individuals simply do not have the language or concepts to know,
19 for example, that the words we use in the United States for how they feel are "non-binary" or
20 "transgender." Many countries do not utilize vocabulary or concepts that distinguish gender
21 from sexuality. Our original intake form illustrates this. We had a question that asked about
22 both gender identity and sexuality. Individuals from numerous countries could answer one but
23 were mystified by the second or *vice versa*.

24 a. Santiago, a Cuban gay man, is a specific example of this. Santiago always
25 described himself as a gay man. It was only when we were working intensively on his
26 declaration that we learned that much of his abuse in Cuba was from when he was dressed

27 ² Pseudonyms are used throughout this declaration to protect both the privacy and the safety of
28 our clients.

1 in female clothes or acting effeminate. Upon delving into it more, his experience would
2 easily be considered gender non-conforming if one were using U.S. gender concepts and
3 terminology, which distinguish between gender and sexuality. Santiago readily said that he
4 often dressed in women's clothes and felt very comfortable, and sometimes preferred it.
5 Since he had a specific sense of what transgender means, with which he did not identify, he
6 had not used that word to describe himself. We learned this about him after his Application
7 for asylum ("i589") had been completed and filed. Over the years, I have found that it is
8 very common, especially when working across linguistic and cultural lines, to
9 miscommunicate when discussing concepts of gender and sexuality. Rigid filing deadlines
10 and arbitrary rules that deny amendments, updating and appeals will undoubtedly cause
11 deserving asylum applicants to lose out due to honest misunderstandings and an unjust
12 technicality.

13 b. Another example is a client we represented who was asked a question along the
14 lines of "how did you know you were gay?" Their response was that they had googled it
15 and came upon the term "homosexual." Later, after living in a shelter in Mexico, they were
16 introduced to the concepts of gender fluidity and transgender identities. This is not an
17 uncommon scenario. Moreover, deep-seated, internalized fear and self-hatred often cause
18 members of our community to ignore what might be obvious to others regarding their
19 identities in order to stay safe and alive; the result is an initially misstated PSG, which then
20 should be revised once a lawyer is found or time passes in the United States and the person
21 becomes better able to explain who they are and what they have experienced as a result.

22 c. One client, Frida, a Salvadoran transwoman, had lived her whole life describing
23 herself as a gay man. She was very effeminate, and this had prompted much of her
24 persecution. Upon her arrival in Tijuana, she stayed at an LGBT shelter. She told me that,
25 after a few weeks of living there, seeing all the transwomen just made her feel something
26 she had never felt before — a sense of belonging that was home. She began to explore her
27 gender through concepts and experiences she had never had access to. Frida did not
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1 suddenly become transgender. Rather, she only came into the identity gradually once she
2 had a safe space, community, and exposure to people who echoed her internal narrative.
3 When I spoke to Frida, her testimony did not change any, and her lived experience did not
4 change. But, the language she had to describe her identity did change. Frida very easily
5 could have not had that experience prior to crossing into the United States and, under this
6 Final Rule, could lose her case. My heart sinks imagining how many will.

7 d. Another individual, Sarah, a Honduran transgender woman, similarly would
8 likely have had her claim foreclosed if these new regulations had been in effect when she
9 began her case due to her failure to understand what is necessary on an asylum application.
10 Sarah was in touch with our Project, but we had only had a very basic conversation and
11 then lost touch with her. We next heard from her from Otay Mesa Detention Center
12 (“OMDC”). We began to provide detention support and to look for an attorney to represent
13 her. Despite us communicating to her that we were looking for an attorney for her, she had
14 another detainee at OMDC fill out the application and submit it to court on her behalf. It
15 had mistakes which obviously were because the person who filled it out had not fully
16 understood the questions. Sarah did not articulate clearly that her transgender identity was
17 the cause of her persecution in Honduras; rather, she just listed the many significant and
18 severe incidents she had endured. Moreover, she did not disclose the significant violence
19 and other persecution she had experienced in Mexico. This was necessary because she had
20 sought asylum in Mexico, was granted it, and then had her throat cut. After that severe
21 injury, the Mexican hospital discriminated against her as she tried to seek treatment.
22 Having pursued asylum in Mexico only to be persecuted there likely would bring her
23 within the exception to the third country transit ban. But the incomplete disclosures on her
24 form and the new limits on amending or reopening applications, and on appeals, would
25 likely cause her meritorious application to fail

26 41. Lastly, many LGBTQ individuals come from places where it is dangerous to say
27 how you truly feel or how you identify. For many of our clients, the language surrounding
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1 gender and sexuality they are most familiar with is often the language of the oppressor. For
2 example, most Jamaicans have heard the slur “battyman” more than “genderfluid.” Because of
3 this, they censor and hide themselves to the extent possible. To expect a lifetime of that
4 survival mechanism to shed completely the first time an individual is in front of an
5 Immigration Judge is unreasonable. And to foreclose the opportunity to provide that accurate
6 information later in the process when the applicant has become able to do so is unjustified and
7 inhumane.

8 a. We met Lisa, a Jamaican transgender woman, while she was still in Tijuana,
9 Mexico. The first time I met with her she gave short answers with a soft voice. The next
10 time I met with her I tried to discuss her case more substantively. She sat on a couch with
11 her body facing away from me speaking in the third person about how transgender people
12 in Jamaica are treated. She would occasionally look in the mirror to glance at me, but she
13 was clearly dissociated. It took numerous meetings and a lot of conversations about
14 unrelated topics until she began to talk to me about her life in any detail. This is an
15 example of extreme trauma, but accurate to a degree for nearly every asylum client I have
16 worked with over my legal career. Minimizing, remembering events in chunks or out of
17 order, speaking in the third person, and forgetting are common for our clients in this field.
18 Our Project works to develop techniques to help clients with trauma, but the one thing we
19 know we cannot do — and should not try — is to work a quick fix for them.

