

**NATIONAL
IMMIGRANT
JUSTICE CENTER**
A HEARTLAND ALLIANCE PROGRAM

Submitted online via <https://www.regulations.gov/document?D=EOIR-2019-0005-0001>

Lauren Alder Reid, Assistant Director
Office of Policy, Executive Office for Immigration Review
5107 Leesburg Pike, suite 2616
Falls Church, VA 22041

Maureen Dunn, Chief
Division of Humanitarian Affairs, Office of Policy and Strategy
U.S. Citizenship and Immigration Services
Department of Homeland Security
20 Massachusetts Ave. NW
Washington, DC 20529-2140

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:

The National Immigrant Justice Center (NIJC) works to advance the rights of all immigrants, including asylum seekers. We believe the right to asylum to be sacrosanct, and write to express our strong opposition to the above-referenced Proposed Rules relating to eligibility for asylum published in the Federal Register on December 19, 2019.

At a time when the asylum system is under attack and asylum seekers are regularly returned by the United States to harm, these Proposed Rules represent yet one more obstacle to protection for those in need. The Rules entirely strip away access to the asylum system for those with even minor criminal legal involvement. Given the widely acknowledged injustices and racial disparities at play in the United States criminal legal system and the Department of Homeland Security's proven history of levying allegations of criminal conduct on flimsy and unreliable evidence, these Rules will do nothing more than layer harm upon harm. These Rules are cruel in spirit and threaten to result in the denial of safety to those who need it most.

NIJC is dedicated to ensuring human rights protections and access to justice for immigrants, refugees, and asylum seekers. NIJC provides direct legal services to and advocates for these populations through policy reform, impact litigation, and public education. Since its founding more than three decades ago, NIJC has been unique in blending individual client advocacy with broad-based systemic change. Headquartered in Chicago, with additional offices elsewhere in the Midwest, San Diego, and Washington, D.C., NIJC provides legal services to more than 10,000 individuals each year, including individuals from across the globe who have come to the United States seeking safety and refuge. In 2018, NIJC provided legal services to more than 1,300 asylum seekers.

We submit this comment today as part of our commitment to our clients and their families and communities. This rule will take the possibility of achieving safety away from many of them.

One such client is Saulo¹, who is seeking asylum in the United States today. Saulo is afraid to return to his home country in Central America because of a powerful gang waiting to do him and his family harm. Saulo's life in his home country was disrupted after he saved a man who had been victimized by a gang; the gang in turn targeted Saulo, brutally assaulting him and his wife and threatening their young son.

Saulo and his wife and child escaped to the United States, but escaping the trauma they endured was impossible. Saulo sought to numb the memories of the attack through alcohol; late one night he was arrested on a deserted street for driving under the influence. His therapist observed that, "[p]ersistent traumatic memories related to events in [his home country] ... left him very vulnerable to [seeking to] escape his reality through alcohol misuse."

Saulo faces a conviction for driving under the influence as a result of this incident. Depending on the outcome of his case, should these Proposed Rules become final he could also be stripped of the ability to ever obtain asylum and the permanence it brings with it. For Saulo, the Proposed Rules would add another layer of harm and unnecessary punitive government actions to a lifetime of struggle. Saulo like so many NIJC clients is fighting to overcome unimaginable obstacles to find safety and security for himself and his family; the United States asylum policy should help with that struggle, not layer additional barriers to an already fraught journey.

NIJC urges the Department of Homeland Security and Department of Justice to withdraw the Rules in their entirety and, instead, to devote their resources and energies to ensuring that a full and fair asylum system is made accessible to all those who seek safety here.

¹ Pseudonyms are used throughout to protect the privacy of NIJC clients.

This comment will address the following arguments in specificity: 1) The Proposed Rules will exclude bona fide refugees from asylum eligibility; 2) The Proposed Rules violate the letter and spirit of United States international treaty obligations; 3) The Proposed Rules will gravely harm those impacted even if withholding or protection under the Convention Against Torture remain available; 4) the Proposed Rules will undermine judicial efficiency; 5) The proposed definition of “conviction” and “sentence” further exclude those in need of protection; 6) The Proposed Rules will disparately impact vulnerable populations already criminalized; and 7) The Proposed Rules are ultra vires to the federal immigration statute.

1. The Proposed Rules unnecessarily and cruelly exclude bona fide refugees from asylum eligibility

The first set of changes proposed by the new rules would add 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; (7) and 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.

This section addresses the myriad ways in which these new bars will inevitably result in the return to harm of bona fide refugees who merit asylum protections under international and domestic law. It is particularly shocking that the Department of Homeland Security and the Department of Justice propose these bars to *categorically* bar relief, meaning that asylum applicants deemed to fall within the new seven categories will not even have the opportunity to have their case heard by an asylum officer or immigration judge. These Rules deny even the chance of a day in court to those asking for protection from return to death—a breathtakingly harsh government action.

NIJC client Than was granted asylum by an immigration judge who weighed all the equities in Than’s case and found him to merit protection. Than came to the United States as a refugee from Burma; when he was a teenager he fell into the wrong crowd and was ultimately convicted of felony possession of a firearm. Prior to coming into the custody of U.S. Immigration and Customs, Than had made numerous positive changes to his life, including working with his local police department to prevent further criminal activity in the area where he lived. Pursuant to current asylum law and policy, Than was able to

present his claim for asylum to an immigration judge and demonstrate the many positive equities in his life; the judge exercised his discretion in Than's favor. Had the Proposed Rules been in effect at the time of his hearing, Than would not have even had the chance to present his case and would have been denied protection.

The barriers to asylum for those previously involved in the criminal legal system are already sweeping in scope; adding more barriers is cruel and unnecessary.

The United States asylum system was first codified in statute through 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 unique historic role as a haven for persons fleeing oppression.”² The 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.³

The asylum protections provided by United States law are sacred. 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 abroad in danger.⁴ Many see the domestic asylum system as a symbol of the United States’ commitment never to repeat its failure to save thousands of Jewish refugees refused entry to the United States on the *St. Louis* and others fleeing the Holocaust.⁵ Others point to the critical role that domestic asylum policy plays in serving the United States’ foreign policy interests abroad.⁶ For those individuals seeking asylum in the United States, the stakes could not be higher—a claim denied often means return to death or brutal persecution.⁷

² 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.

³ See *I.N.S. v. Cardoza-Fonseca*, 40 U.S. 421, 423 (1987).

⁴ The permanency and family reunification benefits that accompany asylum are not provided to those granted withholding of removal or protection under the Convention Against Torture, the alternative forms of relief described throughout the Proposed Rules as a justification for the breadth of the new proposed bars. For more details on the differences between the forms of protection, see section VI *infra*.

