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Via Federal e-Rulemaking Portal

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RE: Procedures for Asylum and Bars to Asylum Eligibility
84 FR 69640 (Dec. 19, 2019)
EOIR Docket No. 18-0002, A.G. Order No. 4592-2019
RIN 1125-AA87, 1615-AC41

Dear Assistant Director Alder Reid and Chief Dunn,

Brooklyn Defender Services (“BDS”) submits these comments to the Department of Homeland Security (“DHS”) and the Department of Justice (“DOJ”) (collectively, the “Departments”) Notice of Proposed Rulemaking regarding “Procedures for Asylum and Bars to Asylum Eligibility,” published in 84 FR 69640, issued on December 19, 2019, EOIR Docket No. 18-0002, A.G. Order No. 4592-2019 (hereinafter, the “Proposed Rule”). For the reasons set forth below, BDS requests that DHS immediately halt implementation of the Proposed Rule.

BDS is a full-service public defender organization in Brooklyn, New York that provides multi-disciplinary and client-centered criminal defense, family defense, immigration, and civil legal services, along with social work and advocacy support. BDS represents low-income people in nearly 30,000 criminal, family, civil, and immigration proceedings each year. Since 2009, BDS has counseled, advised, or represented more than 15,000 clients in immigration matters including deportation defense, affirmative applications, advisals, and immigration consequence consultations in Brooklyn’s criminal court system. About a quarter of BDS’s criminal defense clients are foreign-born, roughly half of whom are not naturalized citizens and therefore at risk of losing the opportunity to obtain lawful immigration status as a result of criminal or family defense cases. Our criminal-immigration specialists provide support and expertise on thousands of such

cases. BDS's immigration practice represents people in applications for immigration relief, including asylum, before U.S. Citizenship and Immigration Services ("USCIS"), and in removal proceedings in New York's immigration courts. In addition, BDS is one of three New York Immigrant Family Unity Project ("NYIFUP") providers and has represented more than 1,400 people in detained deportation proceedings since the inception of the program in 2013.

As set forth below, BDS strongly opposes the proposed expansion of criminal bars to asylum that would significantly increase the number of asylum seekers who are categorically barred from applying for asylum. The proposed criminal bars are extremely harsh, encompassing a wide swath of convictions and conduct, including misdemeanors and non-criminal offenses. The current criminal bars to asylum are already overbroad and unjust, and they should be narrowed not expanded. The additional proposed bars would not only aggravate an already unfair situation, but constitute a marked departure from past practice, would drain any sensible meaning from the phrase "particularly serious crime," and contravene U.S. obligations and international norms.

The proposed bars would have a disparate impact on already vulnerable communities, as they cover conduct that disproportionately stems from homelessness, lack of resources, trauma, substance abuse, and mental health issues. Asylum seekers often come from vulnerable communities that are at heightened risk for arrest and policing, such as communities of color, and lesbian, gay, and transgender individuals, and may be more susceptible to have minor infractions or low-level offenses. These bars prevent otherwise eligible asylum seekers from exercising their right to apply for asylum and presenting their asylum case.

BDS asks that the Proposed Rule be rescinded in its entirety as all asylum seekers deserve a fair opportunity to have their asylum cases heard and to be protected from persecution and death.

A. Background

Under United States law, asylum provides those fleeing persecution and violence with physical safety, a green card and a pathway to citizenship, and the opportunity to reunite with and provide status to immediate family members.¹ The 1951 United Nations Convention Relating to the Status of Refugees (the "Convention") is a multilateral treaty that provides the rights of refugees and the responsibilities of nations. The 1967 Protocol Relating to the Status of Refugees,² which binds parties to the Convention,³ mandates the 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

¹ See generally 8 U.S.C. §§ 1158-1159.

² 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.

³ Convention Relating to the Statute of Refugees, July 28, 1951, 140 U.N.T.S. 1954 (hereinafter "Refugee Convention").

allegedly committed criminal offenses.⁴ By acceding to the Protocol, the United States obligated itself to develop and interpret United States refugee law in a manner that complies with the principle of non-refoulement. The Convention sets forth two exceptions to the non-refoulement principle, one of which is where a refugee who has been convicted “by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.”⁵ 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.”⁶ 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.”⁷ 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.”⁸ 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.⁹

The United States asylum system was codified in statute through the Refugee Act of 1980 (the “Refugee Act”) 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.”¹⁰ Most of the Convention’s provisions have been incorporated in the Refugee Act, which was intended to bring the domestic legal code of the United States into compliance with the Protocol and created a “broad class” of refugees eligible for a discretionary grant of asylum.¹¹ There is evidence that “convicted by a final judgment of a particularly serious crime” and

⁴ Article 33(1) of the Convention.

⁵ Article 33(2) of the Convention.

⁶ U.N. High Commissioner for Refugees (“UNHCR”), *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) (“UNHCR Handbook”).

⁷ 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>.

⁸ *Id.* at ¶ 10.

⁹ *Id.* at ¶ 10-11; UNHCR, *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); UNHCR, *Criminal Justice and Immigration Bill: Briefing for the House of Commons at Second Reading* ¶ 11 (July 2007) (hereinafter “Briefing for the House of Commons”) ¶ 10, <http://www.unhcr.org/en-us/576d237f7.pdf>.

¹⁰ 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%3A1060953608aaobdd30d5d506e1ff6318&seq=1#page_scan_tab_contents.

¹¹ See *I.N.S. v. Cardoza-Fonseca*, 40 U.S. 421, 423 (1987). Specifically, the Refugee Act provides that individual had the right to apply for asylum “irrespective of immigration status.” See Refugee Act of 1980, Pub. L. No. 96-212, § 208 (codified as amended at § 1158)).