20 42. This requirement will be extremely harmful to our clients and other LGBTQ
21 asylum seekers who come from countries where same-sex relationships and transgender
22 identities are misunderstood, held in contempt, and subject people to violent abuse, often at the
23 hands of law enforcement, if not explicit criminal penalties.

24 *Narrowing Nexus, in Particular Excluding Claims Based on Gender*

25 43. The new rules create eight blanket exceptions that require a finding that nexus has
26 not been established between the persecution and an asserted protected ground. As a practical
27 matter, these requirements will defeat meritorious asylum claims in many if not most cases.
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1 44. For example, the new rules will prohibit asylum claims based on “interpersonal
2 animus or retribution,” especially if the “alleged persecutor has not targeted, or manifested an
3 animus against, other members of an alleged particular social group.” But, for LGBTQ asylum
4 seekers like our clients, it is common for harm to have been prompted by both their sexual
5 orientation and/or gender identity and a non-protected reason. Personal animus often motivates
6 persecutors, but it usually is inspired by and mixed with homophobia or transphobia.

7 a. One of our clients, French, a transgender woman from Jamaica was living in her
8 home until around age 16. At that point, she attended an event for transgender people that
9 she found on Facebook, and her cousin then saw online a photograph of her from the party
10 with her dressed in women’s clothes. She and her cousin had never had a good relationship
11 because she was not a biological child of his mother. When he found the photos, he helped
12 lead a neighborhood mob to the family home, with the intent to kill her. Her aunt calmed
13 people down enough to get French into a taxi, but this left her homeless. As this example
14 makes clear, this new, arbitrary requirement does not mean the persecution on account of a
15 target’s sexual or gender identity is less real and traumatizing. Rather, it just minimizes and
16 dismisses the asylum seeker’s experience and serves to block her ability to access asylum.

17 b. Another example is our client, Katina, a transgender woman from Kyrgyzstan.
18 Her father had been a police officer and remained influential in the area after his
19 retirement. From when she was a small child, he abused her physically for all sorts of
20 minor things, but often explained that abuse or, in his words, “punishment” with reference
21 to her falling outside of gender norms. Throughout her life, she lived in fear of him. When
22 she was in her late teens, he forcibly married her to a girl. But, the violent abuse continued.
23 Eventually, he put Katina in a hospital where they forcibly administered high doses of
24 testosterone and other drugs. Katina never had a good relationship with her father. Even if
25 some of it was a personality clash, much of the abuse was explicitly directed at Katina’s
26 gender expression and perceived sexual orientation.

27 c. Another example is our client Linda, a lesbian from Honduras, who was
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1 threatened for many months with demands that she become a gang member’s girlfriend. He
2 would send her messages and come by her house. He would tell her if she did not agree,
3 she would be kidnapped and “forced” into the role. The threats had homophobic elements,
4 but they did not explicitly distinguish between the fact that she was rejecting him and
5 hostility to her sexuality being a reason for the rejection.

6 45. This new regulation also does not explain how one is to distinguish between
7 cognizable PSG-based hostility and ostensibly not cognizable personal animus, and what sort
8 of evidence would establish that distinction. It is difficult to imagine, as a practical matter,
9 what evidence our clients could be expected to produce to show such a distinction, when those
10 who have persecuted them have been explicit that their hostility relates to their perceptions of
11 our clients’ sexuality or gender identity. One reading of the new rule would mean all asylum
12 claims are to be denied whenever a persecutor appears to have personal animus together with
13 hatred or contempt for LGBTQ persons. The inability to give our clients reliable advice on this
14 rule is a problem for us. At a minimum, we will need to provide more extensive legal
15 representation for each person, which will decrease the number of people we serve unless we
16 are able to secure more funding. However, lower numbers often mean less funding, not more.

17 46. Another new bar is when the persecution consisted of “interpersonal animus not
18 manifested towards others.” Such evidence will often be unavailable to clients who have fled
19 for their life without having had conversations with their persecutor, and without other sources
20 of information about how their persecutor has treated other people. Such information should
21 not be required because, under the law, persecution is individual, not class based. Requiring
22 our clients to make that kind of showing will require us to do inordinate amounts of
23 investigation and then, in many cases, to find that the required evidence simply does not exist.

24 a. Pedro, a bisexual man, from El Salvador, described vicious beatings he received
25 from the aunts with whom he lived as a child. On one occasion, they denied him food for
26 three days after they found him wearing his grandmother’s shoes. They also locked him in
27 a room after finding a letter he had written to a boy that they considered inappropriate. His
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1 aunts repeatedly used homophobic slurs against him, however, he has no evidence of them
2 acting this way to other gay people. It was just the one they had access to.

3 b. Another example is Joanna, a gender-fluid person from El Salvador, who was
4 targeted and pressured to smuggle drugs into a prison for a gang. She was briefly
5 kidnapped and threatened that she must do it. After a few days, the gang members started
6 coming to her house repeatedly at night, saying she had to become a drug mule into the
7 prison. The gang members made it clear that they believed it was a fitting job for someone
8 transgender. They attacked and raped her when she refused and said worse would be
9 coming if she did not comply. When they came back to her house again, she jumped over
10 the back wall and never went back. Joanna did not ask these men if they treated all
11 transgender women with such violence and contempt, or whether they had ever
12 encountered transgender people before. It seems that these new regulations would require
13 Joanna to ask them these questions while she was being attacked in order to prove up her
14 case for asylum. The idea is obviously absurd.

15 c. Another client, Kataleena, a transgender woman who grew up in Guatemala,
16 was bullied endlessly by her family for acting feminine. One of her neighbors began trying
17 to sexually assault her and her family did not help, telling her instead that she should fix
18 her own behavior. When her behavior fell outside of what her family members considered
19 appropriate for her gender, they would punish her severely. Kataleena fled home as a
20 teenager and began living in a series of temporary situations. Because she is transgender,
21 she was constantly vulnerable to threatening demands to engage in illegal forms of work.
22 Each time, Kataleena would move to a new place to avoid the coercion and danger. She
23 never inquired of those harassing and threatening her whether this is how they treat all
24 transgender people, or just her. When determining whether her persecution was real and
25 severe, the answer to that question should not matter.