⁵ Dara Lind, “How America’s rejections of Jews fleeing Nazi Germany haunts our refugee policy today,” *Vox*, January 27, 2017, <https://www.vox.com/policy-and-politics/2017/1/27/14412082/refugees-history-holocaust>.

⁶ Council on Foreign Relations, *Independent Task Force Report No. 63: U.S. Immigration Policy* (2009), 117 (additional or dissenting view by Elisa Massimino) (“For better or worse, the United States sets the standard for reasonable and humane treatment of migrants around the world. If the United States endorses harsh treatment of immigrants, it erodes the norms designed to protect them, and other countries will have license to do the same.”).

⁷ See, e.g., Sarah Stillman, “When deportation is a death sentence,” *The New Yorker*, January 8, 2018, <https://www.newyorker.com/magazine/2018/01/15/when-deportation-is-a-death-sentence>.

The laws, regulations, and process governing asylum adjudications are already exceedingly harsh. Asylum seekers bear the evidentiary burden of establishing their eligibility for asylum⁸ in the face of a complex web of laws and regulations, without the benefit of appointed counsel and often from a remote immigration jail.⁹ The obstacles to winning asylum are exceedingly high; indeed in some parts of the country and before certain immigration judges, almost no one succeeds.¹⁰ Today, newly imposed barriers to accessing asylum in the United States are breathtaking in scope, with those seeking safety at the southern border subject to return to dangerous conditions in Mexico and an overlapping web of policies that preclude asylum eligibility for countless migrants simply because of their national origin, manner of entry, or their flight path.¹¹ There are consistent reports of the documented deaths and brutalities endured by those who sought but were denied asylum protections in the United States.¹²

Specifically, the bars to asylum based on allegations of criminal conduct are *already* sweeping and over-broad in nature and scope.¹³ Any conviction for an offense determined to be an “aggravated felony” is considered a *per se* “particularly serious crime” and therefore a mandatory bar to asylum.¹⁴ “Aggravated felony” is a notoriously vague term, which exists only in immigration law. Originally limited to murder, weapons trafficking and drug trafficking,¹⁵ it has metastasized to encompass hundreds of offenses, many of them neither a felony nor aggravated, including petty offenses such as misdemeanor shoplifting, simple misdemeanor battery, or sale of counterfeit DVDs.¹⁶ The existing crime bars should be narrowed, not

⁸ 8 USC § 1158(b)(1)(B); 8 CFR § 1240.8(d).

⁹ See Daniel Connolly, Aaron Montes, and Lauren Villagran, “Asylum seekers in U.S. face years of waiting, little chance of winning their cases,” *USA Today*, September 25, 2019, <https://www.usatoday.com/in-depth/news/nation/2019/09/23/immigration-court-asylum-seekers-what-to-expect/2026541001/>.

¹⁰ Manuel Roig-Franzia, “Immigrants risk it all seeking asylum. The answer is almost always ‘no,’” *Washington Post*, July 24, 2019, https://www.washingtonpost.com/lifestyle/style/migrants-risk-it-all-seeking-asylum-the-answer-in-court-is-almost-always-no/2019/07/23/9c161b2e-a3f7-11e9-b732-41a79c2551bf_story.html.

¹¹ The National Immigrant Justice Center maintains a frequently updated timeline providing details of each of the asylum bans and other policies issued and implemented by the administration undermining asylum access at <https://www.immigrantjustice.org/issues/asylum-seekers-refugees>. For more information on the harms and rights abuses inherent in the Migrant Protection Protocols, or “Return-to-Mexico” program, see Human Rights First, *Delivered to Danger* (December 2019), <https://www.humanrightsfirst.org/campaign/remain-mexico>.

¹² See, e.g., Stillman, “Death Sentence,” *supra* (reporting on a database of more than sixty cases of individuals killed after deportation); see also Maria Sachetti, “‘Death is waiting for him,’” *The Washington Post*, December 6, 2018, <https://www.washingtonpost.com/graphics/2018/local/asylum-deported-ms-13-honduras/> (telling the story of Santos Chirino, denied asylum by a Virginia immigration judge, deported, and then murdered by those he told the immigration judge he feared); and Kevin Sieff, “When death awaits deported asylum seekers,” *Washington Post*, December 26, 2018, <https://www.washingtonpost.com/graphics/2018/world/when-death-awaits-deported-asylum-seekers/>.

¹³ The existing categorical bars to asylum eligibility are discussed in detail on p. 69641 of the Proposed Rules.

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

¹⁵ Pub. L. No. 100-690, § 7342, 102 Stat. 4181, 4469-70.

¹⁶ 8 U.S.C. § 1101(a)(43). See also Nancy Morawetz, “Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms,” *Harvard Law Review* 113 (2000): 1939-40 (criticizing the “Alice-in-Wonderland-like definition of the term ‘aggravated felony’”); Melissa Cook, “Banished for Minor Crimes: The Aggravated Felony Provisions of the Immigration and Nationality Act as a Human Rights Violation,” *Boston College Third World Law Journal* (2003): 293.

expanded. Even for those not categorically barred from relief, the immigration adjudicator maintains full discretion to deny asylum.¹⁷

Immigration adjudicators already have vast discretion to deny asylum to those who meet the refugee definition but have been convicted of criminal conduct.¹⁸ Further categorical bars are not needed. The agencies' efforts to add *seven* new sweeping categories of barred conduct to the asylum eligibility criteria is unnecessary and cruel. The Proposed Rules drain the phrase "*particularly serious crime*," 8 U.S.C. § 1158, of any sensible meaning.

The Proposed Rules are also arbitrary and capricious. They would constitute a marked departure from past practice. And the agencies have proffered no evidence or data to support these changes.

One assumption underlying the Proposed Rules, for example, is that every noncitizen convicted of any offense punishable by more than a year in prison necessarily constitutes a danger to the community. But no evidence is provided to support that assumption, and a criminal record, does not, in fact, reliably predict future dangerousness.¹⁹ The Proposed Rules are so capricious as to preemptorily postulate a noncitizen's supposed danger to the community even in circumstances when a federal, state, or local judge has concluded that no danger exists by, for example, imposing a noncustodial sentence. Conviction for a crime does not, without more, make one a present or future danger—which is why the Refugee Convention's particularly serious crime bar, made part of United States law through 8 U.S.C. § 1158, should only properly apply if both (1) a migrant is convicted of a particularly serious crime and (2) a separate assessment shows that she is a present or future danger.²⁰

Similarly, the Proposed Rules fail to address or account for the fact that a significant number of people may agree to plead to a crime as to avoid the threat of a severe sentence; not only is a conviction an unreliable predictor of future danger, it can also be an unreliable indicator of past

¹⁷ See *Matter of Pula*, 19 I.&N. Dec. 467 (BIA 1987).

