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Re: 84 FR 69640; EOIR Docket No. 18-0002, A.G. Order No. 4592-2019; RIN 1125-AA87, 1615-AC41; Comments in Opposition to Proposed Rulemaking: Procedures for Asylum and Bars to Asylum Eligibility

January 21, 2020

To Whom it May Concern:

We write on behalf of the Immigrant Justice Network (IJN) and its four organizational members, Immigrant Legal Resource Center (ILRC), Immigrant Defense Project (IDP), Just Futures Law (JFL), and the National Immigration Project of the National Lawyers Guild (NIPNLG), in response to the above-referenced Proposed Rules published in the Federal Register on December 19, 2019. We write to express our strong opposition to this proposal to amend the asylum eligibility regulations.

IJN is a leading voice against the criminalization of immigrants in the United States. Grounded in racial justice values, we build power to defend the dignity of immigrants. We fight for a world where our communities are thriving and free from policing, deportation, and imprisonment. Since 2006, IJN has partnered with community groups and directly impacted individuals who have navigated or survived the detention, deportation, and criminal legal systems to achieve these goals. These partnerships help build long-lasting power for

transformational change of our criminal and immigration systems. A description of each of IJN's four organizational members follows.

- The NIPNLG is a national nonprofit organization that provides support, referrals, and legal and technical assistance to attorneys, community organizations, families, and advocates seeking to advance the rights of noncitizens. NIPNLG focuses especially on the immigration consequences of criminal convictions, and its mission is to fight for justice and fairness for noncitizens who have contact with the criminal legal system.

- The ILRC is a national non-profit that provides legal trainings, educational materials, and advocacy to advance immigrant rights. The ILRC's mission is to work with and educate immigrants, community organizations, and the legal sector to continue to build a democratic society that values diversity and the rights of all people. Since its inception in 1979, the ILRC has provided technical assistance on hundreds of thousands of immigration law issues, trained thousands of advocates and pro bono attorneys annually on immigration law, distributed thousands of practitioner guides, provided expertise to immigrant-led advocacy efforts across the country, and supported hundreds of immigration legal non-profits in building their capacity.

- IDP is a New York-based non-profit that conducts litigation and provides training, education, and advocacy in support of advancing the rights of immigrants who are subject to the criminal legal system. IDP's mission is to secure fairness and justice for immigrants in the United States. The organization provides technical assistance to hundreds of immigration attorneys, DOJ-accredited representatives, and criminal and family defense attorneys on issues related to immigration, criminal, and family law, particularly the immigration consequences of law enforcement interactions and criminal court adjudications.

- JFL is a transformational immigration legal shop rooted in movement lawyering. JFL defends and builds the power of immigrants' rights groups working to disrupt and dismantle our deportation and mass incarceration systems. We are legal workers and lawyers with decades of experience, grounded in the core value that lawyering should serve movement organizing. JFL staff have worked on many cases involving the intersection of immigration and criminal law, including recent high-impact decisions on behalf of individuals and amicus curiae, including *Saget v. Trump* (challenging termination of Haiti's Temporary Protected Status), *Catalan-Ramirez v. Wong* (Chicago Police Department's gang database and ICE's unlawful raid on Catalan-Ramirez), and *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018) (holding that immigration crime of violence definition is unconstitutionally vague).

For the reasons detailed in the comment that follows, the Department of Homeland Security and the Department of Justice should immediately withdraw their current proposal, and instead dedicate their efforts to ensuring that individuals fleeing violence are granted full and fair access to asylum protections in the United States.

I. Introduction

On December 19th, the Department of Homeland Security (DHS) and the Department of Justice (DOJ) issued a joint set of Proposed Rules that would substantially change the rules governing asylum adjudications. For asylum seekers affected by these rules, the stakes could not be higher—a claim denied often means return to death or brutal persecution. Asylum provides those fleeing horrors with physical safety, a path to citizenship and security, and the opportunity to reunite with immediate family members who may still remain in danger abroad. This is why restrictions on asylum eligibility must be undertaken with the utmost care, adherence to the law and treaties that form the basis of asylum protection, and consideration of the impact on vulnerable populations meriting relief. The Proposed Rules violate these principles and will have immediate and long-lasting effects on the equal protection, due process, and statutory rights of affected people. For these reasons, we urge that the Proposed Rules be rescinded in their entirety.

The Proposed Rules would make three major changes that narrow asylum eligibility. The first proposed set of changes adds the following seven *categorical* bars to asylum eligibility: (1) any conviction of a felony offense; (2) any conviction for "smuggling or harboring" under 8 U.S.C. § 1324(a), even if the asylum seeker committed the offense for the purpose of bringing her own spouse, child or parent to safety; (3) any conviction for illegal reentry under 8 U.S.C. § 1326; (4) any conviction for an offense "involving criminal street gangs," with the adjudicator empowered to look to any evidence to determine applicability; (5) any second conviction for an offense involving driving while intoxicated or impaired; (6) any conviction *or accusation of conduct* for acts of battery involving a domestic relationship; and (7) any conviction for several newly defined categories of misdemeanor offenses, including *any* drug-related offense except for a first-time marijuana possession offense, any offense involving a fraudulent document, and fraud in public benefits.

The second section of the Proposed Rules provides a multi-factor test for immigration adjudicators to determine whether a criminal conviction or sentence is valid for the purpose of determining asylum eligibility. The third section rescinds a provision in the current rules regarding the reconsideration of discretionary asylum.

Our comment focuses on the proposal to expand the criminal bars to asylum and the proposed framework for evaluating convictions or sentences. These proposed changes are arbitrary, capricious, and ultra vires. They would gut the asylum protections enshrined in United States and international law. We submit this comment to express grave concerns about the administration's continued efforts to undermine due process protections for noncitizens and to exclude refugees and their families from obtaining the security and stability the United States asylum system has long promised.

II. The Agencies Failed to Give the Public and Affected Parties Adequate Opportunity to Comment on the Proposed Rule

At the outset, we note that DOJ and DHS have not provided a meaningful opportunity for the public to comment on the Proposed Rules. The 30 day comment period provided by the

agencies, ending January 21, 2020, includes multiple federal and religious holidays, including the national workplace holidays of Christmas Eve, Christmas Day, and New Years Day when businesses and federal and state governments are closed. It also included other religious holidays, such as Hanukkah and Kwanzaa. Despite requests to extend the comment period, the agencies have taken no such steps to provide the public and affected parties adequate time to comment on such drastic and harmful proposed changes to asylum adjudications.

The complexity of the Proposed Rules requires a full 60 day comment period. The Proposed Rules propose seven categorical bars to asylum eligibility, create guidelines for the evidence that adjudicators may consider in determining whether any of these bars applies, provides a confusing and convoluted reasoning for eschewing the categorical analysis—the bedrock of analysis of criminal convictions in immigration adjudications, and attempts to establish a multi-factor legal test for determining when a state court order vacating a criminal conviction may be considered valid for immigration purposes. Assessing the merits of the agencies' position with respect to each of these proposed changes and their justifications requires a full comment period.

Moreover, the Proposed Rules provide no calculations of the time and cost burden on immigration judges, asylum officers, immigration attorneys, and criminal defense attorneys.[1] The public and affected parties cannot meaningfully comment without enough time to gather data or to conduct the analysis needed to rebut the agencies' supposition that the agencies "do not expect the proposed additional mandatory bars to increase the adjudication time for immigration court proceedings involving asylum applications"[2] or that "[t]o the extent there are any impacts of this rule, they would almost exclusively fall on" asylum applicants.[3] The public also cannot evaluate the agencies' information under the Information Quality Act or assess the agency's proposal against objective or publicly available information.[4] The comment period here does not permit sufficient time for completing these analyses. Nevertheless IJN attempts to address the many issues of concern to immigrant communities and their advocates, but strongly believes the Proposed Rules require an extended comment period.

III. The Categorical Expansion of the Particularly Serious Crime Bar to Asylum Is Ultra Vires to the Federal Immigration Statute and Violates International Treaty Obligations

The United States asylum system was first codified in the Refugee Act of 1980, described by one prominent scholar as a bipartisan attempt to "reconcile our rhetoric with our law, our national immigration policy and our international treaty obligations so that we could maintain a consistent posture towards the world as a nation with a strong humanitarian tradition and a

1 Proposed Rules at 69658 (explaining "there is no precise quantification available for the impact, if any, of this rule beyond the general notion that it will likely result in fewer grants of asylum on the whole").