“danger to the community” were meant to be two elements under Article 33(2) of the Convention.¹² A House Committee report suggests that the drafter of the Refugee Act may have conflated the two elements and separated them into two provisions.¹³ The conflation causes the subsequent broad interpretation of “particularly serious crime,” contrary to what the Convention intended.¹⁴ In 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”), Pub. L. No. 104-208, Div. C, 110 Stat. 3009, which amended the Immigration and Nationality Act (“INA”). The amended §1158(a)(1) provides that “[a]ny alien who is physically present in the United States . . . irrespective of such alien’s status, may apply for asylum.” At the same time, Congress set forth parameters that bar certain refugees from being granted asylum, including those who have been “convicted by a final judgment of a particularly serious crime.” § 1158 (b)(2)(A)(ii). The existing framework for determining if a final conviction falls within the current particularly serious crime bar, includes an assessment of whether the individual is found to pose a danger to the community.¹⁵

The current bars to asylum based on criminal convictions are already sweeping and over-broad in nature and scope.¹⁶ Any conviction for an offense determined to be an “aggravated felony” is considered a per se “particularly serious crime” and, therefore, is a mandatory bar to asylum.¹⁷ “Aggravated felony” is a notoriously vague term, which exists only in immigration law. Originally limited to murder, weapons trafficking and drug trafficking,¹⁸ it has been broadened to encompass hundreds of offenses, many of them

¹² Briefing for the House of Commons ¶ 11 <http://www.unhcr.org/en-us/576d237f7.pdf> (“Conviction of a particularly serious crime in and of itself is not sufficient. The person concerned must, in view of this crime, also present a danger to the community.”).

¹³ Torrey et al., *Misapplication of the Particularly Serious Crime Bar to Deny Refugees Protection from Removal to Countries Where Their Life or Freedom is Threatened*, Immigrant Defense Project (Fall 2018), 12 [hereinafter “IDP Harvard Report”] https://www.immigrantdefenseproject.org/wp-content/uploads/IDP_Harvard_Report_FINAL.pdf (citing H.R. rep. No. 96-608, at 18 (1979) (noting that the Convention provides exceptions to the protection against refoulement for “aliens . . . who have been convicted of particularly serious crimes which make them a danger to the community of the United States.)).

¹⁴ *Id.* (citing Fatma Marouf, *A Particularly Serious Exception to the Categorical Approach*, 97 *Boston Univ. L. Rev.* 1427, 1456 (2017)).

¹⁵ Apart from the statutory aggravated felony bar to asylum, the Board of Immigration Appeals (“BIA”) and Attorney General have historically utilized a circumstantial approach to the particular serious crime determination that would bar an immigrant from receiving asylum. *See e.g., Matter of Juarez*, 19 I.&N. Dec. 664 (BIA 1988) (ordinarily a single misdemeanor that is not an aggravated felony will not be a particularly serious crime); *Matter of Frentescu*, 18 I.&N. Dec. 244 (BIA 1982), *modified* (setting forth several factors to be considered before imposing the particular serious crime bar, including: (i) the nature of the conviction, (ii) the circumstances and underlying facts for the conviction, (iii) the type of sentence imposed, and (iv) whether the type and circumstances of the crime indicate that the individual will be a danger to the community); *Matter of Y-L-, A-G-, R-S-R-*, 23 I.&N. Dec. 270 (A.G. 2002) (setting forth a multi-factor test to determine the dangerousness of a respondent convicted of a drug-trafficking offense who is otherwise barred from asylum as an aggravated felon, but seeking withholding of removal).

¹⁶ 84 Fed. Reg. 69640, 69641 (Dec. 19, 2019).

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

¹⁸ Pub. L. No. 100-690, § 7342, 102 Stat. 4181, 4469-70.

neither a felony nor aggravated, including petty offenses such as misdemeanor shoplifting, simple misdemeanor battery, or sale of counterfeit DVDs.¹⁹ Even for those not categorically barred from relief, the immigration adjudicator maintains full discretion to deny asylum.²⁰ Immigration adjudicators already have vast discretion to deny asylum to those who are eligible for asylum, but have been convicted of criminal conduct,²¹ and further categorical bars are neither needed nor appropriate.

For asylum seekers, the stakes of being denied asylum despite being eligible are extremely high: being returned to their home country, where they will face violence, brutal persecution, and even death. It is already exceedingly difficult to win an asylum claim and the laws, regulations, and processes governing asylum in the United States have become increasingly harsh.²² During asylum cases, individuals must show not only that they have suffered persecution or will suffer future persecution if returned to their home countries, but also that the persecution was based on one of five enumerated grounds.²³ In doing so, individuals bear the evidentiary burden of establishing eligibility,²⁴ must corroborate their claim with supporting documentation and evidence (including official documents and affidavits from their home country and medical or physiological evaluations),²⁵ and must be perceived credible by the adjudicator. Even eligibility is not sufficient; in addition, they must demonstrate that they merit a favorable exercise of discretion.²⁶ Asylum seekers may be detained, lack access to counsel, and must overcome barriers such as past trauma, language access, and mental health issues.

Further aggravating an already extremely difficult and complex process, this Administration has sought to impose additional barriers to asylum, which are aimed at stopping lawful asylum seekers at the southern border from exercising their right to apply for asylum in the United States. These include forcing those seeking safety to return to

¹⁹ 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.

²⁰ *See Matter of Pula*, 19 I.&N. Dec. 467 (BIA 1987).

²¹ *See id.*

²² 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; Daniel Connolly, Aaron Montes, and Lauren Villagran, “Asylum seekers in U.S. face years of waiting, little chance of winning their cases,” *USA Today*, Sept. 25, 2019, <https://www.usatoday.com/in-depth/news/nation/2019/09/23/immigration-court-asylum-seekers-what-to-expect/2026541001/>.

²³ *See* 8 U.S.C. § 1158(b)(1)(B)(i).

²⁴ *See id.*

²⁵ *See* 8 U.S.C. § 1158(b)(1)(B)(ii)-(iii).