26 47. On their face, the new regulations' prohibition on grants of asylum due to
27 persecution based on "gender" seems likely to bar the majority of our clients from qualifying
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1 for asylum. For LGBTQ applicants, language surrounding an individual’s gender – and others’
2 perception of their gender – is common and pervasive in their claims. Many if not most of our
3 clients have been harassed or attacked for their masculine or effeminate appearance, which the
4 persecutor has deemed inappropriate for our clients’ gender and which led the persecutor to
5 conclude that the client is gay, which is despised. Many countries have specific and strong
6 norms regarding gender-appropriate behavior, with violations commonly associated with being
7 gay and social enforcement often done violently. While some of these countries distinguish
8 clearly between gender and sexuality, most do not, resulting in gender-related categories,
9 language, and identities that blur.

10 a. Growing up in Jamaica, John, who identifies as a gay man, was constantly
11 referred to with anti-gay slurs, such as “battyman,” at school. This was because he
12 preferred art and fashion to sports. He does identify as gay, but much of the persecution he
13 endured was focused on his gender presentation and the fact that he did things outside
14 locally accepted gender norms. He was too scared to be very out as a gay man in Jamaica.
15 But his appearance and mannerism were considered effeminate, and the treatment he
16 describes blurs the lines between homophobia and gender stereotyping because, in Jamaica,
17 to be effeminate is to be gay whether one’s sexual orientation is known or not.

18 b. Mayte is a transgender woman from Mexico. Until she was in her early
19 twenties, she would have described herself as a gay man. But as a young adult, she decided
20 she would rather die a woman than try to continue living as a man and began slowly
21 transitioning. But before her transition, she faced considerable persecution while she was
22 living and presenting herself as a gay man who was very effeminate.

23 48. With respect to LGBTQ asylum seekers, and surely with respect to others, the
24 effect of barring, without exception, claims based on “gender” seems inevitably likely to cause
25 profound confusion for lawyers and judges as well as desperate refugees. We will be harmed in
26 our advocacy for clients and our educational work because this confusion will require us to
27 spend more time in all our work, with each client and at each level of the proceedings, to
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1 attempt to clarify how “gender” should be understood in each case and why this new bar
2 should not block the valid claims of LGBTQ/H people. Especially since this is not a field with
3 which many asylum officers are deeply familiar, it is likely to be close to impossible in many
4 cases to provide the needed clarity for our clients or the attorneys we advise.

5 *Narrowing of the Political Opinion Protected Ground*

6 49. The new regulations state that the only political opinions now protected are those
7 relating to a “discrete cause related to political control of a state or a unit thereof.” Now,
8 LGBTQ applicants will be denied protection if persecuted based their political activity or
9 expressions of opinion that aim to change hostile social attitudes or cultural norms, or even to
10 change laws and policies of a sitting government that target LGBTQ people explicitly, unless
11 that activity aims directly and solely to change who holds state power. This means people
12 whose persecution resulted from advocating for LGBTQ rights, such as marriage equality or
13 ending criminal laws against same-sex relationships, will no longer be eligible for asylum.

14 a. One of our clients, Tatiana, a transgender woman from Russia, was very active
15 in LGBTQ rights activism. While she had experienced severe discrimination and other
16 persecution for being transgender, this worsened after she staged a one-person protest over
17 a new rule affecting transgender people. She was arrested and targeted as a political
18 opponent. Her sister was leaked a file through her brother-in-law that showed Tatiana was
19 being followed and that those doing so had every tiny piece of information about her life. It
20 was clear that she was being targeted as an activist based on her involvement in political
21 marches and her employment at a transgender rights organization. That activism is a central
22 part in her claim for asylum. By limiting in this way what qualifies as protected political
23 opinion, the new rules put Tatiana’s claim at risk despite it being classic political opinion
24 persecution and core to her case. This change effectively eliminates asylum claims for
25 LGBTQ activists, a change that is utterly unjustified, wrongfully eliminates an important
26 part of our work, and defeats one of reasons asylum was created in the first place.

27 50. Even simply being openly gay or transgender is a political expression in some
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1 countries. But if pro-LGBTQ political advocacy or opinion statements directly resulting in
2 persecution do not qualify for asylum, it will fundamentally harm our clients. We have
3 represented numerous LGBTQ individuals whose persecution began in earnest or became
4 worse once they came out and began calling for acceptance and basic rights. It should be
5 beyond doubt that, for our clients from many of the nearly 70 countries where being gay is
6 illegal and subject to severe criminal penalties, being openly gay is dangerous, requires
7 courage, and is undeniably political.

8 a. Kennedy, a Ghanaian man, worked in a school. He was married and has two
9 children. One day his wife left him for unknown reasons. Over the next while, he developed
10 feelings for a man. One night they were caught together with one sitting on the other's lap. A
11 group of people from the town attacked them. His partner went one way and Kennedy ran the
12 other. To this day he does not know what happened to his partner. Kennedy was beaten, hung
13 from a tree, and left for dead. He managed to survive because the rope did not break his neck.
14 He hung there all night, but eventually was able to get free. He fled the country immediately
15 after being told by a sympathetic friend that he would have no safe place in Ghana.

16 51. We have approximately a dozen clients from Jamaica. All of them describe
17 Jamaica's criminal law against gay relationships as causing a constant police threat and hostile
18 public refrain. Not all describe having been arrested pursuant to those laws, but many report
19 that the threats of arrest, of random police abuse, and of intense social stigma all deterred them
20 from living freely. In that context, these laws shape the social climate and diminish lives in
21 persecutory ways without needing actual prosecutions and sentencing. Public advocacy for
22 reform of these laws and social norms frequently results in persecution. Disallowing asylum
23 claims by those who then need to escape will substantially defeat our ability to help them
24 obtain safety, a core goal of our mission.