2 Proposed Rules at 69658.

3 *Id.*

4 44 U.S.C. § 3516 note. *See Harkonen v. United States DOJ*, 800 F.3d 1143 (9th Cir. 2015) (discussing the Information Quality Act).

unique historic role as a haven for persons fleeing oppression."[5] The Refugee Act—among other measures designed to bring the United States domestic legal code into compliance with the provisions of the United Nations Protocol Relating to the Status of Refugees—created a "broad class" of refugees eligible for a discretionary grant of asylum.[6]

By acceding to the 1967 Protocol Relating to the Status of Refugees,[7] which binds parties to the United Nations Convention Relating to the Status of Refugees,[8] the United States obligated itself to develop and interpret United States refugee law in a manner that complies with the Protocol's principle of *nonrefoulement* (the commitment not to return refugees to a country where they will face persecution on protected grounds), even where potential refugees have allegedly committed criminal offenses. Specifically, the Convention allows states to exclude and/or expel individuals who, "having been convicted by a final judgement of a particularly serious crime, constitute[] a danger to the community of that country."[9] This clause is intended for "extreme cases," in which the particularly serious crime at issue is a "capital crime or a very grave punishable act."[10]

The United Nations High Commissioner for Refugees (UNHCR) has asserted that to constitute a "particularly serious crime," the crime "must belong to the *gravest category*" and be limited "to refugees who become an extremely serious threat to the country of asylum due to the severity of crimes perpetrated by them in the country of asylum."[11] Ordinary or common crimes do not meet this "threshold of seriousness."[12] Moreover, the UNHCR has specifically noted that the particularly serious crime bar does not encompass less extreme crimes; "[c]rimes such as petty theft or *the possession for personal use of illicit narcotic substances would not meet the threshold of seriousness*."[13] Finally, the UNHCR has urged that when determining whether a

5 Deborah Anker, "The Refugee Act of 1980: An Historical Perspective," *In Defense of the Alien* 5 (1982): 89-94, https://www.jstor.org/stable/23141008?read-now=1&refreqid=excelsior%3A1060953608aa0bdd30d5d506e1ff6318&seq=1#page_scan_tab_contents.

6 *See I.N.S. v. Cardoza-Fonseca,* 40 U.S. 421, 423 (1987).

7 United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, [1968] 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 268.

8 Convention Relating to the Statute of Refugees, July 28, 1951, 140 U.N.T.S. 1954 (hereinafter "Refugee Convention").

9 *Id*. at art. 33(2).

10 U.N. High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* 2, U.N. Doc. HCR/IP/Eng/REV. ¶ 154-55, (1979, reissued 2019).

11 U.N. High Comm'r for Refugees (UNHCR), *Criminal Justice and Immigration Bill: Briefing for the House of Commons at Second Reading* ¶ 7 (July 2007), http://www.unhcr.org/enus/576d237f7.pdf [Emphasis added].

12 U.N. High Comm'r for Refugees (UNHCR), *Criminal Justice and Immigration Bill: Briefing for the House of Commons at Second Reading* ¶ 7 (July 2007), http://www.unhcr.org/enus/576d237f7.pdf. *See also Immigrant Defense Project & The Harvard Immigration and Refugee Clinical Program*, "United States Failure to Comply with the Refugee Convention: Misapplication of the Particularly Serious Crime Bar to Deny Refugee Protection From Removal to Countries Where Their Life or Freedom is Threatened," Fall 2018, https://blogs.harvard.edu/clinicalprobono/2018/09/21/hirc-idp-release-particularly-serious-crime-bars-report-and-chart/ (discussing the history of the particularly serious crime bar and its implementation throughout the signatory states.)

13 U.N. High Comm'r for Refugees (UNHCR), *Criminal Justice and Immigration Bill: Briefing for the House of Commons at Second Reading* ¶ 10 (July 2007), http://www.unhcr.org/enus/576d237f7.pdf [Emphasis added].

person should be barred from protection for having been convicted of a particularly serious crime, the adjudicator must conduct an individualized analysis and consider any mitigating factors.[14]

Rather than taking steps to better adhere to the Convention, however, the Proposed Rules further diminish the protections for refugees by expanding the bar to ever more "common" offenses, like misdemeanors and non-violent felonies, and alleged activity.[15] Under the long-standing approach to the particularly serious crime bar, low-level offenses like misdemeanor driving under the influence where no injury is caused, or simple possession of a controlled substance or paraphernalia, that do not fall within the aggravated felony definition, simply cannot constitute a particularly serious crime.[16] The Proposed Rules defend the expansion of the particularly serious crime bar on the grounds that case-by-case adjudication is "inefficient."[17] However, the proposed framework still relies on case-by-case adjudication by creating fact-specific criteria for a number of the bars, meaning that the Proposed Rules do not even meet their stated purpose. Furthermore, the purported justification disregards the directive of the Convention to ensure that only people who have been convicted of crimes that are truly egregious and therefore present a future danger are placed at risk of *refoulement*.

Adjudicators have repeatedly recognized that crimes specifically contemplated for inclusion by the Proposed Rules are not "particularly serious crimes."[18] When declining to find that a fraudulent document offense was particularly serious, the Board of Immigration Appeals (BIA) cautioned that, "in light of the unusually harsh consequences which may befall a [noncitizen] who has established a well-founded fear of persecution[,] the danger of persecution should generally outweigh all but the most egregious of adverse factors."[19] The BIA has also observed that an alien smuggling offense could be "motivated by love, charity, kindness, or religious principles," and adjudicators should "exercise great caution in designating such an offense as a particularly serious crime" for the purpose of barring eligibility for withholding of removal.[20] As noted in the concurrence to *Delgado v. Holder*, a decision the Proposed Rules cite in support of the expanded bars, barring individuals from asylum based on these relatively minor offenses renders the "particularly serious" part of the "particularly serious crime" bar

14 *Id*. at ¶ 10-11; U.N. High Commissioner for Refugees, *The Nationality, Immigration and Asylum Act 2002: UNHCR Comments on the Nationality, Immigration and Asylum Act 2002 (Specification of Particularly Serious Crimes) Order 2004*, 4 (2004).

15 Note that the BIA has ruled that unless there are unusual circumstances, a single conviction of a misdemeanor offense is not a particularly serious crime. *See Matter of Juarez*, 19 I&N Dec. 664 (BIA 1988).

16 *See Immigrant Defense Project & The Harvard Immigration and Refugee Clinical Program*, "United States Failure to Comply with the Refugee Convention: Misapplication of the Particularly Serious Crime Bar to Deny Refugee Protection From Removal to Countries Where Their Life or Freedom is Threatened," Fall 2018, https://blogs.harvard.edu/clinicalprobono/2018/09/21/hirc-idp-release-particularly-serious-crime-bars-report-and-chart/

17 Proposed Rules at 69646.

18 For a thorough examination of the standards used to designate particularly serious crimes in caselaw *see* Fatma Marouf, "A Particularly Serious Exception to the Categorical Approach," *Boston Univ. Law Review* 97 (2017): 1427.

19 *Matter of Pula*, 19 I.&N. Dec. at 474.

20 *In re L-S-*, 22 I.&N. Dec. 645, 655 (BIA 1999) (citing *In re Tiwan*, 19 I.&N. Dec. 875 (BIA 1989)).

meaningless.[21] The Proposed Rules therefore represent a significant and baseless departure from past practice and the construction of the term "particularly serious crime."

For the same reasons, the Proposed Rules violate the plain meaning of the term "particularly serious crime."[22] The Immigration and Nationality Act ("the INA") "does not define [this] phrase," so it carries "its ordinary meaning," and that common-sense understanding aligns with how the term originated and has been interpreted.[23] There is no ordinary, accepted use of the term "particularly serious crime" that would encompass all of the offenses the Proposed Rules would sweep in. In no way can a misdemeanor document crime, simple drug possession, or even a DUI, be truly considered a "particularly serious crime." The statutory phrase "constitutes a danger to the community of the United States" bolsters this conclusion. Again, no ordinary usage of "danger to the community" would include (for example) simple drug possession. And even if this language is at all ambiguous, the proposal is, for the reasons explained above, "'untethered to Congress's approach'" in implementing our treaty obligations, and therefore impermissible.[24]

IV. The Agencies Fail to Account for the Time and Cost Burden that the Proposed Rules will have on the Agencies as well as Criminal and Immigration Attorneys

The Proposed Rules impose a complex legal inquiry that may require analysis of statutes, review of case law and, in some cases, review of evidence beyond the record of conviction. In so doing, the agencies fail to calculate or consider the substantial burden of training costs and time that they must expend in order to train asylum officers and immigration judges on the criminal statutes of the fifty states as well as the District of Columbia and the U.S. territories in order to determine whether a criminal conviction meets one of the proposed bars.[25] The Proposed Rules would also impose an extraordinary burden of time and cost on the representatives of asylum seekers and asylum seekers proceeding *pro se*, who are the most prejudiced by the new scheme.

The Proposed Rules would supplant the current longstanding case-by-case framework by adding to the regulations seven categorical bars to asylum eligibility. However, the offenses included do not match any uniform label of such crimes (which does not currently exist). Indeed, multiple federal circuit courts of appeals have emphasized the substantial burden that such regulatory bars would have on the agencies, "considering the vast array of crimes defined by each of the fifty states' criminal codes."[26] Such research and legal analysis would need to be conducted by adjudicators who are not all attorneys, and who are already adjudicating a backlog

21 *Delgado v. Holder*, 648 F.3d 1095, 1099-1110 (9 Cir. 2011) (Reinhardt, concurring)

22 8 U.S.C. §§ 1158(b)(2)(A)(ii) and (B)(i).