²⁶ *See* 8 U.S.C. § 1158(b)(2)(A).

dangerous conditions in Mexico²⁷ and a web of policies that bar eligible applicants from being granted asylum for a myriad of reasons, including their national origin, manner of entry, or the path they took to the United States.²⁸ Another set of policies would make it more expensive to apply and would force asylum seekers to suffer financial distress while they wait for their cases to be heard.²⁹

Consistent with these efforts to undermine the United States asylum system, on December 19, 2019, DHS and DOJ issued the instant Proposed Rule that significantly increases the types of criminal offenses and conduct that would categorically bar an asylum seeker from applying for asylum. First, the Proposed Rule would add seven 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), regardless of familial relationship, motivation, or circumstances; (3) any conviction for illegal reentry under 8 U.S.C. § 1326; (4) any conviction for an offense vaguely “involving criminal street gangs,” with the adjudicator empowered to look at any evidence to make the determination; (5) any second conviction for an offense involving driving while intoxicated or impaired; (6) any conviction or accusation of conduct involving acts of battery in 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, minor marijuana possession offense, any offense involving a fraudulent document, and fraud in public benefits. Second, the Proposed Rule creates a multi-factor test for asylum adjudicators to determine whether a criminal conviction or sentence is valid for the purpose of determining asylum eligibility. And third, the Proposed Rule rescinds a provision in the current rules regarding the reconsideration of discretionary asylum. Taken together, these proposed changes constitute an unnecessary, harsh, and unlawful gutting of the

²⁷ See Human Rights First, *Delivered to Danger* (Dec. 2019), <https://www.humanrightsfirst.org/campaign/remain-mexico>.

²⁸ See, e.g., Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33829 (July 16, 2019) (proposing to bar asylum to anyone who enters or attempts the United States via the southern border after failing to apply for protection in a third country through which they passed en route); Implementing Bilateral and Multilateral Asylum Cooperative Agreements Under the Immigration and Nationality Act, 84 Fed. Reg. 63994 (Nov. 19, 2019) (proposing to bar asylum to any applicant who transited through a country with which the United States has entered into certain bilateral agreements).

²⁹ See, e.g., Removal of 30-Day Processing Provision for Asylum Applicant-Related Form I-765 Employment Authorization Applications, 84 Fed. Reg. 47148 (Sept. 9, 2019) (proposing to remove 30-day processing requirement for asylum applicants’ work permit applications); Asylum Application, Interview, and Employment Authorization for Applicants, 84 Fed. Reg. 62374 (Nov. 14, 2019) (proposing to extend the waiting period for asylum seekers to request a work permit and deny work permits to individuals who did not enter the United States through a port of entry or who applied for asylum over one year after entering the United States); Presidential Memorandum on Additional Measures to Enhance Border Security and Restore Integrity to Our Immigration System § 3(c) (Apr. 29, 2019), <https://www.whitehouse.gov/presidential-actions/presidential-memorandum-additional-measures-enhance-border-security-restore-integrity-immigration-system/> (instructing Attorney General and Secretary of Homeland Security to institute a fee for asylum applications); Acting Secretary of Homeland Security Kevin McAleenan, Remarks to the Council of Foreign Relations (Sept. 23, 2019), <https://www.dhs.gov/news/2019/09/23/acting-secretary-mcaleenans-prepared-remarks-council-foreign-relations> (stating that DHS would keep families applying for asylum detained at the border).

asylum protections enshrined in United States and international law. BDS opposes the Proposed Rule in its entirety.

B. The Proposed Categories of Criminal Offenses and Conduct that Would Bar Asylum Eligibility are Vague, Overbroad, and Would Have a Disparate Impact on Low-Income and Communities of Color

A criminal conviction itself does not mean an individual is a danger to the community and should not be sufficient to strip an asylum seeker of their right to apply for asylum. Not only is a conviction an unreliable predictor of future danger, it is also an unreliable indicator of past criminal conduct because of disparate policing practices and the significant number of people who may plead to a crime for a number of reasons.³⁰ This is precisely the reason that the Refugee Convention’s particularly serious crime bar, made part of United States law through 8 U.S.C. § 1158, should only apply if both (1) an individual is convicted of a particularly serious crime, and (2) a separate assessment, taking into considerations the totality of the circumstances, shows that they are a present or future danger.³¹ Indeed, UNHCR has expressly noted that ordinary or common crimes do not meet this “threshold of seriousness.”³² And international norms bolster the UNHCR’s approach. For example, the threshold of seriousness in Canada includes “generally serious criminality, national security, human rights violations, and organized criminality;” in France, the threshold includes “only relatively severe crimes, and the government must find that the individual is a ‘serious threat to the public order.’”³³

As set forth below, the Proposed Rule dilutes the already broad meaning of a “particularly serious crime” under U.S. law, such that many types of offenses and conduct will make an asylum seeker ineligible for asylum. The proposed categorical bars are far broader than what the non-refoulement exceptions allow: they do not require “final judgments,” are a departure from what is considered “particularly serious crimes,” and are not tailored to identify those who pose a danger to the community. The Departments have failed to provide sufficient rationales for sweeping in such broad categories of conduct to bar asylum. Moreover, the Departments fail to address that the proposed conduct-base categorical bars will have a disparate impact on communities of color given the realities of the criminal justice and child welfare systems. The Proposed Rule ignores these realities of structural racism and would exacerbate these inequalities.

³⁰ 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/coof/96d421adf1846d120bf802a8854b5e2c0ff2.pdf>.

³¹ See Briefing for the House of Commons ¶ 11, <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.”).

³² Briefing for the House of Commons ¶ 10.

³³ IDP Harvard Report at 19.

Because the Proposed Rule amplifies the dissonance between U.S. asylum law and the Convention, and violates U.S. obligations under the Convention, the Departments do not have the legal authority to add these proposed criminal bars.

1. Felony Bar

The proposed felony bar would bar asylum seekers with any conviction that is deemed a felony under the applicable penal code, or where the offense is punishable by more than a year in prison.³⁴ Not every felony in the United States is a particularly serious crime, nor is every noncitizen convicted of an offense punishable by more than a year a danger to the community. For example, for certain types of offenses the difference between misdemeanors and felonies is not aggravating conduct or heightened risk to the public, but rather a single factual element, such as the alleged dollar value of a stolen good. Thus, the simple fact of whether a crime is a felony or not, is not a reliable measure of the dangerousness of the individual and should not be used as a categorical bar.

