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Dear Senator:

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On behalf of the American Bar Association, I write to urge you to oppose any effort to attach provisions of the REAL ID Act of 2005 to the emergency supplemental appropriations bill currently under debate.

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The REAL ID Act would make broad-ranging changes to our immigration and asylum laws, which would, in many cases, adversely affect genuine refugees. In addition, these proposals have not had the benefit of congressional hearings or debate.

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While we appreciate that controlling borders is an important component in promoting our national security, our immigration procedures, particularly those pertaining to asylum, must provide for a fair, humane process and ensure that legitimate refugees are not turned away. Concerns that terrorists may be able to exploit the legal system and obtain admission to the United States are addressed under current laws. Asylum seekers are subject to rigorous background and security checks as a basic part of the application process. Those individuals who have engaged in terrorist activities, committed certain crimes abroad, persecuted others, or who reasonably may be considered a danger to the security of the U.S. are already ineligible for asylum.

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A report released by the U.S. Commission on International Religious Freedom on February 8, 2005, found significant flaws in U.S. asylum policy and implementation of the laws, leaving asylum seekers at risk of being returned to countries where they may face persecution. If enacted, the REAL ID Act would increase the possibility that bona fide refugees would be improperly denied asylum. This result would be inconsistent with America's role as a champion of human rights and threatens our longstanding commitment to the protection of those fleeing persecution throughout the world.

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## **The REAL ID Act of 2005**

### **ASYLUM PROVISIONS:**

#### **Burden of Proof: In General**

Section 101(a)(3)(B) of the bill requires asylum applicants to prove that a central reason that they face persecution is on account of one of the five protected grounds for asylum - race, religion, nationality, membership in a particular social group, and/or political opinion. Most often, however, evidence of a persecutor's motive consists of an applicant's recollections of specific statements and actions of the persecutor, and necessarily requires inferences and assumptions about the thoughts of another individual. Placing the additional burden on asylum seekers of not only having to establish why another person took certain actions, but the degree to which that person was motivated by a particular reason to the exclusion of others, is an extreme and unattainable standard of proof. The Supreme Court has explicitly acknowledged this reality, holding in *INS v. Elias-Zacarias* that while the Immigration and Nationality Act requires some proof of motive, either direct or circumstantial,<sup>1</sup> the level of difficulty in proving motive is such that the respondent was not required "to provide direct proof of his persecutor's motives."<sup>2</sup> Recognizing that proving persecution on account of one of the five grounds is a basic element of the refugee definition, courts have nonetheless repeatedly found that "on account of" does not mean *solely* on account of one of the five grounds.<sup>3</sup> More than on motive, or "mixed motives," for persecution is enough to meet the standard of proof for asylum, as long as one of the motives is a protected ground.<sup>4</sup> In practice, implementation of this provision will give rise to inconsistent, overly narrow, and highly subjective rulings, as well as hairsplitting by judges struggling to determine what evidence is sufficient. For example, courts may have to decide how many times a persecutor must use a derogatory slur to show that he or she was motivated primarily on account of the applicant's race, if that is the only evidence of motive available. Or, if an applicant testifies that her persecutor also targeted political activists from the same student group, the judge will have to decide whether targeting one other activist is enough, or whether more than one is required to meet the burden of proof.

In light of the above, the Association is deeply concerned about this provision and the unjust, impossible burden it will place on the asylum process, as well as deserving asylum seekers who already face many hurdles in obtaining evidence as they flee life-threatening conditions.

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<sup>1</sup> See *INS v. Elias Zacharias*, 112 S. Ct. 812 (1992).

<sup>2</sup> See *id.* at 816-17.

<sup>3</sup> See *Osorio v. INS*, 18 F.3d 1017, 1028 (2nd Cir. 1994); *Borja v. INS* 175 F.3d 732, 735 (9th Cir. 1999); *Navas v. INS*, 217 F.3d 646 (9th Cir. 2000); *In Re S-P-*, 21 I&N Dec. 486 (1996).

<sup>4</sup> See *Singh v. Ilchert*, 63 F.3d 1501, 1509-10 (9th Cir. 1995).