23 *Burrage v. United States*, 571 U.S. 204, 210 (2014).

24 *See NRDC v. EPA*, 777 F.3d 456, 469 (D.C. Cir. 2014).

25 *See* Proposed Rules at 69658.

26 *Ali v. Achim*, 468 F.3d 462, 469 (7th Cir. 2006) ("require[ing] the Attorney General and his agents to sift through each state's code and prospectively identify by regulation every single crime that would qualify as 'particularly serious' would impose an onerous burden"); *see also Gao v. Holder*, 595 F.3d 549, 557 (4th Cir. 2010) (explaining "the Attorney General would also face immense practical difficulties if he were required to act through rulemaking alone. It would be a Herculean task to "sift through each state's code and prospectively identify by regulation every single crime that would qualify as particularly serious." [internal quotes removed]).

of cases under immense time pressure.[27] The amount of training required to conduct such an analysis is substantial and has not been included in the costs enumerated in the proposed regulation.

Furthermore, the agencies have not considered the time or cost burden that the addition of such vague and broadly worded criminal bars to asylum will add to immigration attorneys, DOJ-accredited representatives, and *pro se* asylum applicants. The Proposed Rules will also undoubtedly increase the time and cost of providing technical assistance, as our organizations advise legal services providers on issues such as criminal bars to eligibility for asylum. Overall, the Proposed Rules will add many layers of confusion and uncertainty to the asylum application process, for both asylum seekers and their legal advocates, who will be unable to tell how they will determine whether countless criminal convictions will bar an applicant from asylum. This lack of predictability will create a substantial burden on immigration legal services providers, who will be unable to advise their clients as to their asylum eligibility, a long-term and stable form of protection from persecution. Thus, many people who are entitled to asylum will be too afraid to apply and will instead remain in the shadows.

Finally, this vague and unclear language presents constitutional problems. Due process prohibits laws and regulations that fail to "give ordinary people fair warning about what the law demands of them,"[28] and the Equal Protection Clause requires the government to treat similarly situated people the same way.[29] As written, the Proposed Rules fail to give affected people fair notice of which offenses will bar asylum and which will not. And for the reasons set forth above, they will very likely result in applicants, whose acts are materially indistinguishable, being treated differently.

V. Withholding of Removal and CAT are Not Sufficient to Meet Statutory and Treaty Obligations Violated By The Proposed Rules

Throughout the Proposed Rules, the agencies defend their harsh and broad proposal by pointing to the continued availability of alternative forms of relief for those precluded from asylum eligibility under the new rules.[30] The availability of these alternative forms of relief, however—known as withholding of removal and protection under the Convention Against Torture (CAT)—does not render the proposal lawful or nullify the harm created by the Proposed Rules' new limits on asylum. The protections afforded by CAT and by statutory withholding of removal are limited in scope and duration, and they are harder to obtain. As a result, a policy that limits *bona fide* refugees to withholding of removal and CAT protection continues to violate the international treaty obligations enshrined in US immigration law.

First and foremost, the most serious harm that can befall a person as a result of these Proposed Rules is removal to persecution and torture, a risk that is not mitigated by the

27 *See*, e.g., EOIR Memorandum, Case Priorities and Immigration Court Performance Measures, James R. McHenry III, Director (Jan. 17, 2018).

28 *U.S. v. Davis*, 139 S. Ct. 2319, 2323 (2019).

29 *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam).

30 *See, e.g.*, Proposed Rules at 69644.

availability of other forms of relief. CAT and withholding protections demand a higher level of proof than asylum claims: a clear probability of persecution or torture.[31] Thus, an applicant may have a valid asylum claim but be unable to meet the higher evidentiary standard for the other forms of relief and be removed to their country of origin, where they would face persecution or even death. The asylum applicants most prejudiced by the Proposed Rules are those with meritorious claims.

Withholding and CAT recipients also face permanent separation from their families. Their spouses and children cannot reunite with them in the United States, because only immediate relatives of asylees and refugees are eligible to join them as derivatives.[32] For many, this will mean that the Proposed Rules institute yet another formal policy of family separation. For example, a mother with two young children who flees to the United States and is subject to one of the expanded asylum bars will not be able to ensure that her children will be able to obtain protection in the United States with her if she is granted relief. Rather, if her children are still in her home country, they would need to come to the United States and seek asylum on their own, likely as unaccompanied children. If her children fled to the United States with her, then they will need to establish their own eligibility for protection before an immigration judge, no matter their age.[33]

Withholding and CAT recipients cannot travel internationally, which compounds their separation from family. The United States's treaty obligations under the United Nations Convention Relating to the Status of Refugees afford refugees the right to travel in mandatory terms. Article 28 states, "Contracting States shall issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory."[34] Withholding and CAT recipients do not have access to a travel document as contemplated by Article 28. By regulation, refugee travel documents are available only to asylees.[35] Moreover, the BIA requires

[31] Withholding of removal requires the petitioner to demonstrate his or her "life or freedom would be threatened in that country because of the petitioner's race, religion, nationality, membership in a particular social group, or political opinion." *INS v. Stevic*, 467 U.S. 407, 411 (1984) (quoting 8 U.S.C. § 1231(b)(3)). Unlike asylum, however, the petitioner must show a "clear probability" of the threat to life or freedom if deported to his or her country of nationality. The clear probability standard is more stringent than the well-founded fear standard for asylum. *Id; see also Cardoza-Fonseca,* 480 U.S. at 431 (describing the difference between a well-founded fear of persecution and a clear probability of persecution). For CAT relief, an applicant must show it is more likely than not that he or she will be tortured or killed by or at the government's acquiescence if removed to the home country. 8 C.F.R. § 1208.16(c)(2).

[32] 8 C.F.R. § 208.21(a).

[33] Recently, this scenario played out with a mother who was subject to the so-called Migrant Protection Protocols (also known as Remain in Mexico) and the asylum "transit ban," which made the mother ineligible for asylum and thus required the children to establish their independent eligibility for withholding and CAT protection. An immigration judge granted the mother withholding of removal but denied protection to her young children, leaving the children with removal orders and immense uncertainty about their Under the expanded bars in the Proposed Rules, these situations will certainly increase, separating families and forcing parents to return to countries where it has been established they more likely than not will face persecution and torture, rather than leaving their children on their own. *See* Adolfo Flores, "An Immigrant Woman Was Allowed To Stay In The US — But Her Three Children Have A Deportation Order," *Buzzfeed*, December 21, 2019, https://www.buzzfeednews.com/article/adolfoflores/an-immigrant-woman-was-allowed-to-stay-in-the-us-but-not.

[34] 19 U.S.T. 6223 T.I.A.S. No. 6577 (1968).

[35] 8 C.F.R. § 223.1.

that an individual granted withholding or CAT—unlike an individual granted asylum—must simultaneously be ordered removed, making any international travel, regardless of what country they travel to, a "self-deportation."[36]

Perhaps the most pernicious result of these Proposed Rules is that withholding and CAT recipients are not eligible for adjustment of status to permanent residence, and subsequently citizenship. Those with meritorious claims for relief from persecution or torture, who are barred from asylum as a result of the Proposed Rules, will be blocked from a pathway to citizenship and all of its attendant privileges, including the right to vote.

Finally, judicial and administrative efficiency are not served by expanded asylum bars that funnel more applicants into removal proceedings to seek withholding of removal and CAT relief. Implementation of the Proposed Rules would further overload the immigration courts and cause applicants to wait years for a decision. During these extended proceedings, bona fide asylum seekers would remain in limbo, facing permanent separation from their families in their home countries. At the same time, their derivative family members in the United States would be required to seek separate forms of relief, further compounding administrative and judicial backlogs.

VI. Immigration Law Includes a Waiver of Inadmissibility for Asylees Broader than the Criminal Bars Proposed in These Rules

The Proposed Rules impose stricter limits on asylum eligibility than the immigration statute contemplates. Currently the INA provides that one year after being granted asylum, a successful applicant can apply to adjust their status to permanent residence. Asylees with a wide array of convictions that would otherwise make them inadmissible are entitled to apply for a waiver of inadmissibility that is broader than almost any other in the statute. The waiver, found at section 209(c), is to be applied liberally to provide asylees with safe haven and a pathway to citizenship, serving the overall goals of the asylum law and our treaty obligations.[37] The Proposed Rules directly conflict with these aims and would render the existence of this waiver superfluous.

Under section 209(c) of the INA, asylees seeking adjustment of status are completely exempt from certain grounds of inadmissibility, including 212(a)(4), which relates to the likelihood of becoming a public charge.[38] Section 209(c) also authorizes the waiver of almost any other ground of inadmissibility under section 212(a) for humanitarian, family unity, and public interest purposes, with two exceptions. The two exceptions to the waiver are broadly consistent with the existing law governing the determination of particularly serious crimes. First, section 209(c) cannot be used to waive inadmissibility if the government has "reason to believe"

[36] *See Matter of I-S- & C-S-*, 24 I.&N. Dec. 432, 434 n.3 (BIA 2008); 8 C.F.R. § 241.7.