Moreover, by defining a felony by whether the offense can be punishable by more than a year, regardless of the actual sentence, the Proposed Rule undermines its claim that it seeks to measure the seriousness of the conduct and danger to the community. The Proposed Rule claims its definition is appropriate, because the actual sentence imposed takes into account “offender characteristics” that do not depend on “the gravity of the crime”; however, sentencing courts routinely take into account the seriousness of the conduct at issue. Criminal proceedings are already thorough, detailed, fact-finding proceedings designed to keep the public safe while also reaching a just result. Where it occurs, leniency in sentencing can result from many factors, including, *inter alia*, serious concerns about the defendant’s culpability, the existence of viable affirmative defenses, a lack of aggravating circumstances (or a wealth of mitigating ones), or the defendant’s cooperation with law enforcement. Thus, actual sentences reflect a careful consideration of many important factors. By looking to the maximum possible sentence of an offense, rather than the actual sentence imposed, the Proposed Rule serves to undermine the careful consideration of district attorneys and criminal sentencing courts, all of which are already charged with considering public safety. What the Proposed Rule labels “offender characteristics” that it seeks to ignore, are precisely the kind of specific facts and mitigating evidence the Departments are required to analyze when seeking to bar asylum seekers from their right to apply for asylum. For example, individuals who are convicted of a New York felony, but for whom a district attorney and sentencing judge saw fit to grant probation and no jail time based on cooperation with the district attorney, could be barred from asylum protection, even where they have fled attempts on their life and were told by law enforcement in their home country that they could not protect them. Under current law, these individuals could be granted the protection they deserve.

³⁴ 84 Fed. Reg. at 69645-48.

2. Controlled Substance Offenses (“CSO”) and Driving Under the Influence (“DUI”) Bars

The proposed new bars to asylum include drug-related conviction (with one exception for a first, minor marijuana possessory offense) and any second conviction for driving under the influence.³⁵ Both the DUI and CSO bars include convictions that are misdemeanors and violations—considered non-criminal offenses in New York State. Both are excessively overbroad in the convictions and conduct covered, and are not tailored to identify conduct that is “serious” or identify individuals who pose a danger to the community. For example, an asylum seeker who was convicted of multiple counts of marijuana possession in violation of N.Y.P.L. § 221.05, or driving while ability impaired in violation of New York State, V.T.L. § 1192(1), could be categorically ineligible for asylum—despite the fact that these offenses are not crimes under New York law.³⁶ In New York, a DUI offense could include those for which an individual’s blood alcohol level was under the legal limit, *i.e.*, not legally intoxicated.³⁷

Moreover, as asylum seekers are dealing with significant trauma,³⁸ they may also be dealing with substance abuse issues as a result.³⁹ Particularly given the vulnerabilities of asylum-seeking populations, prior struggles with addiction should be addressed in an individualized, fact-dependent proceeding in front of an adjudicator who hears the totality of the asylum seeker’s circumstances and exercises the discretion they see fit. Immigration adjudicators maintain the authority to deny asylum to individuals with drug-related criminal histories on the basis of discretion. The Proposed Rule denies asylum seekers the opportunity to present the countervailing factors of their past trauma and potential recovery.

3. Gang-related Bar

The Proposed Rule creates an inquiry of whether any criminal conviction—either misdemeanors or felonies—“involved criminal street gangs” or was “in furtherance of a gang-related crime.”⁴⁰ The criminal street gang bar is overbroad and is not tailored to the rationale provided. An asylum seeker could be barred if their convictions is considered a “gang” offense in the prosecuting jurisdiction, or if the asylum adjudicator had “reason to

³⁵ *Id.* at 69650-51, 69654.

³⁶ A violation under New York law is not a crime. *See* New York State Penal Law, Article 10.

³⁷ New York State, V.T.L. § 1192(1).

³⁸ 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>; 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) at 51, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5571637/>.

³⁹ Carrier Clinic, *Trauma and Addiction* (2019), <https://carrierclinic.org/2019/08/06/trauma-and-addiction/>; *see also infra* Section E.

⁴⁰ 84 Fed. Reg. at 69649.

believe” the crime was committed “in furtherance of criminal street gang activity.”⁴¹ This standard would expand the number and types of convictions for which an analysis into eligibility is required, and would sweep in even petty offenses that would otherwise not trigger immigration consequences. Thus, the Proposed Rule expands the criminal bars to asylum to include those accused of gang involvement in the commission of minor criminal offenses. For example, 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. Such definitions are substantially broader than the violent, national or multi-national street gangs the Proposed Rule claims it is targeting.⁴² For example, the definition of a gang assault offense in New York is where an individual is aided by “two or more persons actually present,” and “conspiracy” in New York is agreeing to perform a crime with one other person (regardless of whether an individual ever engaged in criminal conduct).⁴³

In support of the proposed bar, the Departments claim that any “gang-related” misdemeanors and felonies could “reasonably be designated” as particularly serious crimes, that those convictions “display[] a disregard for basic societal structures in preference of criminal activities that place” people in danger, and that gangs “are a significant threat to the security and safety of the American people.”⁴⁴ At no point do the Departments acknowledge the significant disparate impact this bar would have on asylum applicants of color, particularly young men. The purported explanations in the Proposed Rule fail to account for the reality of how “gang”-related prosecutions play out, who “gang”-related prosecutions target, and the immense and arbitrary power this proposed bar gives asylum adjudicators to bar young men of color from applying for asylum.

In practice, law enforcement often target for arrest and conspiracy prosecution large groups of young men from the same housing project or neighborhood, alleging they are in a gang—whether or not that is indeed the case.⁴⁵ Where a fight might involve a group of young men, gang allegations often result. In many instances, allegation of gang involvement is never proven: it is easy to allege and difficult to disprove. Even more problematic, once the NYPD determines a person is a gang member, there is no way to challenge that administrative designation in court or elsewhere, even for those who are arrested and whose charges are later dismissed by a factfinder. Thus, the proposed bar would not target those who have been convicted of illicit and violent criminal street gang

⁴¹ *Id.*

⁴² 84 Fed. Reg. at 69650.