25 *Expansion of Asylum Records Disclosure*

26 52. The new regulations greatly expand the circumstances in which the contents of
27 our clients' files can be shared with employees of the Department of Homeland Security and
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1 the Department of Justice for law enforcement purposes. This will cause some of our clients to
2 fear engaging with the asylum process or being completely forthright during the process.
3 Additionally, it could place them in danger from individuals in their home countries or in
4 transit countries. Due to their location in Mexico, many of our clients are concerned that
5 future disclosures could place them in danger from criminal organizations or other people in
6 Mexico or in their home countries, and even within the United States, who have targeted them
7 for being LGBTQ or because they were trafficked or coerced into other activity because their
8 LGBTQ status made them vulnerable.

9 53. Some of our clients have expressed their concerns about confidentiality due to
10 their ongoing fear of acknowledging that they are LGBTQ. Some only have felt comfortable
11 detailing their harrowing experiences after a discussion of the ethical obligations of strict
12 confidentiality. The new rule will undermine our clients' faith in the asylum process and
13 amplify their fears of how governments behave, which often are well placed given their life
14 experiences. This reduction in confidentiality inevitably will lead some LGBTQ people who
15 need safety, and who would have come to us for help, to decide against trying to seek asylum
16 even if that means remaining in danger. This defeats one of the core aspects of our mission.

17 *Narrowing the Definition of Persecution*

18 54. Asylum law obligates the United States to protect individuals who have a well-
19 founded fear of persecution. The Final Rule redefines persecution to "require an intent to target
20 a belief or characteristic, a severe level of harm, and the infliction of a severe level of harm by
21 the government of a country or by persons or an organization the government was unable or
22 unwilling to control." The Final Rule further defines persecution as needing "actions so severe
23 that they constitute an exigent threat," but not "generalized harm that arises out of civil,
24 criminal or military strife ... intermittent harassment, including brief detentions; threats with no
25 actual effort to carry out the threats; of non-severe economic harm or property damage." By
26 excluding harms that became serious because they cumulated, and by requiring that harm be
27 "exigent," the rule heightens the standard unjustifiably and will make it much harder to
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1 substantiate legitimate claims of persecution. It thus will significantly burden our work.

2 55. For many of our clients, persecution is a lifelong and cumulative experience
3 rather than a one-time event. We have represented numerous clients who have described how
4 their families bullied and abused them, sometimes savagely.

5 a. Miguel, a bisexual man from El Salvador, was beaten by his family every time
6 his behavior fell out of line with what they considered appropriate for males. He was kept
7 in a room without food or water as punishment for breaking rules, playing with the
8 “wrong” toys, or not “acting like a man.” When an older uncle targeted him for sexual
9 abuse, his aunt and grandmother told him it seemed like something he should like.

10 b. Another example is Paola, a Mexican transgender woman, who described the
11 tortuous time she had growing up. Her father was very religious and very strict. He was
12 also an alcoholic. She had six brothers and sisters, most of whom were beaten by their
13 father. However, Paola was beaten the most and the hardest. Long before Paola identified it
14 with her gender presentation, her father called her names and said was the one who “just
15 came out wrong.” She was sexually abused as a child and thought she deserved it because
16 she already knew she was attracted to men. The abuse continued when she was in school,
17 and later on the street, because people saw her as acting too feminine for a man. Once
18 Paola reached her late teens, she decided her fate was to die young because of what she saw
19 on the news about transgender people. Eventually, she did decide to transition, but the
20 threats and harassment continued.

21 c. Josué, one of our clients from Cuba, recounted constant harassment by the
22 police. He was briefly detained over and over and over, and then released, for small things
23 for which only LGBTQ people were arrested. The result was that everyone in the area
24 knew him as someone who frequently was arrested, which added to the file kept on every
25 citizen and made it hard for him to maintain employment.

26 56. As these examples show, limiting the standard of persecution to only severe
27 incidents could block many of our clients from presenting their cases of lifelong mistreatment
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1 due to their sexuality or gender identity, which in fact had robbed them of any meaningful life
2 before they fled. It seems absurd to think that Miguel’s history of abuse by his family
3 members, or Paula’s history of harassment, beatings, and sexual violence, or Josué’s history of
4 incessant arrests and their consequences for his ability to hold a job – or any of them – might
5 not meet the threshold of persecution under the Final Rule. At a minimum, the increase in the
6 proof standard will require us to devote even more time and resources to cases like these, all of
7 which should be straightforward and obvious. This will consume our resources and limit the
8 number of people we can help.

9 57. The Final Rule also provides that “threats with no actual effort to carry out the
10 threats” are insufficient to meet the new standard for persecution. This seems to require that
11 people wait until they are attacked, permanently injured, or killed to show that threats against
12 them are not idle. From our clients’ stories, we know that sensible people do not remain in such
13 danger if they can escape. Our client Paola, described above, illustrates this issue. The gender-
14 based harassment did not let up when she transitioned. And then, the only work she could find
15 was in a bar. One night after work, she was targeted and raped. Then her boyfriend was
16 murdered for dating her. Paola found safety in a friend’s apartment. But then her friend told her
17 that she had heard the people who killed Paola’s boyfriend planned to kill her next. Paola fled
18 the next morning. Might she be told during her asylum case that she should have waited to see
19 if the murder threat was serious? Our clients’ cases show how absurd the new rules are, and
20 how little will be left of our law practice if they remain in effect.