[37] 8 U.S.C. §1159(c).

[38] Under section 209(c) of the INA, eligible asylees and refugees seeking adjustment of status are exempt from the following grounds of inadmissibility: sections 212(a)(4) (relating to public charge), 212(a)(5) (relating to labor certification), and 212(a)(7)(A) (relating to presence in the United States without proper immigrant documentation) of the INA. 8 U.S.C. §§ 1159(c); 1182(a).

the applicant has engaged in drug trafficking.[39] Second, the waiver cannot be granted to an asylee who has been convicted of a "violent or dangerous" crime, unless the person shows "exceptional and extremely unusual hardship" or foreign policy concerns justify issuance of the waiver.[40] Apart from those two exceptions, the waiver can forgive any offense, including an inadmissible conviction that also is an aggravated felony, for example for theft or fraud, or a non-trafficking drug offense.

The proposal's dramatic expansion of criminal bars to asylum clashes with the breadth of the waiver available to asylee applicants for adjustment of status. Under the Proposed Rules, an applicant would be barred from eligibility for asylum, in the first instance, because of a criminal conviction that could be waived by section 209(c). The outcome of such a system is that otherwise eligible asylum applicants are blocked from the pathway to citizenship that the immigration statute clearly contemplates for them. This represents a significant conflict with the statute, for which the agencies offer no justification. And agencies may not adopt statutory interpretations that render statutory language superfluous or ineffective.[41]

VII. The Proposed Rules Improperly Authorize Asylum Adjudicators Applying the Particularly Serious Crime Bar to Conduct Criminal Factfinding Using Unreliable and Racially Biased Evidence

The Proposed Rules authorize immigration adjudicators to seek out unreliable evidence obtained in violation of due process to determine whether an asylum applicant's conduct—considered independently of a criminal court adjudication—triggers the particularly serious crime bar. This aspect of the proposal violates the statutory text and would produce burdensome and inefficient proceedings with arbitrary outcomes.

At the outset, we note that the statute allows the Attorney General to bar only those noncitizens who, "having been *convicted by a final judgment of a particularly serious crime*, constitutes a danger to the community of the United States." On its face, this language does not allow the government to decouple the seriousness determination from the conviction. That is, the statute prohibits applying the particularly serious crime bar based on unadjudicated facts. The bar may be applied only where the "final judgment" of "convict[ion]" itself establishes that the crime was particularly serious.[42] That conclusion is bolstered by the Supreme Court's repeated recognition that "[s]imple references to a 'conviction,' . . . are 'read naturally' to denote the 'crime as *generally* committed,'" rather than the defendant's "actual conduct."[43] Specifically, the

39 *See In re Y-L-*, 23 I.&N. Dec. 270 (BIA 2002) Although barred from asylum eligibility as an aggravated felon, a noncitizen convicted of a drug trafficking offense may still qualify for withholding of removal. As a withholding recipient, however, the immigrant would not be eligible to apply for adjustment of status to permanent residence, a result that is consistent with the terms of the 209(c) waiver.

40 *Matter of Jean*, 23 I.&N. Dec. 373 (AG 2002)

41 *E.g.*, *Corley v. United States*, 556 U.S. 303, 314 (2009).

42 See *Delgado v. Eric H. Holder Jr.*, 648 F.3d 1095, 1109 n.1 (9th Cir. 2011) (en banc) (Reinhardt, J., concurring) (the Attorney General's authority to designate particularly serious crimes "applies principally to the *categorical* classification of offenses as particularly serious, rather than to the classification of *individual* criminal acts as particularly serious").

43 *Sessions v. Dimaya*, 138 S. Ct. 1204, 1217 (2018).

Proposed Rules' extension of the asylum bar to *conduct* not requiring any conviction that the asylum adjudicator alone determines is related to domestic violence explicitly violates this textual directive.[44] Moreover, the inclusion of unadjudicated facts in the determination whether any minor offense was committed in furtherance of gang activity also runs afoul of this limitation in the statute to the extent that it sweeps in a vast array of convictions that would not otherwise even trigger an inquiry into whether the particularly serious crime bar applies.

The Proposed Rules repeatedly cite increased efficiency as justification for many of the proposed changes.[45] Yet requiring adjudicators to engage in minitrials to determine the applicability of categorical criminal bars, rather than relying on adjudications obtained through the criminal legal system, will dramatically *decrease* efficiency—and predictability—in the asylum adjudication process. As the immigration courts contend with backlogs that now exceed one million cases,[46] tasking adjudicators with a highly nuanced, resource-intensive assessment of the connection of a conviction to gang activity or the domestic nature of alleged criminal conduct—assessments far outside their areas of expertise—will prolong asylum proceedings and invariably lead to erroneous determinations that will give rise to an increase in appeals.

Indeed, the Supreme Court has "long deemed undesirable" exactly the type of "post hoc investigation into the facts of predicate offenses" proposed by the agencies here.[47] Instead, for more than a century the federal courts have repeatedly embraced the "categorical approach" to determine the immigration consequences of a criminal offense, wherein the immigration adjudicator relies on the statute of conviction as adjudicated by the criminal court system, without relitigating the nature or circumstances of the offense in immigration court.[48] As the Supreme Court has explained, this approach "promotes judicial and administrative efficiency by precluding the relitigation of past convictions in minitrials conducted long after the fact."[49] In *Moncrieffe v. Holder*, the Court forewarned of exactly the sort of harm that would arise from these Proposed Rules; in that case, the Court rejected the government's proposal that immigration adjudicators determine the nature and amount of remuneration involved in a marijuana-related conviction, noting that "our Nation's overburdened immigration courts" would end up weighing evidence "from, for example, the friend of a noncitizen" or the "local police

44 *See* Proposed Rules at 69652.

45 *See* Proposed Rules at 69646, 69656-8.

46 Marissa Esthimer, "Crisis in the Courts: Is the Backlogged U.S. Immigration Court System at Its Breaking Point?," *Migration Policy Institute*, October 3, 2019, https://www.migrationpolicy.org/article/backlogged-us-immigration-courts-breaking-point.

47 *Moncrieffe v. Holder*, 569 U.S. 184, 186 (2013).

48 *See Moncrieffe*, 569 U.S. at 191 ("This categorical approach has a long pedigree in our Nation's immigration law."); *United States ex rel. Guarino v. Uhl*, 107 F.2d 399, 400 (2d Cir. 1939) (L. Hand, J.) (holding that "deporting officials may not consider the particular conduct for which the alien has been convicted"). ."). For a more fulsome history of the development of the categorical approach in immigration court, *see* Alina Das, "The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law," *New York University Law Review* 86, no. 6 (2011): 1689 - 1702, https://www.nyulawreview.org/wp-content/uploads/2018/08/NYULawReview-86-6-Das.pdf.

49 *Moncrieffe*, 569 U.S. at 200-201.

officer who recalls to the contrary," with the end result being a disparity of outcomes depending on the whims of the individual immigration judge and a further burdened court system.[50]

Although it has not been decided that a categorical approach should apply to the particularly serious crime bar, these due process principles remain crucial to prevent governmental overreach. Certainly, the statute's use of crime categories and the emphasis on the finality of a conviction militates against the fact-finding inquiry contained in the Proposed Rules. So too, is the use, for much of the last century, of some form of the categorical analysis to determine the immigration consequences of convictions.[51] The departure from that approach in these Proposed Rules, in violation of the statutory language and Congress's policy, makes them ultra vires and an unauthorized exercise of executive power.

A. *The Proposed Rules Empower Adjudicators to Rely on Unreliable, Unproven, and Racially Biased Evidence of Gang Involvement*

The Proposed Rules also allow an adjudicator to apply the particularly serious crime bar to anyone who is convicted of a crime—including a misdemeanor—that the adjudicator deems linked to gang activity based on evidence that has no indicia of accuracy. This rule confers on immigration adjudicators—who generally are not criminologists, sociologists, or criminal law experts—the sole responsibility to determine if there is "reason to believe" that *any* conviction flows from activity taken in furtherance of gang activity. This rule will necessarily ensnare asylum seekers of color who have experienced racial profiling and a criminal legal system fraught with structural challenges and incentives to plead guilty to some crimes, particularly misdemeanors. These same individuals are vulnerable to being erroneously entered into gang databases. Such databases are notoriously inaccurate, outdated, and infected by racial bias.[52]

This aspect of the proposal is unlawful in two other ways. First, the agencies propose that immigration adjudicators be allowed to consider "all reliable evidence" to determine whether there is "reason to believe" an offense was "committed for or related to criminal gang activities," or "in furtherance of gang-related activity, triggering ineligibility for asylum in either case.[53] The rule's operative phrase—"in support, promotion, or furtherance of the activity of a criminal street gang"—fails to "give ordinary people fair warning about what the law demands of them,"[54] particularly in conjunction with the malleable "reliable evidence" and "reason to

50 *Id.* at 201.