⁴³ *See, e.g.*, N.Y.P.L. 120.06; 105.00.

⁴⁴ *Id.*

⁴⁵ Alice Speri, The Largest Gang Raid In NYC History Swept Up Dozens Of Young People Who Weren't In Gangs, *The Intercept*, Apr. 25, 2019, <https://theintercept.com/2019/04/25/bronx-120-report-mass-gangprosecution-rico/> (describing a raid conducted by local and state law enforcement in conjunction with federal agencies and ICE that swept up individuals not part of gang); Professor Babe Howell & Priscilla Bustamante, Report on the Bronx 120 Mass “Gang” Prosecution (CUNY School of Law 2019), <https://bronx120.report/>.

activity—as the Proposed Rule suggests—but rather would target asylum seekers because they are from a particular country, live in a particular neighborhood or housing project, go to a specific school, or “look” to law enforcement or asylum adjudicators like gang members purportedly look.⁴⁶

That is why the “reason to believe” standard is arbitrary, capricious, and ultra vires. It represents an open-ended, arbitrary, adjudicative process where asylum adjudicators will inevitably and unfairly rely on discredited methods of gang identification. The gang-related inquiry into eligibility mandated by the Proposed Rule would not be an individualized inquiry that considers the basis for the asylum claim, the applicant’s story, or even the seriousness of the conduct at issue—rather, the sole inquiry is whether there is a “reason to believe” the conduct is “in furtherance” of gang-activity. In practice, this could mean that the individual was flagged in the gang database by law enforcement without any investigation or due process, that ICE made unsubstantiated gang allegations during an enforcement action, that the prosecutor alleged (but never proved) the individual was in a gang, or that they were charged with—but never convicted of—a gang offense or acting as part of a conspiracy or in concert with others.

For example, inclusion in the New York Police Department (“NYPD”) database is racially disproportionate, and represents a mass surveillance of the Black and Latinx communities.⁴⁷ The NYPD uses arbitrary criteria to determine gang membership or affiliation for purposes of the gang database, including where an individual lives, what they wear, any scars or tattoos, hand signals they make in social media posts, or “affiliation” with “known gang members” *i.e.*, others in the database. Notably, commission of any crime is not among the criteria. Further, the NYPD gang database has no meaningful oversight, accountability, or due process protections to ensure that people are not erroneously placed or kept on the database. Nor is there any transparency on whether someone is on the database or remedy to remove someone from the database. The unreliability of the information in the database, as well as lack of due process protections, means the NYPD gang database, and others like it,⁴⁸ should not be used to

⁴⁶ See K. Babe Howell, *Gang Policing: The Post Stop-and-Frisk Justification for Profile-Based Policing*, 5 *Univ. Denver Crim. Law Rev.* 1 (2015), https://academicworks.cuny.edu/cgi/viewcontent.cgi?article=1067&context=cl_pubs.

⁴⁷ Nearly 66% of those added to the NYPD’s gang database between Dec. 2013 and Feb. 2018 were Black and 33% were Latinx. Alice Speri, *New York Gang Database Expanded By 70 Percent Under Mayor Bill De Blasio*, *The Intercept*, June 11, 2018, <https://theintercept.com/2018/06/11/new-york-gang-database-expanded-by-70-percent-under-mayor-bill-de-blasio/>; see also Howell, *Gang Policing*, 5 *Univ. Denver Crim. L. Rev.* 16 (Data based on NYPD FOIL responses show the NYPD added 21,537 people to its gang database between 2001 and August 30, 2013. 48% were Black and 44% were Latino; only 1% of the individuals added to the NYPD’s gang database were white. An additional 17,000 people were added to the database in the past four years, with less than 1% being white, and a majority being young people, as young as 13).

⁴⁸ 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/>. “People have been put on gang databases for as little as living in an area that’s considered a high-crime gang neighborhood, wearing a red jersey, or being caught hanging out in the living room of a cousin who may be involved with gangs.” Julianne Hing, “ICE Admits Gang Operations Are Designed to Lock Up Immigrants,” *The Nation* (Nov. 20, 2017),

strip an eligible asylum seeker of their right to apply for asylum. Moreover, the cooperation between local law enforcement and ICE on supposed gangs-related raids, have demonstrated the inaccurate and racial disparate impact of gang-related claims by local law enforcement.⁴⁹ The Proposed Rule 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.⁵⁰

Immigration adjudicators already routinely premise enforcement, detention, discretionary denials of relief, or release on bond on purported gang membership, where ICE makes gang allegations on the basis of questionable evidence and deference to this evidence is often granted by immigration adjudicators.⁵¹ For example, an ICE agent “admitted during a predawn raid on a supposed gang member that the only known crime the suspect had committed was being undocumented.”⁵² General and unsubstantiated claims of gang membership often appear in a Form I-213 in a manner that is rife with indicia of unreliability. For example, during Operation Matador, a joint immigration enforcement initiative between ICE and local law enforcement agencies in and around New York City, the assistant special agent admitted: “The purpose of classifying [one detainee] as a gang member or a gang associate is because once he goes in front of an immigration judge, we don’t want him to get bail.”⁵³ Form I-213s prepared with the goal

<https://www.thenation.com/article/ice-admits-gang-operations-are-designed-to-lock-up-immigrants/>.

⁴⁹ For example, the Chicago Police have admitted that errors in its gang database enabled ICE raids. Jacqueline Serrato, “Chicago Police admits gang database error that enabled ICE raid.” Chicago Tribune (December 6, 2017), <http://www.chicagotribune.com/hoy/ct-chicago-police-admits-gang-database-error-20171206-story.html>.

⁵⁰ See Jonanthan 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>.

⁵¹ 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. For an illustration of ICE’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>. A DHS internal memo from July 2017 instructed federal agents to detain teenagers who met at least two criteria of gang membership. Jacqueline Serrato, “Chicago Police admits gang database error that enabled ICE raid.” Chicago Tribune (December 6, 2017), <http://www.chicagotribune.com/hoy/ct-chicago-police-admits-gang-database-error-20171206-story.html>; see also 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.