21 58. The regulations also add a new evidentiary requirement that a law or policy that
22 criminalizes a group cannot support a claim if the laws were “unenforced or infrequently
23 enforced.” In other words, unless an applicant can show that the law will be enforced against
24 them personally, it cannot sustain a finding of persecution. This requirement will be extremely
25 harmful to our clients and other LGBTQ asylum seekers who come from countries where
26 same-sex relationships and transgender identities are criminalized. We represent many LGBTQ
27 clients from African countries, Jamaica and other countries where there are laws
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1 criminalizing homosexuality. The threat of incarceration and related ostracism often embolden
2 private actors to coerce, hurt and blackmail LGBTQ persons in ways that cause LGBTQ people
3 to hide and that deprive them of the ability to live a full life. There is no need for criminal
4 proceedings to achieve the intended effect of entrenching gender norms, deterring our clients
5 from seeking help after abuse, and covering for officials who act under color of law when
6 persecuting those marked by law and social norms for ostracism, derision, and violence.

7 *Barring the Use of So-Called Cultural Stereotypes as Evidence*

8 59. The new regulations deem much of the evidence of social and cultural norms
9 routinely used to show likelihood of persecution if a person is returned to their country of
10 origin to be inadmissible “cultural stereotypes.” This new exclusion will be problematic for our
11 work in at least two ways. First, it is unclear how we are expected to distinguish between valid
12 evidence of dangerous social conditions and invalid cultural stereotyping. This confusion will
13 inject uncertainty and make our representation and our trainings more difficult.

14 60. Second, and even more problematic, evidence of this nature often has been at the
15 heart of LGBTQ claims. It confirms the culture of *machismo* or similar prevailing gender-
16 related expectations in the asylum seeker’s country of origin, which explain how gender and
17 sexuality norms affect the environment from which they escaped. For example, song lyrics and
18 graphics in music videos, and other evidence from popular media, illustrate the norms of
19 violence around homosexuality in Jamaica. Evidence showing the focus of gang culture on
20 masculinity standards in Mexico, for example, can confirm and lend significant weight to
21 testimony about threats or sexual attacks.

22 61. In our experience, evidence confirming the pervasively hostile cultural and social
23 norms in LGBTQ asylum applicants’ countries of origin has been indispensable, particularly
24 for *pro se* litigants. Therefore, we submit such evidence in nearly every one of our cases and
25 we have created a research database of this type of evidence both to improve the efficiency of
26 our work and to allow us to help more people, including by sharing this material with those
27 who pursue asylum without counsel.

1 62. The result of this confusing, unjustified rule change is that a great many of the
2 people we help, both the ones we represent and those who proceed *pro se*, will find themselves
3 unable to articulate and to substantiate adequately their membership in a cognizable PSG, their
4 persecution due to that membership, and their resulting, well-founded fear of returning to their
5 home country. This, in itself, completely frustrates the Transgender Law Center’s mission to
6 support LGBTQ asylum seekers and to help keep them safe.

7 ***Creation of Bars with Respect to Certain Kinds of PSGs***

8 63. This regulation imposes new restrictions on certain types of PSGs, precluding
9 groups delineated by “interpersonal disputes of which governments were unaware or
10 uninvolved, or those which are committed by private actors.” In our experience, LGBTQ
11 persons are frequently persecuted by private actors. Often our clients do not report that
12 violence to the government because they know the police will not help them; in fact,
13 sometimes the police themselves are perpetrators of violent anti-LGBTQ abuse, and sometimes
14 they have close connections with cartel or gang members, who share those attitudes and
15 represent the opposite of safety. To deny claims based on private-actor persecution is to close
16 the door on many of our clients’ valid claims.

17 *Internal Relocation*

18 64. When the persecution at issue was committed fully or in part by private actors,
19 this new regulation shifts to the applicant the burden to prove that relocation within the country
20 would not be a reasonable option. This will create a barrier for many of our clients and make
21 our work more difficult because the same “country conditions” evidence of cultural norms that
22 often helps confirm the persecutory conditions from which they escaped also is important for
23 showing the pervasive nature of discrimination and violence in the country. If some or all of
24 that evidence is deemed “cultural stereotyping” and disallowed, it will significantly impair our
25 ability to help many of our clients substantiate the dangerous conditions they would face if
26 returned anywhere in their country of origin.

27 a. John, a gay Jamaican, had an asylum case in Germany. He has endured
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1 bullying, beatings, and the denial of employment in Jamaica for being gay. He fled to
2 Germany after a situation that made him fear for his life. He explained all of this to the
3 judge in Germany. The judge denied his claim for asylum on the grounds that the judge had
4 been to Montego Bay on vacation and based on that experience concluded John could be
5 safe there. He ordered John deported. John described his feeling on the plane back to
6 Jamaica as numb. He wanted to cry but could not find tears. He was scared because
7 he had heard stories of people being burned alive at the airport after being deported. He
8 returned, was homeless, was further persecuted and fled again, this time hoping for safety
9 in the United States. Although this is an example of internal relocation being assessed from
10 Germany, it illustrates that asylum seekers often need to dispel for non-LGBTQ people the
11 misleading impressions they have of country conditions; this usually is done using data,
12 reports and studies documenting the actual conditions on the ground. That German judge
13 may have believed sincerely that John could have lived safely in Montego Bay because it
14 appeared peaceful and welcoming to him, a visiting outsider. But the realities for white
15 tourists and for black gay Jamaicans are very different. An asylum seeker's ability to show
16 that this is true throughout Jamaica would be exceedingly limited if most country
17 conditions evidence is excluded, even though it is well known that Jamaican society is
18 notably homophobic, and often violently so, and that gay people are not safe.