51 *See* Alina Das, "The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law," *New York University Law Review* 86, no. 6 (2011): 1689-1702, https://www.nyulawreview.org/wp-content/uploads/2018/08/NYULawReview-86-6-Das.pdf (providing a history of the development of the categorical approach in immigration law).

52 *See* Annie Sweeney and Madeline Buckley, "Chicago police gang data collection faulted by city's inspector general as unchecked and unreliable," *Chicago Tribune*, April 11, 2019, https://www.chicagotribune.com/news/breaking/ct-met-chicago-police-gang-data-04112019-story.html; Anita Chabria, "A routine police stop landed him on California's gang database. Is it racial profiling?," *Los Angeles Times*, May 9, 2019, https://www.latimes.com/politics/la-pol-ca-california-gang-database-calgang-criminal-justice-reform-20190509-story.html.

53 *See* Proposed Rules at 69649.

54 *Davis v. United States*, 139 S. Ct. 2319, 2323 (2019).

believe" standards. For example, while "a minor traffic infraction is not 'particularly serious'" by itself,[55] the proposal would allow an adjudicator to deem a traffic violation a particularly serious crime if, in the adjudicator's view, there is "reason to believe" the violation was somehow "in support, promotion, or furtherance" of gang activity. This result not only contravenes the plain meaning of the phrase "particularly serious crime," as explained above, but also deprives people of fair notice. The rule provides no indication of what degree of relation is required to establish "support" or "promotion," especially given that law enforcement agencies have sometimes deemed people to be promoting gang affiliations based merely on their tattoos or style of dress,[56] which have nothing to do with the nature of any particular offense.

The effect of these provisions of the Proposed Rules would be to expand the number and type of convictions for which an asylum seeker might be found ineligible for relief, sweeping in even petty offenses that would otherwise not trigger immigration consequences. Thus, an asylum applicant convicted of simple assault without use of a weapon, a non-violent property crime, or even possession of under 30 grams of marijuana for personal use (otherwise exempted from the reach of the Proposed Rules), could trigger a bar to asylum if the adjudicator concludes she has "reason to believe" the offense was committed in furtherance of gang activity.[57] In making these determinations, asylum adjudicators improperly relying on uncorroborated allegations contained in arrest reports, could nevertheless shield their decisions by relying on discretion.[58] The Proposed Rules contain no safeguards to ensure against such erroneous determinations.

In recent years, the expansion of gang databases for use in the apprehension and removal of foreign nationals—including children—has generated tremendous concern among advocates and the communities they serve.[59] The use of gang databases by local law enforcement and Immigration and Customs Enforcement has been widely criticized as an overbroad, unreliable and often biased measure of gang membership and involvement.[60] The Proposed Rules expand the criminal bars to asylum to those accused of gang involvement in the commission of minor criminal offenses, embracing an open-ended adjudicative process that will inevitably result in asylum adjudicators relying unfairly on these discredited methods of gang identification. This

55 *Guerrero v. Whitaker*, 908 F.3d 541, 545 (9th Cir. 2018).

56 LAPD, *How Are Gangs Identified*, http://www.lapdonline.org/get_informed/content_basic_view/23468.

57 Page 69649 of the Proposed Rules notes that the applicable standard for determining when to apply the bar on asylum seekers convicted of a crime involving criminal street gangs is "reason to believe," as used in 8 U.S.C. § 1182(a)(2)(c), and that the asylum adjudicator may consider "all reliable evidence" in making their decision.

58 *See Garces v. U.S. A.G.*, 611 F.3d 1337, 1349-50 (11th Cir 2010) (reversing finding of "reason to believe" that the respondent was a participant in drug trafficking based on unsubstantiated arrest reports); *Matter of Rico*, 16 I.&N. Dec. 181, 185-86 (BIA 1977) (relying on pre-hearing admissions to uphold finding of inadmissibility).

59 *See* Nermeen Arastu, et al., "Swept Up In The Sweep: The Impact of Gang Allegations on Immigrant New Yorkers," *New York Immigration Coalition (NYIC) and CUNY School of Law's Immigrant and Non-citizen Rights Clinic*, May 2018, https://www.law.cuny.edu/wp-content/uploads/page-assets/academics/clinics/immigration/SweptUp_Report_Final-1.pdf.

60 Ali Winston, "Marked for Life: U.S. Government Using Gang Databases to Deport Undocumented Immigrants," *The Intercept*, August 11, 2016, https://theintercept.com/2016/08/11/u-s-government-using-gang-databases-to-deport-undocumented-immigrants/.

outcome would compound the disparate racial impact of inclusion in gang databases and bar asylum seekers who are themselves fleeing violence from gangs in their home countries.[61]

Indeed, asylum applicants are *already* frequently subjected to wrongful denials of protection because of allegations of gang activity made by the Department of Homeland Security based on information found in notoriously unreliable foreign databases and "fusion" intelligence-gathering centers. That is true even though past legislative efforts to expand the grounds of removal and inadmissibility in the INA to include gang membership have failed to pass both houses of Congress.[62] In addition, immigration adjudicators already routinely premise discretionary denials of relief or release on bond on purported gang membership, and scores of alleged gang members have already been deported on grounds related to immigration violations or criminal convictions for which no relief is available.[63] Creating a "gang-related crime" bar will only exacerbate the due process violations already occurring as a result of unsubstantiated information about supposed gang ties.[64] Empowering immigration adjudicators to render asylum applicants *categorically* excluded from protection on the basis of such spurious allegations presents serious due process concerns and will inevitably result in the return of many refugees back to harm.[65]

The Departments asks for comments on: (1) what should be considered a sufficient link between an asylum seeker's underlying conviction and the gang related activity in order to trigger the application of the proposed bar, and (2) any other regulatory approaches to defining the type of gang-related activities that should render individuals ineligible for asylum. The premise of these questions is wrong: a vague "gang related" bar should not be introduced at all. The INA and existing regulations already provide overly broad bars to asylum where criminal behavior by an asylum seeker causes concern to an adjudicator. Adding this additional, superfluous layer of complication risks erroneously excluding bona fide asylum seekers from protection without adding any useful adjudicatory tool to the process.

61 *See* Jonathan Blitzer, "How Gang Victims Are Labeled As Gang Suspects," *The New Yorker*, January 23, 2018, https://www.newyorker.com/news/news-desk/how-gang-victims-are-labelled-as-gang-suspects.

62 *See* Jessica Chacon, "Whose Community Shield?: Examining the Removal of the 'Criminal Street Gang Member,'" *University of Chicago Legal Forum* 317 (2007: 333-336) (reviewing legislative history of failed efforts to expand removability of those accused of gang related offenses and noting criticism that "[t]he only legal effect of the proposed legislation would be to increase the number of noncitizens lawfully present who would be subject to removal on the basis of their purported associations with individuals involved in group criminal activity.").

63 For an illustration of Immigration and Customs Enforcement's propensity to make gang allegations on the basis of questionable if not fabricated evidence, and the deference to which the evidence is often granted by immigration adjudicators, *see* Mark Joseph Stern, "Bad Liars," *Slate*, May 16, 2018, https://slate.com/news-and-politics/2018/05/federal-judge-accused-ice-of-making-up-evidence-to-prove-that-dreamer-was-gang-affiliated.html.

64 *See* Yvette Cabrera, "New ICE Tactic Raises Questions About Due Process," *ThinkProgress*, October 6, 2017, https://thinkprogress.org/ice-targets-gangs-6775356473a8/; Rebecca Hufstader, "Immigration Reliance On Gang Databases: Unchecked Discretion And Undesirable Consequences," 90 *New York University Law Review* 90 (2015): 671.

65 Melissa del Bosque, "Immigration Officials Use Secretive Gang Databases to Deny Migrant Asylum Claims," *Pro Publica*, July 8, 2019, https://www.propublica.org/article/immigration-officials-use-secretive-gang-databases-to-deny-migrant-asylum-claims.