⁵² Julianne Hing, “ICE Admits Gang Operations Are Designed to Lock Up Immigrants,” *The Nation* (Nov. 20, 2017), <https://www.thenation.com/article/ice-admits-gang-operations-are-designed-to-lock-up-immigrants/>.

⁵³ ICE Press Release, *Operation Matador Nets 39 MS-13 Arrests in Last 30 Days* (June 14, 2017), <https://www.ice.gov/news/releases/operation-matador-nets-39-ms-13-arrests-last-30-days>; CBS, “Inside ICE’s Controversial Crackdown on MS-13” (Nov. 16, 2017), <https://www.cbsnews.com/news/ms-13-gang-ice-crackdown-thomas-homan/>.

of ensuring someone is denied bond in immigration court—or stripped of the right to apply for asylum under the Proposed Rule—is an ulterior motive that rebuts its reliability.⁵⁴ Nonetheless, as demonstrated above in the context of the gang database, once the claim of gang affiliation is made it is very difficult to disprove.

Creating a “gang-related crime” bar will only exacerbate the existing harm and due process issues with the gang databases and unsubstantiated claims of gang affiliation, which are disproportionately levied against young men of color and notoriously inaccurate, outdated, and infected by racial bias.⁵⁵ The Proposed Rule, thus, invites extended inquiry into the character of young men of color who are otherwise eligible for asylum, based on information gained through racially disparate policing practices and as a result of racially disparate rates of guilty pleas to minor offenses.

The Proposed Rule asks what constitutes a “sufficient link” between an underlying conviction and gang-related activity for purposes of barring asylum eligibility:⁵⁶ any individual, regardless of where they live or what they look like, should be allowed to apply for asylum, present their case, and receive an individualized determination from asylum adjudicators.

4. Domestic Violence (“DV”) Bar

The categorical domestic violence bar does not require a final conviction. The proposed DV bar provides that “offenses involving conduct amounting to domestic assault or battery, stalking, or child abuse in the domestic context” make an individual ineligible for asylum,⁵⁷ and instruct asylum adjudicator to “assess all reliable evidence in order to determine whether that conviction amounts to a domestic violence offense,” or, if there is no conviction, “to consider what conduct” the asylum seeker engaged in “to determine if the conduct amounts to a covered act of battery or extreme cruelty.”⁵⁸ The Proposed Rule does not state the standard to be used in these determinations, where the burden lies, or what would prompt these inquiries—rather, the Rule would allow for a

⁵⁴ See *Barradas v. Holder*, 582 F.3d 754, 763 (7th Cir. 2009) (listing reasons I–213 may not be inherently reliable, including when it is “carelessly or maliciously drafted or was intended to serve as anything other than an administrative record”).

⁵⁵ An analysis of Chicago’s gang database by the UIC Policing in Chicago Research Group showed that 96 percent of the nearly 65,000 people identified as suspected gang members are Black or Latino. Individuals are included in the gang database without any notification by CPD and then they are not allowed any opportunity to contest their inclusion in the gang database. Jacqueline Serrato, “Chicago Police admits gang database error that enabled ICE raid.” *Chicago Tribune* (December 6, 2017), <http://www.chicagotribune.com/hoy/ct-chicago-police-admits-gang-database-error-20171206-story.html>; see also 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.

⁵⁶ 84 Fed. Reg. at 69650.

⁵⁷ *Id.* at 69651-52.

⁵⁸ *Id.* at 69652.

general and sweeping inquiry every time there is an arrest and, potentially, any time a child welfare agency or family court system is involved.

The Proposed Rule again ignores the reality of how domestic violence cases are prosecuted, the minor conduct that can lead to such cases, and the disparate impact this will have on low-income and communities of color. In Brooklyn, generally any time there is an incident involving intimate partners or children, the case is designated a domestic violence case from the beginning, orders of protection are almost always issued regardless of any individual assessment of danger, and, if a child is involved, a child welfare case is opened. Often, all parties involved are arrested in “cross-arrests.” If the prosecutor cannot prove the allegations, the case is dismissed, an individual may plead to a violation—a non-criminal offense, or accept an adjournment contemplating dismissal during which an order of protection could be in place as a matter of standard practice, rather than an individualized assessment of danger or threat.

Nonetheless, because the proposed DV bar is focused on alleged conduct, not conviction, the incident and arrest alone would trigger an inquiry into an asylum seeker’s purported conduct. In doing so, the Proposed Rule undermines the criminal justice system and the constitutional due process protections mandated for criminal defendants. The Proposed Rule not only allows but actually requires an asylum adjudicator to re-try an applicant without providing the applicant with any protections or tools—such as discovery, subpoena, or even counsel—needed to defend themselves again. For example, an individual who is a political activist and fleeing persecution and torture with their family could be barred from asylum for being arrested and having an order of protection issue against them. Even if the individual has never been convicted of a domestic violence offense, they could still be categorically ineligible for asylum under the new rules if an adjudicator conducts an independent inquiry into the incident underlying the order of protection. This would result not only in the applicant being barred from asylum, it would also prevent their children and spouse—who the government is allegedly trying to protect—from gaining any relief. While withholding of removal and Convention and Against Torture (“CAT”) relief would still be available to the primary applicant, those forms of relief do not provide any relief for derivative family members. The unfairness and difficulty in adjudicating these broad inquiries will be exacerbated where asylum seekers do not have access to counsel or fully understand why an immigration judge is asking them about past incidents.

Under the Proposed Rule even an unsubstantiated civil, non-criminal case in family court could potentially be used to bar an individual from asylum. For example, cases have been brought for “endangering the welfare of a child” where a child was briefly left alone in their home because a single parent had to run to the store, or where there was a lapse in babysitting for a working parent.⁵⁹ Neglect cases have been brought against both parents for having an altercation while a child is sleeping in the other room, where a parent has a substance abuse or mental health issue, or against individuals who are only temporary caretakers of a child. Child welfare cases can be started by anonymous tips or

⁵⁹ See, e.g., WNYC, “Family Separations in Our Midst”, <https://www.wnyc.org/story/child-removals-emergency-powers/>.

mandatory reporters, where children and parents are first interviewed without protections, such as counsel, and the inquiry into a family could last months or years.⁶⁰ While these cases are often eventually dismissed or otherwise resolved in family court, the allegations themselves could be the basis to deny an entire family asylum.