## **Burden of Proof: Credibility Determination**

Section 101(a)(3)(B)(iii) of the bill provides that a trier of fact may use statements including those made at any time, regardless of whether or not they are under oath, in assessing an applicant's credibility. Asylum seekers often suffer from Post-Traumatic-Stress-Disorder, and revealing even minimal details of persecution, or even simply a fear of returning home, is very difficult for many asylum seekers, particularly if they have fled government officials in their home country and are faced with U.S. government agents upon arrival. Women asylum seekers, including rape survivors, face special challenges in speaking about their persecution. This provision leaves all asylum seekers, who face cultural and language barriers as well particularly upon arrival, vulnerable to having statements unfairly used against them. Asylum seekers' statements not made under oath should therefore not be given equal weight as other evidence in a credibility determination.

## **Standard of Review for Orders of Removal**

Section 101(c) allows a court to reverse a judge's determination regarding the availability of corroborating evidence only if the court finds that a trier of fact "is *compelled to conclude* that such corroborating evidence is unavailable" (emphasis added). This provision leaves an inappropriate amount of discretion in the hands of immigration judges, and effectively renders asylum seekers' right to judicial review meaningless in this regard. Whether or not a judge determines that corroborating evidence is available will determine the outcome of an asylum seeker's case, if the judge decides that the applicant has not met his or her burden of proof without such evidence. Allowing appellate courts to defer to judges' findings on this issue is therefore tantamount to undermining the appellate process for asylum seekers and is fundamentally unfair, unnecessary, and unrelated to protecting national security as is the bill's stated purpose.

The difficulties inherent in asylum seekers' ability to obtain evidence are well documented. Asylum seekers face separation from their family and country, mental and emotional stress, and a lack of knowledge about the asylum process in the U.S. They may risk their own or their family's lives trying to obtain evidence that was left behind in their country as they fled. In *Bolanos-Hernandez v. INS*, the 9th Circuit held that requiring corroborating evidence would impose too great a burden on an asylum applicant. The court stated that such a requirement would make it "close to impossible for [any political refugee] to make out a . . . case [for asylum]."<sup>5</sup> The 9<sup>th</sup> Circuit has also said that "there is nothing novel about the concept that persecutors cannot be expected to conform to arbitrary evidentiary rules established by the Immigration and Naturalization Service . . ."<sup>6</sup> Furthermore, the *United Nations' Handbook on Procedures and Criteria for Determining Refugee Status*, serving as a guide to the 1951 Convention and the 1967

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<sup>5</sup> See *Lopez-Reyes v. INS*, 79 F.3d 908, 912 (9th Cir. 1996) citing *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1285 (9th Cir. 1984).

<sup>6</sup> See *Mejia-Alvarado v. INS*, 168 F.3d 500 (9th Cir. 1990) citing *Aguilera-Cota v. INS*, 914 F.2d 1375, 1380 (9th Cir. 1990).

Protocol Relating to the status of Refugees, the latter of which the U.S. is a signatory to, states that it is not possible for an asylee to prove every aspect of his or her case through corroborating evidence. Such a requirement would render the majority of asylum seekers ineligible and facing return to countries where they face persecution.

It is crucial for asylum seekers to have the opportunity for judicial review on this determinative aspect of their case.

### **Elimination of Judicial Review**

Section 105 would eliminate habeas corpus and mandamus review for a variety of final immigration decisions. Immigration reform laws enacted in 1996 already bar direct federal appellate review in a significant number of instances. Habeas review remains as the only mechanism by which many individuals facing removal may seek relief. Section 105 would limit the ability of federal courts to grant a stay of deportation, increasing the possibility that individuals will be deported before federal courts can rule on the merits of their cases. To obtain a stay, an individual would have to prove by clear and convincing evidence that removal would be prohibited as a matter of law. Finally, Section 101(e) would eliminate judicial review of almost all discretionary decisions made outside the context of removal proceedings, including decisions to deny applications for adjustment of status or to revoke employment-based immigrant visa petitions.

Access to the courts is an essential feature of our system of government, and the implementation and execution of the immigration law has often been “corrected” by such judicial oversight. Judicial review has also been important historically in protecting immigrants’ rights and civil liberties. Legislation that further restricts judicial review in the immigration process, such as the REAL ID Act, should be rejected.