B. *The Proposed Rules Empower Adjudicators to Rely on Unreliable, Unproven, and Biased Evidence of Domestic Violence in Direct Contravention of the Statute*

The Proposed Rules too broadly categorize domestic violence offenses as particularly serious and sweep both offenders and survivors into their dragnet. Survivors of domestic violence include trafficking survivors and LGBTQ community members, such that inclusion of offenses and conduct related to domestic violence in the expanded asylum bars affects populations with overlapping vulnerabilities.[66]

Moreover, the domestic violence sections of the Proposed Rules include the only categorical bar to asylum for which a conviction is *not required*. This provision of the Proposed Rules is undeniably an ultra vires exercise of authority, in conflict with the statute and treaty obligations, and has a disparate impact on vulnerable populations including survivors of domestic violence. The Proposed Rules permit immigration adjudicators to "assess all reliable evidence in order to determine whether [a] conviction amounts to a domestic violence offense," and to go even further by considering whether non-adjudicated *conduct* "amounts to a covered act of battery or extreme cruelty."[67]

Finally, the exemption for asylum applicants who can demonstrate their eligibility for a waiver under section 237(a)(7)(A) of the INA does not cure the harm to asylum seekers caused by imposition of a categorical domestic violence related bar based on unadjudicated facts.[68] Domestic violence incidents all too often involve the arrest of both the primary perpetrator of abuse and the survivor.[69] These "cross-arrests" do not always yield clear determinations of victim and perpetrator. Authorizing asylum adjudicators to determine the primary perpetrator of domestic assault, in the absence of a judicial determination, unfairly prejudices survivors who are wrongly arrested in the course of police intervention in domestic disturbances. Moreover, it exceeds the authority delegated to the Attorney General by the immigration statute.

VIII. The Proposed Rules Will Disparately Impact Vulnerable Populations Already Routinely Criminalized, Including LGBTQ Immigrants, Survivors of Trafficking and Domestic Violence, and Immigrant Youth of Color

66 Marty Schladen, "ICE Agents Detain Alleged Domestic Violence Victim," *El Paso Times*, February 16, 2017, https://www.elpasotimes.com/story/news/2017/02/15/ice-detains-domestic-violence-victim-court/97965624/ (noting that the immigrant detained, a transgender person previously deported following her conviction for crimes such as posession of stolen mail and assault, was then living at the Center Againts Sexual and Family Violence, a shelter for survivors of intimate partner violence).

67 *See* Proposed Rules at 69652.

68 8 U.S.C. § 1227(a)(7)(A).

69 David Hirschel, et al., "Domestic Violence and Mandatory Arrest Laws: To What Extent Do They Influence Police Arrest Decisions," *Journal of Criminal Law & Criminology* 98, no. 1 (2007-2008): 255, https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7284&context=jclc (noting that "[i]n some cases, dual arrests may be the result of legislation, department policies, or both failing to require officers to identify the primary aggressor. In addition, when such provisions are present, police may lack the training or information needed to identify the primary aggressor when responding to a domestic violence assault. This situation may be compounded by batterers who have become increasingly adept at manipulating the criminal justice system, and may make efforts to 'pre-empt' victims from notifying police in order to further control or retaliate against them.").

The expanded criminal bars exclude from safety and a pathway to citizenship those convicted of offenses that are coincident to their flight from persecution, and do not accomplish the stated goal of making communities safer. They will disparately impact vulnerable populations, who comprise asylum seekers hailing primarily from Central America and the Global South, and those routinely criminalized because of their identities, racially disparate policing practices, or in connection with trafficking and domestic violence.[70] For these populations especially, the discretion currently delegated to asylum adjudicators is crucial for becoming fully integrated in the larger community. The imposition of additional categorical bars to asylum will only further marginalize asylum seekers already struggling with trauma and discrimination.

The Proposed Rules turn asylum into a blunt instrument that would prevent the use of discretion where it is most needed and most effective. The existing framework for determining if an offense falls within the particularly serious crime bar already provides latitude for asylum adjudicators to deny relief to anyone whose final criminal convictions show they are a danger to the community.[71] Furthermore, asylees with convictions that render them inadmissible must apply for a waiver at the time of their applications for permanent residence.[72] These measures ensure that asylum applicants in vulnerable populations have access to supportive resources and have the opportunity to demonstrate their ongoing commitment to social and personal health. Moreover, the existence of provisions allowing the revocation of asylum status ensures that adjudicators may continue to enforce concerns related to the safety of the community even after asylum is granted.[73]

A. *Barring asylum for immigrants convicted of migration-related offenses punishes them for fleeing persecution and/or seeking safety for their children, and does not make communities safer.*

The expansion of the criminal bars to asylum to include offenses related to harboring and smuggling of noncitizens by parents and family members and those previously removed further

70 *See* D'Vera Cohn et al., "Rise in U.S. Immigrants from El Salvador, Guatemala and Honduras Outpaces Growth from Elsewhere," *Pew Research Center*, December 7, 2017, https://www.pewresearch.org/hispanic/wp-content/uploads/sites/5/2017/12/Pew-Research-Center_Central_American-migration-to-U.S._12.7.17.pdf.

71 Apart from the statutory aggravated felony bar to asylum, the BIA and Attorney General have historically utilized a highly circumstantial approach to the particular serious crime determination that would bar an immigrant from receiving asylum. *See e.g.*, *Matter of Juarez*, 19 I.&N. Dec. 664 (BIA 1988) (ordinarily a single misdemeanor that is not an aggravated felony will not be a particularly serious crime); *Matter of Frentescu*, 18 I.&N. Dec. 244 (BIA 1982), *modified* (setting forth several factors to be considered before imposing the particular serious crime bar, including: (i) the nature of the conviction, (ii) the circumstances and underlying facts for the conviction, (iii) the type of sentence imposed, and (iv) whether the type and circumstances of the crime indicate that the individual will be a danger to the community); *Matter of Y-L-, A-G-, R-S-R-*, 23 I.&N. Dec. 270 (A.G. 2002) (setting forth a multi-factor test to determine the dangerousness of a respondent convicted of a drug-trafficking offense who is otherwise barred from asylum as an aggravated felon, but seeking withholding of removal).

72 8 U.S.C. § 1159(c).

73 8 C.F.R. § 208.24(a).

criminalizes vulnerable populations fleeing persecution.[74] The vast expansion of migrant prosecutions at the border during the current administration has created administrative chaos and separated families that do not pose a threat to the safety of communities in the United States.[75] The Proposed Rules threaten to magnify the harm caused by these reckless policies by further compromising the ability of those seeking safety on the southern border to access the asylum system.

The Proposed Rules expand the asylum bar to parents or other caregivers who are convicted of smuggling or harboring offenses after taking steps to help minor children enter the United States in order to flee persecution. This proposed bar is particularly grave in light of the administration's efforts to prosecute parents and caregivers as part of its strategy of deterring families from seeking asylum in the United States.[76] The Proposed Rules seek to take this strategy one step further, by additionally barring those parents *already prosecuted* from obtaining asylum protections for themselves and their children. The Proposed Rules multiply the harms parents and caregivers have experienced in their treacherous journeys to safety and callously penalize parents for doing what they must—taking all necessary steps to protect their children.

The Proposed Rules also expand the asylum bar to those who have fled persecution multiple times and therefore been convicted of illegal reentry. Their inclusion is premised on conclusory statements regarding the dangerousness of recidivist offenders, without consideration of the nature or seriousness of prior convictions.[77] Rather, the Proposed Rules treat all immigration violations as similar in seriousness without any independent evidence to justify the expansion. Such an approach renders meaningless the limiting language of "particularly serious" in the statute.

The Proposed Rules also conflate multiple entries by noncitizens having prior removal orders with those who have entered multiple times without ever having their asylum claims heard. Many immigrants who have previously attempted entry to the United States to flee persecution could not have been aware of the complex statutory regime that governs asylum claims and would not knowingly have abandoned their right to apply for asylum. Some asylum seekers have also wrongly been assessed in prior credible fear interviews. And others yet may have previously entered or attempted to enter the United States before the onset of circumstances

74 On April 11, 2017, then-Attorney General Sessions instructed all federal prosecutors to increase their prioritization of immigration offenses for prosecution, including misdemeanor offenses committed by first time entrants. *See* Memorandum from the Attorney General: Renewed Commitment to Criminal Immigration Enforcement (April 11, 2017), https://www.justice.gov/opa/press-release/file/956841/download.

75 *Id*.; Richard Marosi, "The aggressive prosecution of border crossers is straining the courts. Will zero tolerance make it worse?," *Los Angeles Times*, May 11, 2018, https://www.latimes.com/local/california/la-me-ln-immigrant-prosecutions-20180511-story.html.

76 Ryan Devereaux, "Documents Detail ICE Campaign to Prosecute Migrant Parents as Smugglers," *The Intercept*, April 29, 2019, https://theintercept.com/2019/04/29/ice-documents-prosecute-migrant-parents-smugglers/ (describing how in May 2017, the Department of Homeland Security set out to target parents and family members of unaccompanied minors for prosecution).

77 Proposed Rules at 69648.

giving rise to their fear. Preserving discretion to grant asylum in these circumstances allows meritorious asylum seekers to be heard and corrects errors that might previously have occurred.

B. Extending the criminal bars to immigrants convicted of misdemeanor document fraud unfairly punishes low-wage immigrant workers and does not make communities safer.

The Proposed Rules expand the asylum bar to include any asylum seeker who has been convicted of a misdemeanor offense for use of a fraudulent document. Yet again, this expansion is flatly inconsistent with the plain statutory language. "As a matter of ordinary usage,"[78] no one would describe a misdemeanor document offense as a "particularly serious crime" that renders the offender "a danger to the community."