¹⁸ See *id.*

¹⁹ See U.S. Sentencing Commission, *The Effects of Aging on Recidivism Among Federal Offenders* (2017) (noting that recidivism rates fall substantially with age); U.S. Sentencing Commission, *Recidivism Among Federal Violent Offenders* (2019) (noting that non-violent offenders recidivate at significantly lower rates); J. Ramos and M. Wenger, "Immigration and recidivism: What is the Link?" *Justice Quarterly* (2019) (finding no correlation between recidivism rates and citizenship status among those formerly incarcerated for felonies in Florida prisons).

²⁰ See U.N. High Commissioner for Refugees, *Criminal Justice and Immigration Bill: Briefing for the House of Commons at Second Reading* ¶ 11 (July 2007), <http://www.unhcr.org/en-us/576d237f7.pdf> (the Refugee Convention's particularly serious crime bar only applies if (1) a migrant is convicted of a particularly serious crime and (2) a separate assessment shows she is a "present or future danger.").

criminal conduct.²¹ In addition, the Proposed Rules do not address and make no exception for convictions for conduct influenced by mental illness or duress.

The Board of Immigration Appeals has 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.”²² Yet because of the categorical nature of the seven news bars proposed here, asylum seekers will be precluded from obtaining protection on the basis of a vast array of conduct, without any discretion left to the immigration adjudicator to determine whether the circumstances merit such a harsh penalty. Indeed, in the case of the domestic-violence related ground, the categorical bar will be imposed on the basis of *mere allegations* of conduct without any adjudication of guilt.²³

Those unjustly precluded from even seeking a discretionary grant of asylum by the Proposed Rules will include, for example: individuals struggling with addiction with one drug-related conviction, regardless of the circumstances of the offense; asylum seekers with two convictions for driving under the influence, regardless of whether the applicant has sought treatment for alcohol addiction or the circumstances of the convictions; community members seeking asylum defensively who have been convicted of a document fraud offense related to their immigration status; and asylum-seeking mothers convicted for bringing their own child across the southern border in an effort to find safety.

The Proposed Rules cruelly disregard the connections between trauma and involvement in the criminal legal system.

The harsh nature of the Proposed Rules is especially evident when viewed through a trauma-informed lens. Asylum seekers are an inherently vulnerable population because of the trauma they have experienced in their countries of origin and, often, along the journey to find safety. Existing literature suggests that at least one out of every three asylum seekers struggles with depression, anxiety, and/or post-traumatic stress disorder (PTSD).²⁴ One recent study found the

²¹ John H. Blume and Rebecca K. Helm, “The Unexonerated: Factually Innocent Defendants Who Plead Guilty,” *Cornell Law Review* 100 (2014): 157, <https://pdfs.semanticscholar.org/c00f/96d421adf1846d120bf802a8854b5e2c0ff2.pdf>.

²² *Pula*, 19 I.&N. Dec. at 474.

²³ The Proposed Rules at p. 69651 explain that the regulations will “render ineligible [non-citizens] who engaged in acts of battery and extreme cruelty in a domestic context in the United States, regardless of whether such conduct resulted in a criminal conviction.”

²⁴ Giulia Turrini et al., “Common mental disorders in asylum seekers and refugees: umbrella review of prevalence and intervention studies,” *International Journal of Mental Health Systems* 11 (August 2017): 51, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5571637/>.

mental health problems facing refugees and asylum seekers so acute that more than a third of the study's sample admitted having suicidal thoughts in the preceding two weeks.²⁵

Studies also consistently reveal a high prevalence of comorbidity of PTSD and substance use disorders, with individuals with PTSD *up to 14 times more likely* to struggle with a substance use disorder.²⁶ Asylum seekers in the United States are often unable to access affordable medical care and treatments for complex trauma;²⁷ some turn to drugs and alcohol in an effort to self-medicate.²⁸ The proposed new bars to asylum include *any* drug-related conviction (with one exception for a first minor marijuana possessory offense) and any second conviction for driving under the influence. This approach is not only cruel but also ignores the evidence. *Particularly* given the vulnerabilities of asylum-seeking populations, prior struggles with addiction should be addressed with treatment and compassion, not a closed door and deportation order.

NIJC client Joshua is currently living safely as an asylee in the United States. Under the Proposed Rules, the very same vulnerability that would result in his harm or death in his home country of the Philippines would have excluded him from asylum. Joshua is a young man from the Philippines who became addicted to meth and was convicted of drug possession. Because of this conviction he faced deportation to the Philippines, where President Duterte has waged a war on drugs that has involved extrajudicial torture and killings. Despite his conviction, Joshua was able to pursue asylum before the immigration judge; in court he was able to demonstrate that despite his offense, he both qualified for and merited asylum in the exercise of discretion. For Joshua, the U.S. asylum system offered a second chance at a safe and whole life. The Proposed Rules threaten to take this second chance away from countless others like Joshua who desperately need it.

Immigration adjudicators already maintain the authority to deny asylum to individuals with drug-related criminal histories on the basis of discretion; denying asylum seekers even the opportunity to present the countervailing factors of their past trauma and potential recovery is simply cruel.

²⁵ Megan Brooks, "Refugees have high burden of mental health problems," *Psychiatry and Behavioral Health Learning Network*, June 2019, <https://www.psychcongress.com/article/refugees-have-high-burden-mental-health-problems>.

²⁶ Jenna L McCauley et al., "Posttraumatic Stress Disorder and Co-Occurring Substance Use Disorders: Advances in Assessment and Treatment," *Clinical Psychology Science and Practice* 19, 3 (October 2012), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3811127/>.

²⁷ For more information on immigrant eligibility for federal benefits, see <https://www.nilc.org/issues/health-care/>.

²⁸ Carrier Clinic, *Trauma and Addiction* (2019), <https://carrierclinic.org/2019/08/06/trauma-and-addiction/> ("...some people struggling to manage the effects of trauma in their lives may turn to drugs and alcohol to self-medicate. PTSD symptoms like agitation, hypersensitivity to loud noises or sudden movements, depression, social withdrawal and insomnia may seem more manageable through the use of sedating or stimulating drugs depending on the symptom. However, addiction soon becomes yet another problem in the trauma survivor's life. Before long, the 'cure' no longer works and causes far more pain to an already suffering person.").