Moreover, the types of families most susceptible to intrusive policing and child welfare supervision are low-income and families of color and, as such, this overbroad conduct-based inquiry will disparately impact asylum seekers from these communities.⁶¹ In BDS's Family Defense Practice, the vast majority of those represented are people of color living in poverty, often raising their children in homeless shelters or public housing, and in highly-policed neighborhoods, making them vulnerable to government surveillance. Asylum seekers are often in financial distress, as they may have been forced to flee their home countries without bringing financial resources with them or having contacts in the United States, and may have been excluded from economic opportunities in their home countries for the very reasons they are applying for asylum. Families living in homeless shelters, under incredible economic stress, are living under the fear that one argument between parents or one moment of impatience with a child may lead to a knock on their door from a child welfare worker. School attendance interrupted by homelessness or an angry landlord seeking to evict a family illegally can result in a call to the child welfare authorities and begin an investigation into a family. For all these reasons, a factual admission or judicial finding in the family court process should not be used as a way to bar otherwise eligible asylum seekers.

C. The Proposed Rule Undermines the Important Principle that Asylum and Non-Refoulement Inquiries Are Individualized

The Departments assert that the proposed limitations on eligibility for asylum are consistent with Article 34 of the Convention.⁶² However, this is not so. By creating

⁶⁰ Describing the overly invasive way that child welfare cases can begin: "Caseworkers enter homes, not necessarily showing official documentation or identification indicating who they are and why they are there. Once in the home, they ask a series of questions, some related to the investigation at hand and others not. Parents do not understand that the caseworkers are collecting information that may result in an eventual Family Court petition alleging abuse and neglect, and give them an abundance of information (not always connected to their actual parenting) in hopes that if they are honest, they will be left alone." The New School, *Child Welfare Needs to Have Its 'Stop-and-Frisk Moment'*, June 27, 2018), <http://www.centernyc.org/child-welfare-needs-to-have-its>.

⁶¹ Poor communities and communities of color are disproportionately impacted by the child welfare system. In New York State, Black children make up 40% of the children in foster care yet make up only 15% of the children in the state, whereas white children make up 25% of the children in foster care and 48% of the children across the state. See New York State CPS, 2018 Monitoring and Analysis Profiles With Selected Trend Data: 2014-2018, at 7 <https://ocfs.ny.gov/main/reports/maps/counties/New%20York%20State.pdf>. In NYC, despite making up only 23% of New York City's child population, Black children represent over 52% of foster care placements. New York City Administration of Children's Services Community Snapshots, (2010, 2011, 2013), http://www.nyc.gov/html/acs/html/statistics/statistics_links.shtml; see also NYS OCFS, Disproportionate Minority Representation (DMR) in Child Welfare and Juvenile Justice Systems (Dec. 2015) at 7, https://ocfs.ny.gov/main/bcm/DMR_Section%20Seven%20of%20Grant%20RFP_2015.pdf, page 7.

⁶² 84 Fed. Reg. at 69640.

categorical particularly serious crimes through the aggravated felony definition and by interpreting aggravated felonies and particularly serious crimes to encompass broad types of convictions, the INA and agency interpretation (prior to the Proposed Rule) already expanded the non-refoulement exception far beyond what was contemplated in the Convention or provided for by the United Nations. UNHCR instructs the Convention signatories to consider “the nature of the act, the actual harm inflicted, the form of procedure used to prosecute the crime, and whether most jurisdictions would consider the act in question as a serious crime.”⁶³ UNHCR also instructs that when analyzing whether a criminal issue bars an individual from asylum relief, adjudicators should balance the nature of the offense “with the degree of persecution” and “other relevant or mitigating factors.”⁶⁴ Consideration of “the nature of the act” and balancing mitigating evidence means a case-by-case analysis, which a categorical bar contravenes.⁶⁵ For example, there are no per se bars to asylum in Canada, Austria, or Germany.⁶⁶ Some countries like Austria, Canada, Germany, and the United Kingdom require an independent finding of ongoing dangerousness before finding an offense “a particularly serious crime.”⁶⁷ Some countries, including Austria, Canada, France, and Germany further require balancing the danger posed by the refugee against the risk of persecution in the refugee’s home country,⁶⁸ as is consistent with United Nations guidance. By contrast, the Proposed Rule seeks to multiply the categorical bars to asylum where minor convictions, non-criminal offenses, and conduct without any final judgment will bar asylum; as such, the proposed categorical bars are unlawful.

The established principle that asylum determinations should be individualized and balance any negative factors against the persecution at issue and mitigating evidence is crucial given the substantial risk that returning asylum seekers to their home countries. These measures ensure that asylum applicants in vulnerable populations have the opportunity to present the totality of their case and not be defined by an arrest. Instead, the Proposed Rule undermines this important principle. To implement the proposed categorical bars, asylum adjudicators are directed to undermine and second-guess the results of the state criminal justice and family court systems. Immigration adjudicators would hold mini-trials to “re-prosecute” asylum seekers to determine whether a sentence, a conviction, or conduct fits into one of the vague categories proposed by the Rule, or to reverse lawful state court orders to vacate, expunge, or modify convictions and sentences. The Proposed Rule prevents individuals from presenting their asylum case and providing context and mitigating factors for criminal justice contacts.

The Departments do not sufficiently explain why such broad categorical bars are needed. For example, the Proposed Rule excludes from protection anyone who was convicted of a felony and defines “felony” as “any crime punishable by more than one year

⁶³ UNHCR Handbook ¶ 86.

⁶⁴ *Id.* ¶¶ 156-157.

⁶⁵ Briefing for the House of Commons ¶ 10.

⁶⁶ IDP Harvard Report at 21.

⁶⁷ *Id.* at 23-24.