19 b. Yara, a transwoman from Mexico, was walking with a friend when a taxi van
20 pulled over and grabbed and took her friend. Yara stumbled home with her friend's
21 backpack, which had been separated from her friend when Yara tried to pull her back from
22 the kidnappers. A few days later she saw a headline in the newspaper accompanied by a
23 photo. She recognized the jeans of her friend who was shown in the photo, lying face down
24 and dead in a ditch. Yara was not sure but strongly suspected that her friend was targeted
25 for being a lesbian. A few days later, men came by and just stood outside her business. A
26 few days after that, the home she shared with her mother was ransacked. She recognized
27 that they were being followed and watched. They knew that, in their context, it meant "do
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1 not be a witness.” She did not intend to be one. However, the stalking continued until her
2 mother came to her one night and told her they needed to leave for Mexico City. But after
3 just a few days in Mexico City, her mother saw a man on a motorbike watching them. He
4 pointed at her and drove away. Knowing they could not go to the police because that would
5 be taken as offering to be a witness about the murder, they fled to the United States. Yara
6 explained that she and her mother knew that many Mexican police officers are co-opted by
7 organized crime. Although many people hear stories about organized crime in Mexico, that
8 does not necessarily translate to immigration judges knowing how extensive such networks
9 are and whether or not Yara and her mother could expect to be safe anywhere in Mexico.
10 This requires evidence of country conditions and, with the new rules seeming to exclude
11 much of that evidence and many asylum seekers having limited English language
12 proficiency, the assistance of an attorney to present it.

13 *Asylum-Only Proceedings*

14 65. The new regulations require that if an individual receives a positive credible fear
15 determination, the person is placed in asylum-only proceedings before an immigration judge.
16 This is problematic for us because individuals in these proceedings are only eligible for
17 asylum, withholding of removal, and protection under the Convention Against Torture. But
18 many of our clients potentially have additional, alternative forms of relief, such as when there
19 has been an issue of trafficking or when the client married a person with legal status in the
20 United States after arrival. To have our clients denied these alternate options unjustifiably
21 limits their potential pathways to safety and imposes greater pressure on us as providers of
22 immigration legal services and related assistance.

23 a. One example of this situation is Gloria, a Honduran gay woman, who has spent
24 a year and a half in Mexico waiting to have her number called to enter the United States. In
25 that time, she met and fell in love with a United States citizen. They want to get married
26 and her fiancée is now waiting for her in United States so they can be reunited. Gloria is
27 scared to return to Honduras to get a K visa due to the persecution she suffered due to her
28

1 sexual orientation. An asylum-only court would prevent her pursuing both her asylum case
2 and also an adjustment of status through marriage.

3 b. Seth, a Jamaican gay man, has a mother who is a green card holder who applied
4 for him. The wait to adjust his status this way is very long and Seth came to believe it was
5 no longer safe for him to wait in Jamaica.

6 *The Firm Resettlement Bar*

7 66. The new rule creates a categorical bar to asylum eligibility with a drastically
8 expanded standard for firm resettlement. It states that an individual will be deemed firmly
9 resettled, and thus ineligible for asylum in the United States, if: (i) the person “resided or could
10 have resided” with permanent legal residence or other protection in a country through which
11 the alien transited before arriving in the United States; (ii) the person “physically resided
12 voluntarily, and without continuing to suffer persecution or torture,” in any country for more
13 than a year prior to entering the United States; or (iii) the person transited through a country of
14 which they are a citizen, other than the one from which they fled persecution.

15 67. Many LGBTQ people are forced to wait, often for long periods of time, in transit
16 countries due to barriers put in place far south of the United States, which limit access to
17 asylum. During these periods, many people stay in shelters where they try their best to keep
18 their identities hidden. When they manage to avoid persecution during such periods, it does not
19 mean they have achieved safety. Rather, it simply means they are being vigilant and staying
20 largely hidden, which hardly equals security from identity-based persecution.

21 68. Many of our clients have resided in a third country for a year or more. There is no
22 exception to the new asylum bar for when an asylum seeker transits through a third country but
23 then is unable to leave that country. When the U.S. government raises the issue of firm
24 resettlement, the burden of proof falls to the applicant to demonstrate that they could not have
25 obtained a safe immigration status in the third country. This is difficult if not impossible for
26 many of our clients.

27 //

1 (i) the person “resided or could have resided” with permanent legal residence or other
2 protection in a country through which the alien transited before arriving in the U.S.

3 a. Monserrat and Gaviota, a lesbian couple from El Salvador, described arriving in
4 Southern Mexico and being offered the option of applying for asylum there. Initially they
5 thought it was a good idea. They could stop traveling, they would get work authorization,
6 and they would not have to learn English in the United States. They did receive legal
7 residency, however, while the process was still ongoing, they started being harassed in
8 public and eventually were threatened because of their sexual orientation. They were
9 terrified. They moved to another part of Mexico, and things were better for a brief while.
10 But then the same thing happened again. Now they are trying to get out of Mexico in order
11 to be able to live their lives safely.

12 b. Sarah, the Honduran transgender woman described above, escaped from
13 Honduras to Mexico. She was deterred from trying to get a humanitarian visa, a long
14 process, to try to travel north. She very much needed to work and was told to apply for
15 residency in Mexico and assured it would be quick, then she could work. She thought
16 maybe it would be alright. But, within months, she and a friend were attacked in a local
17 park by men shouting transphobic slurs at her. A few months later, another friend was gang
18 raped. Shortly thereafter she was attacked and had her throat cut. She then found herself in
19 Mexico City being mistreated by the hospital that was supposed to be helping her recover
20 from that serious injury. She filed a complaint with the country’s human rights
21 organization, Centro Nacional de Derechos Humanos (CNDH), but they did nothing more
22 than accept her report.

23 c. Javier and Arturo, two gay men from El Salvador, fled after Arturo was raped
24 and beaten (an attack through which he contracted HIV/AIDS), and Javier was fired after
25 being tricked into disclosing his sexual orientation (he and 13 other gay men were purged
26 together). Upon entering Mexico, the couple was staying in Tapachula on the southern
27 Mexican border pending their visas when they began being threatened. Their roommate
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1 was trying to force Javier into sex work. The couple sought assistance from an international
2 agency, which told them to apply for residency and then they could be moved to another
3 town. They did, believing they at least would be able to leave Tapachula and work legally.
4 Upon being relocated, however, they found that their former roommate was gang affiliated
5 and was able to find them in their new location. They fled again to the U.S. border and
6 crossed. Upon entering the United States, they were put into the Migrant Protection
7 Protocols (“MPP”) and returned to Nuevo Laredo on the northern border of Mexico. Upon
8 arriving back in Nuevo Laredo, within minutes, they were targeted for kidnapping. They
9 narrowly escaped because a pastor was at the Port of Entry to try to intervene in these
10 kidnapping attempts, something for which LGBTQ people in MPP are especially
11 vulnerable. He drove the couple out of town in the back of a pickup truck and said they
12 should probably not come back. The couple made their way to Tijuana where they were
13 able to secure our assistance and presented for a non-refoulement interview (“NRI”). A
14 blanket requirement that everyone, no matter what harm they face, must seek formal
15 protection in a transit country fundamentally misunderstands LGBTQ forcible
16 displacement.