2. The Proposed Rules violate the letter and spirit of United States international treaty obligations

By acceding to the 1967 Protocol Relating to the Status of Refugees,²⁹ which binds parties to the United Nations Convention Relating to the Status of Refugees,³⁰ the United States obligated itself to develop and interpret United States refugee law in a manner that complies with the Protocol's principle of non-refoulement (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. As noted above, adjudicators already have over-broad authority to deny asylum based on allegations of criminal activity, which vastly exceeds the categories for exclusion and expulsion set out in the Convention. Instead of working towards greater congruence with the terms of the Convention, the Proposed Rules carve out categorical bars from protection that violate both the language and spirit of the treaty.

While the Convention allows states to exclude and/or expel potential refugees from protection, the circumstances in which this can occur are limited. In particular, the Convention allows states to exclude and/or expel individuals from refugee protection if the individual "having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country."³¹ However, 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."³² 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."³³ 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."³⁴ Finally, when determining whether an individual 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.³⁵

²⁹ 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.

³⁰ Convention Relating to the Statute of Refugees, July 28, 1951, 140 U.N.T.S. 1954 (hereinafter "Refugee Convention").

³¹ *Id.* at art. 33(2).

³² 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).

³³ 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>.

³⁴ *Id.* at ¶ 10.

³⁵ *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).

As noted above, legislation and agency interpretation of the Immigration and Nationality Act have already expanded the particularly serious crime bar far beyond what was contemplated in the Convention by creating categorical particularly serious crimes through the aggravated felony definition. The Proposed Rules would amplify the dissonance between U.S. refugee law and the Convention, as well as the violation of U.S. obligations under the Convention, by creating categorical bars within categorical bars. For example, at p. 69659, the Proposed Rules first exclude from protection anyone who was convicted of a felony and then at p. 69660, define “felony” as “any crime punishable by more than one of imprisonment” without any reference to other factors, including dangerousness. The Proposed Rules described the increased categorization of the particularly serious crime bar as necessary because the case-by-case adjudication previously used for non-aggravated felony offenses was “inefficient,”³⁶ but an individualized analysis is exactly what the Convention requires to ensure only those individuals who have been convicted of crimes that are truly serious and therefore present a future danger are placed at risk of refoulement.

Additionally, outside of the aggravated felony context, it has generally been well understood by the Board of Immigration Appeals and the Courts of Appeals that low-level, “run-of-the-mill” offenses do not constitute particularly serious crimes.³⁷ Under this long-standing interpretation of the particularly serious crime bar in the INA, there is simply no scenario in which low-level offenses like misdemeanor driving under the influence where no injury is caused to another or simple possession of a controlled substance or paraphernalia would constitute a particularly serious crime.

The reason for this is common sense. As Judge Reinhardt explained in a concurring opinion in *Delgado v. Holder*,³⁸ a decision the Proposed Rules cite in support of the expanded bars, run-of-the-mill crimes like driving under the influence have “little in common” with other crimes the Board of Immigration Appeals has deemed particularly serious—e.g., felony menacing with a deadly weapon, armed robbery, and burglary of a dwelling in which the offender is armed or causes injury.³⁹ Judge Reinhardt further noted that public opinion does not treat them similarly either: “American voters would be unlikely to elect a president or vice president who had committed a particularly serious crime, yet they had no difficulty in recently electing to each office a candidate with a DUI record.”⁴⁰ Barring individuals from asylum based on these relatively minor offenses renders the “particularly serious” part of the “particularly serious crime” bar meaningless.

³⁶ Proposed Rules at 69646.

³⁷ *Delgado v. Holder*, 648 F.3d 1095, 1110 (9th Cir. 2011) (en banc) (J. Reinhardt, concurring).

³⁸ 648 F.3d at 1110 (J. Reinhardt, concurring).

³⁹ *Id.* at 1110.

⁴⁰ *Id.* at 1110.

The expansion of the asylum bar to include individuals who have been convicted of reentering the United States without inspection pursuant to INA § 276⁴¹ is also unlike any of the other bars previously established or as interpreted by the Board of Immigration Appeals or Circuit Courts of Appeals. It is an offense with no element of danger or violence to others, and has no victim. Most significantly, and more so than other bars contained in the Proposed Rules, barring asylum based on the manner of entry directly violates the Convention’s prohibition on imposing penalties based on a refugee’s manner of entry or presence.⁴² This prohibition is a critical part of the Convention because it recognizes that refugees often have little control over the place and manner in which they enter the country where they are seeking refuge.

3. Those precluded from asylum eligibility will be gravely impacted even if granted withholding of removal or protection under the Convention Against Torture

Throughout the Proposed Rules, the agencies defend the harsh and broad nature of their proposal by pointing to the continued availability of alternative forms of relief for those precluded from asylum eligibility under the new rules.⁴³ The availability of these alternative forms of relief, however—known as withholding of removal and protection under the Convention Against Torture (CAT)—does not nullify the harm created by the Proposed Rule’s 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 Rule that limits *bona fide* refugees to withholding of removal and CAT protection would impose a very real harm on individuals who have come to the United States in search of protection.

First, the most serious harm that can befall an individual as a result of these Proposed Rules is removal to persecution and torture, and the existence of withholding of removal does not account for that risk. CAT and withholding protections demand a higher level of proof than asylum claims: a clear probability of persecution or torture.⁴⁴ Thus, an individual could have a valid asylum claim but be unable to meet the standard under the other forms of relief and therefore would be removed to their country of origin, where they would face persecution or even death.

⁴¹ Proposed Rules at 69659, 69660.

⁴² Refugee Convention, *supra*, at art 31.

⁴³ *See, e.g.*, Proposed Rules at 69644.

⁴⁴ 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).

Even for those who meet the higher standard, withholding and CAT recipients are still subject to significant prejudice. For example, they have no ability to travel internationally. The United Nations Convention Relating to the Status of Refugees⁴⁵ affords 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.” 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.⁴⁶ And the Board of Immigration Appeals requires that an individual granted withholding and CAT—unlike an individual granted asylum—must simultaneously be ordered removed, making any international travel a “self-deportation.”⁴⁷ Refugees granted only withholding of removal or CAT protection are thus effectively trapped within the United States in long-term limbo.

Withholding and CAT recipients also face permanent separation from their spouses and children. Because international travel is prohibited, these individuals cannot reconnect with their families in a third country. And they also cannot reunite with family in the United States because only asylees and refugees are eligible to petition for a spouse and children to join them as derivatives on that status.⁴⁸ 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.

Recently, this exact 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,”⁴⁹ 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 future.⁵⁰ 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.