This expansion also ignores the migration-related circumstances that often give rise to convictions involving document fraud. Migrants fleeing persecution often leave their home countries with nothing but the clothes on their backs and must rely on informal networks to navigate their new circumstances.[79] Extension of a blanket bar to asylum seekers who are compelled to resort to fraudulent means to enter the United States, or to remain safely during their applications for asylum, upends decades of settled law directing that violations of law arising from an asylum applicant's manner of flight should constitute only one of many factors to be consulted in the exercise of discretion.[80]

Moreover, migrants in vulnerable communities who struggle to survive during the pendency of their asylum proceedings are often exploited by unscrupulous intermediaries who offer assurances and documentation that turn out to be fraudulent.[81] Many noncitizens working in the low-wage economy face egregious workplace dangers and discrimination and suffer retaliation for asserting their rights.[82] The continued availability of asylum to low-wage immigrant workers can encourage them to step out of the shadows. The expansion of criminal asylum bars to sweep in all document fraud offenses would unfairly prejudice immigrants with meritorious asylum claims and force them deeper into the dangerous informal economy.

C. *The Proposed Rules will harm communities with overlapping vulnerabilities, including LGBTQ asylum seekers, survivors of trafficking, and survivors of domestic violence.*

The Proposed Rules exclude from asylum protections countless members of vulnerable communities who have experienced trauma, abuse, coercion, and trafficking. Many of these people may become aware of their ability to apply for asylum only after law enforcement

78 *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1759 (2018).

79 *See Matter of Pula*, 19 I.&N. Dec. at 474.

80 *Id.*

81 See American Bar Association, "About Notario Fraud," July 19, 2018, https://www.americanbar.org/groups/public_interest/immigration/projects_initiatives/fight-notario-fraud/about_notario_fraud/.

82 Paul Harris, "Undocumented workers' grim reality: speak out on abuse and risk deportation," *The Guardian*, March 28, 2013, https://www.theguardian.com/world/2013/mar/28/undocumented-migrants-worker-abuse-deportation.

encounters that lead them to service providers who can educate them about their immigration options. Despite the unique difficulties they face, the Proposed Rules would compound their harm and prevent them from achieving family unification and a pathway to citizenship.

The Proposed Rules pose a unique threat to LGBTQ immigrant community members. LGBTQ immigrants in particular may already have experienced a high degree of violence and disenfranchisement from economic and political life in their home countries.[83] Hate violence towards undocumented LGBTQ immigrants in the United States is already disproportionately higher than for other members of the LGBTQ population.[84] Members of these communities also experience isolation from their kinship and national networks following their migration. This isolation, compounded by the continuing discrimination towards the LGBTQ population at large, leave many in the LGBTQ immigrant community vulnerable to trafficking, domestic violence, and substance abuse, in addition to discriminatory policing practices. The expansion of criminal enforcement and prosecution of undocumented people also harms the LGBTQ immigrant community.[85] The Proposed Rules will therefore have a disparate impact on LGBTQ individuals whose involvement in the criminal legal system is often connected to past trauma and/or the result of biased policing.

The expansion of asylum bars to include various misdemeanor offenses that were not previously considered particularly serious also unfairly sweeps trafficking survivors into its dragnet. Trafficking survivors frequently come into contact with intervention resources and service providers only after contact with law enforcement occurs. Innovative criminal justice reform efforts currently being adopted across the country include special trafficking courts that recognize the need for discretion in the determination of criminal culpability.[86] The same approach should be employed in the determination of asylum eligibility, where the applicant's life and safety are on the line.

The Proposed Rules instead preclude asylum adjudicators from using a trauma-centered approach, categorically barring countless trafficking survivors convicted of misdemeanor and felony offenses without any opportunity to present the specific circumstances of their claim.

83 *See* Aengus Carroll and Lucas Ramon Mendos, *State Sponsored Homophobia: A World Survey of Sexual Orientation Laws: Criminalisation, Protection and Recognition* 12th Ed. (International Lesbian, Gay, Bisexual, Transgender, and Intersex Association (ILGA), 2017), https://ilga.org/downloads/2017/ILGA_State_Sponsored_Homophobia_2017_WEB.pdf.

84 *See* Sharita Gruberg, "LGBTQ Undocumented Immigrants Face an Increased Risk of Hate Violence," *Center for American Progress*, June 10, 2014, https://www.americanprogress.org/issues/immigration/news/2014/06/10/91233/lgbt-undocumented-immigrants-face-an-increased-risk-of-hate-violence/.

85 *See eg.*, Sharita Gruberg, "How Police Entanglement with Immigration Enforcement Puts LGBTQ Lives at Risk," *Center for American Progress*, April 12, 2017, https://www.americanprogress.org/issues/lgbtq-rights/reports/2017/04/12/430325/police-entanglement-immigration-enforcement-puts-lgbtq-lives-risk/.

86 Elise White, et al., "Navigating Force and Choice: Experiences in the New York City Sex Trade and the Criminal Justice System's Response," *Center for Court Innovation*, December 2017 (noting that 78% of participants in the report's study had been arrested, mostly for non-violent, non-prostitution offenses such as *drug possession*).

IX. The Proposed Definition of "Conviction" and "Sentence" for the Purposes of the New Bars Further Excludes Those in Need of Protection

The section of the Proposed Rules that outlines a new set of criteria for determining whether a conviction or sentence is valid for the purpose of determining asylum eligibility violates the INA. The Proposed Rules impose an unlawful presumption against asylum eligibility for applicants who seek post-conviction relief while in removal proceedings for longer than one year after their initial convictions. They also deny full faith and credit to state court proceedings by attributing improper motives to state court actors.[87]

A. *The Proposed Rules undermine Sixth Amendment protections and harm immigrants unfamiliar with the complex criminal and immigration framework governing prior convictions.*

The Proposed Rules outline a new multi-factor process asylum adjudicators must use to determine whether a conviction or sentence remains valid for the purpose of determining asylum eligibility. This proposal begins from the premise that "[n]o order vacating a conviction, modifying a sentence, clarifying a sentence, or otherwise altering a conviction or sentence, shall have any effect."[88] This presumption is overcome only if the adjudicator finds that the court had authority to issue the order and the order "was not entered for rehabilitative [or immigration] purposes." And an order presumptively fails this test if it was entered into after the asylum seeker was placed in removal proceedings or if the asylum seeker moved for the order more than one year after the date the original conviction or sentence was entered.[89]

This newly created presumption unfairly penalizes asylum applicants, many of whom may not have the opportunity to seek review of their prior criminal proceedings until applying for asylum.[90] In *Padilla v. Kentucky*, the Supreme Court recognized that the immigration consequences of a conviction are sufficiently serious for the Sixth Amendment to require a noncitizen defendant to be competently advised of them before agreeing to a guilty plea.[91] By imposing a presumption against the validity of a withdrawal or vacatur of a plea, the Proposed Rules hold asylum seekers whose rights were violated under *Padilla* to a different standard; even though they too were denied effective assistance of counsel in the course of their underlying criminal proceedings, asylum seekers will be forced to rebut a presumption that their court-ordered withdrawal or vacatur is invalid. The Proposed Rules therefore compound the harm to

87 *See Saleh v. Gonzales*, 495 F.3d 17, 25-26 (2d Cir. 2007) (discussing 28 U.S.C. § 1738, requiring federal courts to give full faith and credit to state acts, records, and judicial proceedings and U.S. Const. art. IV, § 1, and finding that there was no violation where the BIA stopped short of "refusing to recognize or relitigating the validity of [Saleh's] state conviction.").

88 Proposed Rules at 69660.

89 Proposed Rules at 69655.

90 On page 69656 of the Proposed Rules, the Department of Homeland Security and the Department of Justice urge that "[i]t is reasonable to conclude that an alien who has a meritorious challenge to a criminal conviction based on a procedural or substantive defect is more likely to seek post-conviction relief sooner than an alien who is seeking relief on rehabilitative grounds…"

91 *Padilla v. Kentucky*, 559 U.S. 356 (2010).

immigrants who, in addition to facing persecution in their home countries, have been denied constitutionally compliant process in the United States criminal legal system.

Many asylum applicants, especially those in vulnerable populations isolated from resources and unfamiliar with the due process protections available to them in the United States, may not have discovered the defects in their underlying criminal proceedings until their consultation with an immigration attorney, or until they are placed into removal proceedings, which may happen several years after a conviction. Imposing a presumption *against* the validity of a plea withdrawal or vacatur in these cases will undoubtedly lead to the wrongful exclusion of countless immigrants from asylum simply because they were unable to adequately rebut the presumption, particularly in a complex immigration court setting without the benefit of appointed counsel.