17 *(ii) the person “physically resided voluntarily, and without continuing to suffer*
18 *persecution or torture,” in any country for more than a year prior to entering the U.S.*

19 d. Before the list at the Port of Entry was closed in March 2019, the wait time
20 already was over 6 months. Then the list and border were closed and the waiting time got
21 longer. And this does not include the average of four to six months people spend just trying
22 to secure legal means to transit Mexico. This means that people trying to follow the
23 prescribed course set out by the U.S. government will often spend over a year just trying to
24 seek an opportunity to seek asylum. This procedural rule clashes with other rules the U.S.
25 government has adopted, which means a person with a claim that should be accepted, who
26 follows in good faith the guidelines applicable to them, will be defeated by the procedures
27 and deemed ineligible for asylum. Moreover, if they choose to enter the United States
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1 irregularly to avoid this one-year ban, they still will find themselves ineligible.

2 e. Another example is Elias, a gay man from Iran who we represented in
3 2019. He waited on a list for a long time to seek asylum. During this time, he made his way
4 to an LGBT shelter. He described for me his life in the shelter, which consisted of reading
5 a lot and trying to learn some Spanish. He did not go out of the shelter. He did not try to
6 find work. He was too scared due to prior instances of discrimination in Mexico. While in
7 the shelter, he was not trying to build a life. He was just trying to survive until he could get
8 to the United States. But he would not have had stories of persecution not because Mexico
9 was safe, but precisely because he was in hiding to avoid the harsh outside conditions.

10 f. We represented eight Russian citizens in 2020. It is unreasonable to expect non-
11 Spanish speakers like them to apply for asylum in countries where they do not understand
12 the language or the laws and they are likely to be unsafe. Tatiana, a Russian transgender
13 woman, is an example. She stated that she also spent all of her time in Mexico just trying
14 to lay low. This is the stated experience of many LGBTQ asylum seekers — living in
15 hiding, staying inside and out of sight — just trying to survive until their number is called
16 and they can enter the United States

17 g. Another client, a transgender woman from Honduras who has had to live in
18 Mexico for a full year while waiting to enter the United States, would then have to contend
19 with the transit ban bar. However, it is well known by the United States authorities that
20 transgender woman experience persecution in Mexico because transgender woman from
21 Mexico have regularly sought and been granted asylum based on the recognized bases of
22 their fears of future persecution. Therefore, it seems illogical and inconsistent with the
23 purpose of asylum that the United States would impose an arbitrary bar like this.

24 69. This regulation seems to posit that people are free to make decisions about where
25 they live and for how long. It ignores the prevalence of human trafficking. We have worked
26 with numerous people through our Border Project that have been trafficked on their journey to
27 the United States. One of our client's, Aldo, fled Honduras after years of physical and sexual
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1 violence including being trafficked into violent child pornography because of his sexual
2 orientation. On his journey to the United States, he was held in Mexico for over a year and
3 forced to work. His traffickers used violence and fear to control him, but he eventually
4 escaped. However, due to his extensive trauma, his ability to describe the violence and
5 trafficking that occurred in Mexico took months of trauma-informed interviewing. The Final
6 Rule would deny Aldo asylum and would force him back into the hands of his persecutors.

7 *Pretermission*

8 70. The Rule requires immigration judges to deny relief without a hearing “if
9 warranted by the record” if the applicant fails to establish a ‘prima facie claim’ in the initial
10 filing. There are only three questions on the i589 form that ask about the underlying
11 substantive claim. To meet the Final Rule’s more demanding standards and given the
12 punishing stakes raised by pretermission, we will need to put more time into helping our clients
13 prepare their applications and will need to train our volunteers accordingly. We would want to
14 increase our staff, however, we have no indications where we might secure the resources to do
15 so other than by diverting resources from other programs.

16 71. A smaller set of our clients are *pro se* and they are at an extreme deficit. Often,
17 our clients are told by others to just write “see declaration” on the application and we have had
18 numerous clients who have handed us applications prepared this way. It is too much to expect
19 people to meet the Final Rule’s heightened standard with an asylum application not designed
20 for robust and complete answers. It will require much more intensive intakes and hands-on
21 assistance to prepare these *pro se* applications.

22 72. Given the new standards we will need to fundamentally change the way in which
23 we provide services. Historically, we focused on the biographical sections of the application
24 when working with people in Mexico in order to help provide a prima facie articulation of a
25 claim and the person’s biographical data and asylum bar prima facie screening. There is
26 nothing about the application that advises the applicant to be comprehensive. Consequently, we
27 know refugees will need more intensive professional assistance. This situation will require us
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1 to redirect our resources and will limit our ability to fulfill our mission.

2 *Discretionary Factors Related to Manner of Entry and Third Country Transit*

3 73. In addition to meeting the legal standards for asylum, asylum seekers must
4 receive a favorable discretionary finding by an adjudicator. But, the Rule adds twelve
5 “significant adverse discretionary factors” that now will be applied.

6 74. One is that an asylum applicant who enters the United States without inspection
7 EWI is to receive a denial. Individuals waiting in Tijuana place their names on a list and must
8 wait, sometimes in the very country from which they are fleeing due to persecution, for
9 anywhere from 5 to 8 months. Some people have been waiting more than a year. This forced
10 waiting places great pressure on many people who are living with few resources and no
11 protection, usually in dangerous, discriminatory conditions.