⁴⁵ 19 U.S.T. 6223 T.I.A.S. No. 6577 (1968).

⁴⁶ 8 C.F.R. § 223.1.

⁴⁷ See *Matter of I-S- & C-S-*, 24 I.&N. Dec. 432, 434 n.3 (BIA 2008); 8 C.F.R. § 241.7.

⁴⁸ 8 C.F.R. § 208.21(a).

⁴⁹ 8 C.F.R. § 1208.13(c)(4).

⁵⁰ 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>.

Furthermore, neither withholding of removal nor CAT protection allow family members who are in the United States together and pursuing protection on the same basis to apply as derivatives on a principal application. As a result, family claims for those rendered ineligible for asylum by the new rules will have to be adjudicated separately, and potentially before different adjudicators even when the claims are interrelated and even when minor children may not be in a position to explain the claim at all or as sufficiently as a parent. In addition to being unjust to the affected family members, this approach would result in gross inefficiencies.⁵¹

Withholding recipients likewise face hurdles in access to employment. Article 17 of the Refugee Convention states that a contracting state “shall accord to refugees lawfully staying in their territory the most favorable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to wage-earning employment.” Recipients of withholding enjoy no such right. They must apply for work authorization, and they face frequent delays in the adjudication of these applications, which often result in the loss of legal authorization to work.⁵²

And perhaps most fundamentally, there is continuing jeopardy for withholding and CAT recipients that does not exist for asylum recipients. When a noncitizen is granted asylum, the person receives a legal status.⁵³ Asylum, once granted, protects an asylee against removal unless and until that status is revoked.⁵⁴ None of these protections exists for withholding and CAT recipients. They have no access to permanent residency or citizenship.⁵⁵ Instead, they are subject to a removal order and vulnerable to the permanent prospect of deportation to a third country and subject to potential check ins with immigration officials where they can be made to pursue removal to third countries to which they have no connection.⁵⁶

4. The Proposed Rules will result in “mini-trials” in immigration court, undermine judicial efficiency and result in racially-biased decision-making

In two significant ways, the Proposed Rules require immigration adjudicators to engage in decision-making to determine whether an asylum applicant’s conduct—considered independently of any criminal court adjudication—triggers a categorical bar to asylum eligibility. First, the agencies propose that immigration adjudicators be allowed to consider “all reliable

⁵¹ See, e.g., 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://bit.ly/2sJuEWR>.

⁵² 8 C.F.R. § 274a.12(a)(10); *Northwest Immigrant Rights Project, et al. v. USCIS, et al.*, No. 2:15-cv-00813-JLR (W.D. Wash., filed May 22, 2015) (class action regarding delays in adjudication of work authorization).

⁵³ See, e.g., 8 C.F.R. 245.1(d)(1) (defining “lawful immigration status” to include asylees).

⁵⁴ See 8 U.S.C. § 1158(c)(1)(A).

⁵⁵ *Matter of Lam*, 18 I.&N. Dec. 15, 18 (BIA 1981); 8 C.F.R. § 245.1(d)(1) (explaining that only those in “lawful immigration status” can seek permanent residency and excluding withholding recipients from such status); 8 C.F.R. § 209.2(a)(1) (authorizing adjustment of status to permanent residence for asylees); 8 C.F.R. § 316.2 (naturalization available only to permanent residents).

⁵⁶ See *R–S–C v. Sessions*, 869 F.3d 1176, 1180 (10th Cir. 2017).

evidence” to determine whether there is “reason to believe” an offense was “committed for or related to criminal gang evidence,” or “in furtherance of gang-related activity, triggering ineligibility for asylum in either case.”⁵⁷ Second, 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.”⁵⁸

Requiring adjudicators to make complex determinations regarding the nature and scope of a particular conviction or, in the case of the domestic violence bar, *conduct*, will lead to massive judicial inefficiencies and slanted “mini-trials” within the asylum adjudication process. The scope of the “reliable evidence” available to adjudicators in asylum cases is potentially limitless; advocates on both sides would be obligated to present fulsome arguments to make their cases about gang connections to the underlying activity or the relationship of the asylum applicant to the alleged victim. Because of the lack of robust evidentiary rules in immigration proceedings, it will be difficult if not impossible for many applicants to rebut negative evidence marshaled against them, even if false; and in other cases, asylum applicants will struggle to find evidence connected to events that may have happened years prior (especially for those detained). Asylum trials, which are typically three or fewer hours under current policies, would provide insufficient time to fully present arguments on both sides of these unwieldy issues.

As the immigration courts contend with backlogs that now exceed one million cases,⁵⁹ tasking adjudicators with a highly nuanced, resource-intensive assessment of the connection of a conviction to gang activity and/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. The Proposed Rules repeatedly cite increased efficiency as justification for many of the proposed changes.⁶⁰ Yet requiring adjudicators to engage in mini-trials to determine the applicability of categorical criminal bars, rather than relying on adjudications obtained through the criminal legal system, will dramatically *decrease* efficiency in the asylum adjudication process.

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.⁶¹ Instead, for more than a century the federal courts have repeatedly embraced the “categorical approach” to determine the immigration consequence(s) of a criminal offense, wherein the immigration

⁵⁷ See Proposed Rules at 69649.

⁵⁸ See Proposed Rules at 69652.

⁵⁹ 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>.

⁶⁰ See Proposed Rules at 69646, 69656-8.

⁶¹ *Moncrieffe v. Holder*, 569 U.S. 184, 186 (2013).

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.⁶² 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.”⁶³ 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 officer who recalls to the contrary,” with the end result a disparity of outcomes depending on the whims of the individual immigration judge and a further burdened court system.⁶⁴

Particularly in the context of the new proposed bar related to alleged gang affiliation, NIJC is concerned that creating a blanket exclusion for anyone who is convicted of a crime – including a misdemeanor – that an immigration adjudicator deems linked to gang activity will erroneously prevent bona fide asylum seekers from receiving protection. This rule confers on immigration adjudicators—who generally are not criminologists, sociologists, or criminal law experts—the responsibility to determine if there is “reason to believe” 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.⁶⁵

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 on the basis of information found in notoriously unreliable foreign databases and “fusion” intelligence-gathering centers outside the United States. Empowering immigration adjudicators to render

⁶² See *Moncrieffe*, 569 U.S. at 191 (“This categorical approach has a long pedigree in our Nation’s immigration law.”). 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>.

⁶³ *Moncrieffe*, 569 U.S. at 200-201.

⁶⁴ *Id.* at 201.