B. *The Proposed Rules violate the full faith and credit to which state court decisions are entitled.*

The Proposed Rules further improperly authorize immigration adjudicators to second-guess the decision of a state court, even where the order on its face cites substantive and procedural defects in the underlying proceeding. The proffered justification for this presumption against the validity of post-conviction relief is to "ensure that aliens do not have their convictions vacated or modified for purported rehabilitative purposes that are, in fact, for immigration purposes," "to codify the principle set forth in *Matter of Thomas and Thompson*," and to bring the analysis of post-conviction orders in line with *Matter of Pickering.*[92] The agencies misread the applicable law, however, by authorizing adjudicators to disregard otherwise valid state orders.

Apart from their textual infirmity, the Proposed Rules abandon the presumption of regularity that should accompany state court orders, thus upending settled principles of law. The Proposed Rules cite a misleading quote from *Matter of F-* in support of allowing asylum adjudicators to look beyond the face of a state court order; had the Rules' authors looked to the full case, they would have read the following: "Not only the full faith and credit clause of the Federal Constitution, but familiar principles of law require the acceptance at face value of a judgment regularly granted by a competent court, unless a fatal defect is evident upon the judgment's face. However, the presumption of regularity and of jurisdiction may be BIA offers support for the proposition that an adjudicator should presume the validity of a state court order unless there is a reason to doubt it, contrary to the *presumption of irregularity* put forward in the Proposed Rules.

The authority extended to adjudicators by the Proposed Rules also violates the law of multiple circuits, including *Pickering*, on which it relies.[93] In *Pickering v. Gonzales*, the Sixth Circuit Court of Appeals held that despite the petitioner's stated motive of avoiding negative

92 Proposed Rules at 69655-56 (*citing Matter of Thomas and Thompson*, 27 I.&N. Dec. 674 (A.G. 2019) and *Matter of Pickering*, 23 I.&N. Dec. 621 (BIA 2003), *rev'd on other grounds by Pickering v. Gonzales*, 465 F.3d 263, 267-70 (6th Cir. 2006)).

93 *See id*. (*citing Matter of Pickering*, 23 I.&N. Dec. 621).

immigration consequences, the BIA was limited to reviewing the authority of the court issuing the order as to the basis for his vacatur.[94] Similarly, in *Reyes-Torres v. Holder,* the Ninth Circuit Court of Appeals held that the motive of the respondent was not the relevant inquiry.[95] Rather, "the inquiry must focus on the state court's rationale for vacating the conviction."[96] In addition, the Third Circuit Court of Appeals in *Rodriguez v. U.S. Att'y Gen*., which the Proposed Rules cite as "existing precedent," held that the adjudicator must look only to the "reasons explicitly stated in the record and may not impute an unexpressed motive for vacating a conviction."[97] Moreover, the *Rodriguez* court stated that to determine the purpose of a vacatur, the adjudicator must first look to the face of the order vacating the conviction, and "if the order explains the courts reasons … the [adjudicator's] inquiry must end there."[98] The Proposed Rules contain no such limiting language to guide the adjudicator's inquiry. Instead, the Rules grant adjudicators vague and indefinite authority to look beyond even a facially valid vacatur. Such breadth of authority undermines asylum seekers' rights to a full and fair proceeding.

C. *The Proposed Rules wrongly extend* Matter of Thomas and Thompson *to all forms of post-conviction relief and impose an ultra vires and unnecessary burden on asylum seekers.*

Finally, the above-described presumption is ultra vires and unnecessary. As an initial matter, the Proposed Rules' reliance on *Matter of Thomas and Thompson* is flawed. The Attorney General's decision in *Matter of Thomas and Thompson* has no justification in the text or history of the immigration statute.

To start, nowhere does the plain text of the INA support giving adjudicators the authority to give effect only to state court sentence modifications undertaken to rectify substantive or procedural defects in the underlying criminal proceedings. On its face, the statute requires a "convict[ion] by a final judgment." A vacated judgment is neither "final" nor a "judgment"—it "has no effect" whatsoever.[99] Likewise, a vacated conviction is no conviction at all. Nothing in the statutory definition of "conviction" suggests a different approach here.[100]

94 *Pickering v. Gonzales*, 465 F.3d 263, 267-70 (6th Cir. 2006).

95 *Reyes-Torres v. Holder*, 645 F.3d 1073, 1077-78 (9th Cir. 2011) (*citing Cardoso-Tlaseca v, Gonzales*, 460 F.3d 1102, 1107 n.3 (9th Cir. 2006) and *Pickering v. Gonzales*, 454 F.3d 525 (6th Cir. 2006), *amended and superseded* by *Pickering*, 465 F.3d at 263.

96 *Id*.

97 *Rodriguez v. U.S. Att'y Gen*., 844 F.3d 392, 397 (3d Cir. 2006) (noting that "[T]he IJ may rely only on reasons explicitly stated in the record and may not impute an unexpressed motive for vacating a conviction.").

98 *Id*. ("Put simply, '[w]e will not . . . permit[ ] . . . speculation . . . about the secret motives of state judges and prosecutors,'" *quoting Pinho v. Gonzales*, 432 F.3d 193, 214-215 (3d Cir. 2005)).

99 *E.g.*, *Fort Knox Music Inc. v. Baptiste*, 257 F.3d 108, 110 (2d Cir. 2001).

100 8 U.S.C. § 1101(48)(A) ("The term 'conviction' means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where—(i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.").

Thus, nothing in the statute allows the government to treat a vacated judgment as valid and effective based on when, how, or why it was vacated. Put differently, the validity of a court order does not depend on the judge's apparent subjective reasons for entering it, or even whether the judge's legal reasoning was wrong,[101] and the statute leaves no room for the proposal's contrary presumption. The only even arguably permissible criterion in the proposal is whether the vacating court had jurisdiction to issue the order—but even then, the proposal errs by presuming that a vacatur order is invalid unless the adjudicator is shown otherwise. Court orders are presumptively valid, not the other way around.[102]

The same is true of orders modifying, clarifying, or altering a judgment or sentence. Again, nothing in the statute authorizes the government to ignore such an order based on the order's timing or the adjudicator's view of the reasons behind it. And there is no serious argument that Congress, in using the phrase "convicted by a final judgment," contemplated federal asylum adjudicators second-guessing state courts in this way. The statute's plain language flatly forecloses this aspect of the proposal. The BIA recognized this in *Matter of Cota-Vargas*, where it concluded that applying "the *Pickering* rationale to sentence modifications has no discernible basis in the language of the Act."[103]

Nor does the legislative history support such a rule. Based on the text of the INA and the well-documented legislative history behind Congress's definition of "conviction" and "sentence" in 8 U.S.C. § 1101(a)(48), the Board in *Matter of Cota-Vargas* determined that Congress intended to ensure that, generally, proper admissions or findings of guilt were treated as convictions for immigration purposes, even if the conviction itself was later vacated. Neither the text of the INA nor the legislative history of the definitions reveal any attempt on Congress's part to change the longstanding practice of giving effect to state court sentencing modifications. For these reasons, *Matter of Thomas and Thompson* lacks Congressional support for its rule and should not be extended.

Moreover, as applicants for immigration benefits or relief from removal, asylum seekers already bear the burden of demonstrating their eligibility for asylum.[104] The Proposed Rules do not alter or shift this burden, nor do they provide evidence supporting the need for this presumption. By introducing a presumption of bad faith into asylum adjudication, the Proposed Rules unfairly interfere with asylum seekers' efforts to establish their claims. Immigration law, and asylum law in particular, is already highly complex, and the process of seeking asylum is in many instances re-traumatizing, particularly for applicants who do not have counsel to represent them and who lacked effective counsel in their underlying criminal proceedings. The Proposed Rules as applied to asylum applicants who seek post-conviction relief transform an already difficult process into an adversarial inquiry, contrary to the intent of Congress.

101 *E.g.*, *Patton Boggs, LLP v. Chevron Corp*., 825 F. Supp. 2d 35, 40 (D.D.C. 2011).

102 *E.g.*, *Lee v. Ali (In re Ali)*, No. 17-30413, at *5 (Bankr. S.D. Tex. Jan. 30, 2018) ("A court's orders are generally *presumed valid*; therefore, the burden of establishing that the Harris County Court's order was invalid rests with [the challenger].").

103 *Matter of Cota-Vargas*, 23 I.&N. Dec. 849, 852 (BIA 2005).

104 *Matter of S-K-*, 23 I.&N. Dec. 936, 939-40 (BIA 2006).

X. Conclusion

For the foregoing reasons, IJN and its four member organizations, ILRC, IDP, JFL, and NIPNLG, strongly oppose this rule. In addition to the arguments made above, the Proposed Rules represent a sweeping and unauthorized change to asylum in the United States. The Proposed Rules would endanger the lives of untold thousands by leaving them at greater risk of *refoulement* in violation of our nation's treaty obligations, and do not make communities safer. As organizations that work closely with immigrant communities, criminal defenders, and immigration attorneys, we encourage the agencies to rescind these harmful Proposed Rules in full.

We request that the agencies consider this comment on the Proposed Rules. Please do not hesitate to contact Cristina Velez at cristina@nipnlg.org if you have any questions or need any further information. Thank you for your consideration.

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