12 a. More than half of our clients who have entered the United States have “EWI’d.”
13 Marisa, a transgender woman from Honduras, was in detention in the United States when
14 she told me she had been harassed in a shelter along the border and then nearly raped in a
15 park. She decided she needed to just cross the border in order to stay safe.

16 b. Javier and Arturo, described above, recounted that, as they were trying to escape
17 a gang that was pursuing them to force them into sex work, they also concluded they
18 needed to get to the United States as quickly as possible in order to survive.

19 c. Lia and Roanny, a Cuban transwomen and a gay man, crossed the border after
20 realizing they were being targeted as darker skinned migrants, gay and transgender people.
21 They had been in Mexico trying to survive for nearly six months. They were not being
22 allowed to renew their visa in Mexico without applying for residency, which they did not
23 want, and concluded that they had no choice but to cross into the U.S. informally.

24 75. Failure to seek protection in a country of transit creates another bar to asylum.
25 Immigration judges must deny asylum claims if the person (i) did not seek protection in a
26 country through which they traveled or (ii) stayed in a country for more than 14 days. This bar
27 would apply to nearly every one of our clients.

1 understanding of LGBTQ people. For example, our client French was initially given a
2 negative finding by an asylum officer after an interview over the phone. Despite her identifying
3 herself as a transgender woman, the officer wrote down her identified PSG as “sexual
4 minority.” This led to the asylum officer not understanding one of the incidents French
5 described, which led to a “not credible” finding. The asylum officer seemed confused and not
6 to understand or believe that French is transgender. This type of misunderstanding can occur
7 for multiple reasons. These interviews take place with all parties on the phone, which means
8 there are no visual cues for the officer about the applicant’s identity. Usually, the asylum
9 seeker is in a booth in a detention center using a poor-quality phone. Often, as in French’s
10 interview, the asylum officer is in a hurry because they have so many interviews to conduct.
11 Sometimes the officers are obviously transphobic. Sometimes they are simply not well
12 trained. Either way, this puts LGBTQ people at a disadvantage. In this case, after the denial, I
13 had to spend a week pursuing the two available forms of relief – advocating for reconsideration
14 of the adverse finding and preparing the appeal. The reconsideration request was not acted on,
15 but the hearing before the Immigration Judge was very quick. Once she understood that French
16 is a transgender woman from Jamaica, she immediately reversed the adverse finding and
17 approved the case to proceed.

18 79. While I was able to get a good result for French, her need for a lawyer even at that
19 initial stage illustrates why we are so concerned about the Final Rule. If it takes effect, we
20 anticipate even more of our clients will fail their interviews and be referred to an Immigration
21 Judge for review. Those referrals involve court hearings, which will require us to provide more
22 direct representation of our clients, further straining our limited resources and requiring that we
23 limit the number of people we can serve.

24 80. The standard of proof in determinations for withholding of removal and
25 protection under the Convention Against Torture in a reasonable fear interview is “raised from
26 a significant possibility that the alien can establish eligibility for such relief or protection to a
27 reasonable possibility.” Nearly every client we have would fail to qualify under this new
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1 standard because of the bars on asylum. Specifically, most of our clients likely will be barred
2 from asylum due to the transit ban, the EWI ban, or other impediments imposed by the Rule.

3 81. Some refugees will go *pro se* when we lack resources to help people at the rate we
4 maintained under the prior rules. When a client is given a negative finding, significant time is
5 needed for re-arguing and requesting a new interview. Given the heightened standards along
6 with the new, additional bars, we expect more negative findings and more appeals. Together
7 with everything else newly required by the Rule, we expect to not have capacity to represent
8 those we previously would have helped.

9 *Convention Against Torture (“CAT”)*

10 82. The Final Rule amends the regulations implementing the CAT, sharply limiting
11 available relief. CAT requires a nexus between government action and the harm. The Rule now
12 requires evidence that a public official inflicted, instigated, consented to, or acquiesced to
13 torture, and the applicant must show that the public official was acting “under color of law.” A
14 public official will not be found to have acquiesced to torture unless the applicant shows that
15 the public official deliberately avoided learning the truth and was “charged with preventing the
16 activity as part of his or her legal duties and have failed to intervene.”

17 83. CAT is often the last resort for LGBTQ people seeking relief and these
18 requirements appear likely to be insurmountable in most cases. For instance:

19 a. Tatania, the woman from Kyrgystan, was held against her will by state officials
20 in a hospital. She was forcibly injected with testosterone and other drugs. Much of what
21 happened is obscured in her memory due to trauma and the drugs. This imprisonment was
22 arranged and managed by her father, a former police official, who remained highly
23 influential as a religious leader and former police officer. She was beaten, drugged, and
24 tortured until she was finally able to escape. Under the Rule, however, to qualify for CAT
25 relief, Tatiana would have to prove that her father and others were acting under “color of
26 law,” which seems very difficult because her father’s role was no longer official even
27 though he retained the social authority to direct the torture to which Tatania was subjected.
28

1 b. Frank is a gay man from Cuba, where the police frequently detain LGBTQ
2 people solely because they are gay or transgender. Frank was no exception. The officers
3 assigned to his neighborhood harassed him unrelentingly and arrested him often for trivial
4 or under baseless reasons because he is gay. Frank was held with other gay people in a
5 section of the jail that was worse than the other parts. And the police let other prisoners into
6 the cells of the gay people to attack them. It appears likely that the Rule would make Frank
7 ineligible for CAT because the actions of the police would not be assessed cumulatively
8 and the violent attacks they facilitated would be deemed to have been the actions of private
9 parties, not the police themselves.

10
11 I hereby declare under penalty of perjury that the foregoing is true and correct.

12 Executed this 21st day of December, 2020 in Baja California, Mexico.

13
14 

15 _____
16 Meghan DuPuis Maurus
17 Legal Coordinator/Staff Attorney
18 Transgender Law Center
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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

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