⁶⁵ 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>.

asylum applicants *categorically* excluded from protection on the basis of such spurious allegations will inevitably result in the return of many refugees back to harm.⁶⁶

The Departments curiously argue that all gang-related offenses should be construed as “particularly serious crimes.”⁶⁷ They cite statistics from up to 16 years ago in an attempt to make the point that gang members commit violent crimes and drug crimes. They then make the illogical leap to the conclusion that *all crimes*—including misdemeanor property crimes—that may be construed as connected to gang activity are particularly serious. This simply does not follow; in fact, the Proposed Rules will inevitably result in the exclusion from protection of asylum seekers of color who live in economically distressed communities and have obtained a minor conviction such as a property crime. Relying on the definition of “particularly serious crime” to prevent asylum seekers convicted of even minor crimes construed as gang-related from accessing asylum protection is disingenuous at best, and tinged with racial animus at worst.

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 Immigration and Nationality Act and existing regulations already provide overly broad bars to asylum where criminal behavior by an asylum seeker causes concern by 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.

5. 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 is an ultra vires exercise of authority that is not authorized by the Immigration and Nationality Act. The Proposed Rules impose an unlawful presumption against asylum eligibility for applicants who seek post-conviction relief while in removal proceedings or 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.⁶⁸

⁶⁶ 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>.

⁶⁷ Proposed Rules at p. 69650.

⁶⁸ 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 Board of Immigration Appeals stopped short of “refusing to recognize or relitigating the validity of [Saleh’s] state conviction.”).

The Proposed Rules undermine Sixth Amendment protections and harms 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; the proposal includes a rebuttable presumption “against the effectiveness” of an order vacating, expunging, or modifying a conviction or sentence if the order 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.⁶⁹

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.⁷⁰ 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.⁷¹ 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 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.

⁶⁹ Proposed Rules at 69655.

⁷⁰ 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...”

⁷¹ *Padilla v. Kentucky*, 559 U.S. 356 (2010).

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*.⁷² The agencies misread the applicable law, however, by authorizing adjudicators to disregard otherwise valid state orders. The immigration law only requires that to be effective for immigration purposes, orders vacating or modifying convictions must be based on substantive or procedural infirmities in the underlying proceedings. The Proposed Rule goes well beyond that requirement.

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 overcome by extrinsic evidence or by the record itself.”⁷³ In *Matter of F-*, the Board of Immigration Appeals 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.⁷⁴ In *Pickering v. Gonzales*, the Sixth Circuit Court of Appeals held that despite the petitioner’s stated motive of avoiding negative immigration consequences, the Board of Immigration Appeals was limited to reviewing the authority of the court issuing the order as to the basis for his vacatur.⁷⁵ Similarly, in *Reyes-Torres* the Ninth Circuit Court of Appeals held that the motive of the respondent was not the relevant

⁷² 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)).

⁷³ *Matter of F-*, 8 I.&N. Dec. 251, 253 (BIA 1959).

⁷⁴ See *id.* (citing *Matter of Pickering*, 23 I.&N. Dec. 621).

⁷⁵ *Pickering v. Gonzales*, 465 F.3d 263, 267-70 (6th Cir. 2006).

inquiry.⁷⁶ Rather, “the inquiry must focus on the state court’s rationale for vacating the conviction.”⁷⁷ 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.”⁷⁸ 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.”⁷⁹ 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.

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. Nowhere does the plain text of the Immigration and Nationality Act 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. Nor does the legislative history support such a rule. The Board of Immigration Appeals recognized this in *Matter of Cota-Vargas*, where it concluded that the application of “the *Pickering* rationale to sentence modifications has no discernible basis in the language of the Act.”⁸⁰ Based on the text of the Immigration and Nationality Act and the well-documented legislative history behind Congress’s definition of “conviction” and “sentence” in 8 U.S.C. § 1101(a)(48), the Board 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.

⁷⁶ *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).

⁷⁷ *Id.*

⁷⁸ *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.”).

⁷⁹ *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)).

⁸⁰ *Matter of Cota-Vargas*, 23 I.&N. Dec. 849, 852 (BIA 2005).

Moreover, as applicants for immigration benefits or relief from removal, asylum seekers already bear the burden of demonstrating their eligibility for asylum.⁸¹ 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.

6. 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

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 experiences of trafficking and domestic violence.⁸² For these populations especially, the discretion currently delegated to asylum adjudicators is crucial for them to become 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 the latitude for asylum adjudicators to deny relief to anyone found to pose a danger to the community.⁸³ Furthermore,

⁸¹ *Matter of S-K-*, 23 I.&N. Dec. 936, 939-40 (BIA 2006).

⁸² 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>.

⁸³ Apart from the statutory aggravated felony bar to asylum, the Board of Immigration Appeals 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

asylees with convictions that render them inadmissible must apply for a waiver at the time of their applications for permanent residence.⁸⁴ 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.⁸⁵

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, smuggling of noncitizens by parents and family members and those previously removed further criminalizes vulnerable populations fleeing persecution.⁸⁶ 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.⁸⁷ 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 insidious in light of now-public documents revealing this administration's explicit efforts to utilize smuggling prosecutions against parents and caregivers as part of its strategy of deterring families from seeking asylum in the United States.⁸⁸ The Proposed Rules seek to take this widely condemned 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

(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).

⁸⁴ 8 U.S.C. § 1159(c) (2012).

⁸⁵ 8 C.F.R. § 208.24(a) (2012).

⁸⁶ 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>.

⁸⁷ *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>.

⁸⁸ 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).

and caregivers have experienced in their treacherous journeys to safety and callously penalize parents for doing what is only human—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 seriousness of prior convictions.⁸⁹ Rather, the Proposed Rules treat all immigration violations as similar in seriousness to those previously warranting inclusion in the particularly serious crime bar, 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 have knowingly abandoned their right to apply for asylum. Some asylum seekers have also been wrongly 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 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 have previously occurred.

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. In so doing, the Rule entirely 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.⁹⁰ 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.⁹¹

Moreover, migrants in vulnerable communities who are struggling to survive during the pendency of their asylum proceedings are often exploited by unscrupulous intermediaries who

⁸⁹ Proposed Rules at 69648.

⁹⁰ *See Pula*, 19 I.&N. Dec. at 474.

⁹¹ *Id.*

offer assurances and documentation that turn out to be fraudulent.⁹² Many noncitizens working in the low-wage economy face egregious workplace dangers and discrimination and suffer retaliation for asserting their rights.⁹³ 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, on the other hand, would unfairly prejudice immigrants with meritorious asylum claims and force them deeper into the dangerous informal economy.

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 individuals may only become aware of their ability to apply for asylum after law enforcement 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 have already experienced a high degree of violence and disenfranchisement from economic and political life in their home countries.⁹⁴ Hate violence towards undocumented LGBTQ immigrants in the United States is already disproportionately higher than for other members of the LGBTQ population.⁹⁵ 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

⁹² 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/.

⁹³ 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>.

⁹⁴ 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.

⁹⁵ 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/>.

community.⁹⁶ 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. It is becoming more widely recognized across state court systems that 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.⁹⁷ 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 conducting 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.

Survivors of domestic violence include trafficking survivors and LGBTQ community members, such that inclusion of offenses related to domestic violence in the expanded asylum bars affects populations with overlapping vulnerabilities.⁹⁸ The Proposed Rules too broadly categorize domestic violence offenses as particularly serious and sweep both offenders and survivors into their dragnet. The immigration laws extend protections to domestic violence survivors outside of the asylum context, recognizing the complex dynamics surrounding intimate partner violence. Provisions in the Violence Against Women Act allow adjudicators evaluating claims for relief arising thereunder to exercise discretion based on a number of factors and circumstances.⁹⁹ The blunt approach adopted by the Proposed Rules is inconsistent with the approach taken towards survivors elsewhere in the federal immigration statute and does not rely on any evidence-based justification for treating asylum seekers differently.

⁹⁶ 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/>.

⁹⁷ 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*).

⁹⁸ 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 possession of stolen mail and assault, was then living at the Center Against Sexual and Family Violence, a shelter for survivors of intimate partner violence).

⁹⁹ Nadine Shaanta Murshid and Elizabeth A. Bowen, "A Trauma-Informed Analysis of the Violence Against Women Act's Provisions for Undocumented Immigrant Women," *Violence Against Women* 24(13) (2018): 1540–1556, <https://doi.org/10.1177/1077801217741991>.

Moreover, the domestic violence sections of the Proposed Rules include the only categorical bar to asylum for which a conviction is not required. Domestic violence incidents all too often involve the arrest of both the primary perpetrator of abuse and the survivor.¹⁰⁰ 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 to domestic disturbances.

Finally, the exemption for asylum applicants who can demonstrate their eligibility for a waiver under section 237(a)(7)(A) of the Immigration and Nationality Act does not cure the harm to asylum seekers caused by imposition of a categorical domestic violence related bar.¹⁰¹ Rather, it converts a non-adversarial asylum proceeding into a multi-factor, highly specific inquiry into culpability based on circumstances that may be very difficult for an asylum seeker to prove—especially if proceeding without counsel and with limited English proficiency.

Barring asylum for immigrants convicted of “gang-related crimes” based on unreliable evidence and racially disparate policing practices is harmful to youth of color and does not make communities safer.

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.¹⁰² 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.¹⁰³ 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

¹⁰⁰ 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.”).

¹⁰¹ 8 U.S.C. § 1227(a)(7)(A).

¹⁰² 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.

¹⁰³ 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.¹⁰⁴

Past legislative efforts to expand the grounds of removal and inadmissibility in the Immigration and Nationality Act to include gang membership have failed to pass both houses of Congress.¹⁰⁵ 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.¹⁰⁶ Creating a “gang-related crime” bar will only exacerbate the due process violations already occurring as the result of unsubstantiated information about supposed gang ties.¹⁰⁷

There is no doubt that the Proposed Rules will result in asylum seekers being denied protection on the basis of unsubstantiated allegations pushed forward by Department of Homeland Security attorneys and officers focused on pursuing removal. In 2019, the New York Civil Liberties Union and the New York Immigration Coalition conducted a study of hundreds of pages relating to immigration cases in the state of New York, and found that:

“The Department of Homeland Security, in cooperation with local and federal law enforcement, compiles vague and overbroad evidence to argue that individuals are gang members or associates. Subsequently, DHS uses that evidence to oppose bond in removal and custody proceedings. DHS even alleges an individual is a ‘gang associate,’ and is therefore presumed dangerous, based on nothing more than the person having some social interaction with a gang member, no matter the significance of the interaction.”¹⁰⁸

¹⁰⁴ 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>.

¹⁰⁵ 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.”).

¹⁰⁶ 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>.

¹⁰⁷ 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.

¹⁰⁸ Paige Austin Et al., “How Vague Gang Allegations Impact Relief & Bond for Immigrant New Yorkers: Stuck With Suspicion,” *New York Civil Liberties Union and New York Immigration Coalition*, 2019, <https://thenyic.pi.bypronto.com/2/wp-content/uploads/sites/2/2019/02/020819-NYCLU-NYIC-Report.pdf>.

The Department of Homeland Security also persists in levying erroneous allegations of criminality against asylum seekers arriving at the southern border, allegations that already routinely result in the abusive practice of family separation and will now further serve to unjustly preclude refugees from asylum.¹⁰⁹ Specifically, Customs and Border Protection often relies on data via a transnational intelligence-sharing program involving Mexico, El Salvador, Guatemala, and Honduras to make these determinations, yet these allegations are often unsubstantiated.¹¹⁰

NIJC client Juanita was separated from her teenage son in July 2018 after government agents accused her of gang affiliation in her home country. Despite repeated requests, Immigration and Customs Enforcement refused to present any evidence in support of its baseless accusations. Juanita was separated from her son for eight months before the government finally released her in March 2019 after NIJC advocated extensively and threatened to file litigation. Since their traumatic separation, Juanita has suffered from severe depression, trouble sleeping, and uncontrollable shaking. Should the Proposed Rules become final, asylum seekers like Julia will face the additional harm of being precluded from asylum protections.

In addition, by focusing on “reason to believe” as the basis for the bar, rather than the seriousness of the crime, the proposed provision is ultra vires and unconscionably limits the eligibility for asylum of those most in need of protection. The effect of the Proposed Rules would be to expand the number and type of convictions for which an analysis of eligibility is required, 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 Rule), could trigger a bar to asylum if the adjudicator concludes she has “reason to believe” the offense was committed in furtherance of gang activity.¹¹¹ In making these determinations, asylum adjudicators would be unable to rely on uncorroborated allegations contained in arrest reports, but could nevertheless shield their decisions by relying on discretion.¹¹²

The Proposed Rules thus invite extended inquiry into the character of young immigrants of color who otherwise have meritorious asylum claims, based on information gained through racially

¹⁰⁹ Jesse Franzblau, “Family Separation Policy Continues, New Documents Show,” *National Immigrant Justice Center*, June 22, 2019, <https://www.immigrantjustice.org/staff/blog/family-separation-policy-continues-new-documents-show>.

¹¹⁰ *Id.*

¹¹¹ 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.

¹¹² 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).

disparate policing practices. These rules multiply the harm to asylum seekers of color subject to racially disparate policing that results in racially disparate rates of guilty pleas to minor offenses. This same population is overrepresented in gang databases, which are notoriously inaccurate, outdated, and infected by racial bias.¹¹³

7. The Proposed Rules are ultra vires to the federal immigration statute to the extent they purport to bar eligibility through a categorical exercise of discretion

When Congress speaks clearly through a statute, the plain meaning of that statute governs.¹¹⁴ Congress by statute permits the Attorney General to designate certain categories of offenses as “particularly serious crimes.”¹¹⁵ As such, Congress *explicitly* permitted the Attorney General to designate a non-aggravated felony to be a particularly serious crime and thus to disqualify a person from asylum. In the context of asylum, all aggravated felonies are *per se* particularly serious crimes and the Attorney General “may designate by regulation [other] offenses that will be considered to be” a particularly serious crime for purposes of asylum.¹¹⁶

Here, however—seemingly in an attempt to insulate the Proposed Rules from review, the agencies attempt to designate new bars to asylum both by designating them as “particularly serious crimes” pursuant to 8 U.S.C. § 1158(b)(2)(B)(ii) and rendering them categorically exempt from a positive discretionary adjudication of asylum pursuant to 8 U.S.C. § 1158(b)(2)(C). This effort is unlawful. Section 1158(b)(2)(B)(ii) does permit the Attorney General to, if he wishes, attempt to designate some classes of offenses as particularly serious crimes; such designations are reviewable for legal error (and as explained above, the commenters believe these expansions are unlawful).¹¹⁷ However, if the offense is not a particularly serious crime, then a discretionary decision must be rendered on the application. It is true that the Attorney General may also provide for “additional limitations and conditions” on asylum applications so long as they are “consistent” with the with the asylum statute.¹¹⁸ In this case, however, the Proposed Rules add sweeping categories of offenses that automatically remove an applicant from the consideration of discretion—a regulatory proposal that is ultra vires to the plain text of the statute.

¹¹³ 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>.

¹¹⁴ See, e.g., *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997).

¹¹⁵ 8 U.S.C. § 1158(b)(2)(B)(ii).

¹¹⁶ *Id.* The Attorney General has not designated “substantial battery” to be a particularly serious crime for any purpose, including for purposes of ineligibility to seek asylum.

¹¹⁷ 8 U.S.C. § 1252(a)(2)(D).

¹¹⁸ 8 U.S.C. § 1158(b)(2)(C); see also 8 U.S.C. § 1158(d)(5)(B).

To the extent that the proposed rules would adopt a bar to asylum based on a categorical discretionary bar, rather than a particularly serious crime designation, they are similar to the rules struck down by numerous Circuit Courts of Appeal in the context of adjustment of status for those considered by law to be “arriving aliens.” Purporting to exercise discretion categorically, then-Attorney General Reno putatively rendered that class of noncitizens ineligible for adjustment of status, a determination that is ordinarily discretionary, even though the statute seemed to allow eligibility. Multiple Circuit Courts of Appeal struck down the proposed regulations, finding them to reflect an impermissible reading of the statute in light of the fact that Congress carefully defined in the statute the categories of people eligible to apply for adjustment of status.¹¹⁹

The same logic applies here. In the asylum statute, Congress explicitly made the commission of a particularly serious crime a bar to asylum. The canon of interpretation known as *expressio unius est exclusio alterius* instructs that, “expressing one item of [an] associated group or series excludes another left unmentioned.”¹²⁰ The Proposed Rules attempt to create numerous categories of discretionary “pseudo-particularly serious crimes,” barring asylum through a categorical exercise of discretion even if those offenses are ultimately found not to be particularly serious crimes. Such an effort violates this canon of interpretation, and places the Proposed Rules ultra vires to the statute.

8. Conclusion

NIJC client Mario is a young man who suffers from schizophrenia and would face involuntary institutionalization were he to return to Mexico. Mario has a conviction in his past for possession of cocaine, stemming from efforts to self-medicate. With NIJC providing legal representation, Mario was able to defend against deportation and seek asylum; the immigration judge weighed the circumstances of his case and determined that he merited the exercise of asylum. Mario is now safely in the United States, and his asylum grant allows him to access the benefits he will need to stay healthy. Should the Proposed Rules go into effect, Mario and others like him would be shut out of safety and

¹¹⁹ The First and Ninth Circuits found the regulations contrary to clear statutory command. *Succar v. Ashcroft*, 394 F.3d 8, 29 (1st Cir. 2005); *Bona v. Gonzales*, 425 F.3d 663, 668-71 (9th Cir. 2005). Other courts invalidated the adjustment regulations under “Step Two” of *Chevron*. Those courts found some ambiguity in the statute, but found a per se discretionary bar not based on a permissible construction of the eligibility standards set forth in the governing statute in light of the statutory scheme and congressional intent. *Zheng v. Gonzales*, 422 F.3d 98, 116-20 (3d Cir. 2005) (invalidating regulation precluding category of people from applying to adjust status “[g]iven Congress’s intent as expressed in the language, structure, and legislative history of INA section 245 [8 U.S.C. § 1255]”); *Scheerer v. United States Attorney General*, 445 F.3d 1311, 1321-22 (11th Cir. 2006). This reasoning would likewise be applicable to the proposed rule. Where Congress went through the trouble to create a comprehensive statutory scheme to define asylum eligibility, the agency cannot preempt that in the guise of discretion by creating out of whole cloth a separate set of eligibility criteria.

¹²⁰ *United States v. Vonn*, 535 U.S. 55, 65 (2002).

precluded from sharing the individual circumstances of their lives with an immigration adjudicator.

Immigrants seeking asylum in the United States have overcome unique obstacles. Many have endured trauma in their home country, over the course of their flight to safety, and here in the United States. Some have become involved in the criminal legal system or are the subject of allegations of criminal conduct; yet these facts render them no less deserving of the opportunity to seek safety and legal protection in the United States. The United States government is quickly and violently closing the door to those in need of protection; we urge the Department of Homeland Security and the Department of Justice to urgently reverse course and *rescind* these Proposed Rules rather than adding yet one more layer of shameful cruelty to our domestic immigration laws and policy.

Thank you for the opportunity to submit comments on the Proposed Rules. Please do not hesitate to contact Heidi Altman at haltman@heartlandalliance.org or 202-879-4311 to provide further information.

Sincerely,

Heidi Altman
Director of Policy