⁶⁸ *Id.* at 25-26.

of imprisonment” without any reference to other factors, including dangerousness.⁶⁹ The Proposed Rule claims the additional categorical bars that expand the definition of a particularly serious crime are necessary because the case-by-case adjudication previously used for non-aggravated felony offenses was “inefficient;”⁷⁰ but an individualized analysis is exactly what the Convention requires to ensure that only those individuals who have been convicted of crimes that are truly particularly serious and who present a future danger to the community are placed at risk of refoulement. Even the BIA 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.”⁷¹ Asylum seekers will be precluded from obtaining protection on the basis of a vast array of conduct. Indeed, in the case of the domestic violence and gang-related grounds, the categorical bar would be imposed on the basis of mere allegations of conduct.⁷²

Furthermore, the Departments seek to justify their proposed changes, in part, by claiming the Attorney General has the discretion to enact them;⁷³ however, that discretion cannot be used to violate domestic law and international treaties—let alone fundamental human rights—as the Proposed Rule does here. While asylum is a discretionary benefit and, therefore, corresponds to Article 34 of the Convention,⁷⁴ the Attorney General’s discretion in establishing asylum procedures is limited by the criteria in §1158(b) and (d) and their legislative history,⁷⁵ which clearly incorporate international law and legal norms.

As such, the Proposed Rule is not a valid exercise of the Attorney General’s discretion, but rather constitute a violation of the United States’ international legal obligations. It is well established that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”⁷⁶ Furthermore, where the United States is a party to treaty, Congress must make a clear expression of any intent it may have to abrogate the treaty.⁷⁷ The “law of nations” undoubtedly includes the

⁶⁹ 84 Fed. Reg. at 69659-60.

⁷⁰ *Id.* at 69646.

⁷¹ *Pula*, 19 I.&N. Dec. at 474.

⁷² The Proposed Rule explains 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.” 84 Fed. Reg. at 69651

⁷³ The amended §1158 affords the Attorney General power to “establish additional limitations and conditions, consistent with this section, under which an alien shall be ineligible for asylum.” §1158 (b)(2)(C).

⁷⁴ *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 441 (1987) ,

⁷⁵ *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 758 (9th Cir. 2018).

⁷⁶ *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804).

⁷⁷ The Supreme Court has further crystalized the avoidance of repeal or abrogation absent clear legislative intent. *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) (“a firm and obviously sound canon of construction against finding implicit repeal of a treaty in ambiguous congressional action”); *Cook v. United States*, 288 U.S. 102, 120 (1933) (“[a] treaty will not be deemed to

Convention, a treaty to which the United States is a party, as well as international refugee law norms.⁷⁸ The purpose of the Refugee Act was “to provide a permanent and systematic procedure for the admission to this country of refugees of special humanitarian concern to the United States.”⁷⁹ The text of the asylum statute tracks almost verbatim the United States’ treaty obligations under the 1951 Convention and the 1967 Protocol.⁸⁰ By adopting the Convention’s language regarding a “final judgment of a particularly serious crime” that precludes granting asylum, Congress similarly indicated that the IIRIRA should be interpreted in accordance with international refugee law norms.⁸¹ Against the backdrop of this clear congressional scheme and background principles of comity, the Attorney General’s discretion under 8 U.S.C. § 1158(b)(2)(C) to establish “additional limitations and conditions” confining asylum eligibility must stay within the legislative parameters.⁸²

Simply put, existing asylum law in the United States has already deviated from the international norm and the Departments’ proposed additional bars will only further disconnect the United States from its obligation to the Convention. Instead of working towards greater congruence with the terms of the Convention, the Proposed Rule carves out further categorical bars from protection that violate both the language and spirit of the treaty.

have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed.”).

⁷⁸ The “laws of nations” under *Charming Betsy* has been further held to include treaties and customary international law. *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 251 (2d Cir. 2003); *see also The Paquete Habana*, 175 U.S. 677, 700, 20 S. Ct. 290, 299, 44 L. Ed. 320 (1900) (“International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination.”).

⁷⁹ *Marincas v. Lewis*, 92 F.3d 195, 198 (3d Cir. 1996) (citing Pub.L. 96–212, tit. I, § 101(b), 94 Stat. 102 (1980)); H.R. Rep. No. 96-608 (1979) at 12-14 (explaining that by changing the statutory phrase “special concern” to “special humanitarian concern” in what became § 1157(a), the House committee “intends to emphasize that the plight of the refugees themselves, as opposed to national origins or political considerations, should be paramount in determining which refugees are to be admitted to the United States”); *see also* Pub. L. No. 96-212 § 201 (a) (providing a universal, nondiscriminatory definition of “refugee” closely paralleling that of the United Nations Conventions Relating to the Status of Refugees (1951)), codified at 8 U.S.C. § 1101(a)(42).

⁸⁰ *See, e.g., I.N.S. v. Stevic*, 467 U.S. 407, 426 n.20 (1984) (“As with the asylum provision, the Committee feels that the proposed change in section 243(h) is necessary so that U.S. statutory law clearly reflects our legal obligations under international agreements”) (quoting H.R. Rep. No. 96-256, at 17–18 (1979)).

⁸¹ *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185 (1988) (“We generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts.”).

⁸² *E. Bay Sanctuary Covenant*, 932 F.3d at 774 (“[w]here ‘Congress itself has significantly limited executive discretion by establishing a detailed scheme that the Executive must follow in [dealing with] aliens,’ the Attorney General may not abandon that scheme because he thinks it is not working well”) (citing *Jama v. Immigration & Customs Enft.*, 543 U.S. 335, 368 (2005)). Indeed, 8 U.S.C. § 1158(b)(2)(C) expressly provides that in establishing “additional limitations and conditions,” the Attorney General must be “consistent with” existing law. *E. Bay Sanctuary Covenant*, 932 F.3d at 754.

D. The Proposed Rule Undermines State Court Orders Vacating or Expunging Convictions, and Altering Sentences

The Proposed Rule outlines a new multifactor process that asylum adjudicators must use to determine whether a vacated, expunged, or modified conviction remains valid for asylum purposes.⁸³ This process unfairly burdens asylum seekers, undermines their right to sound advice on the consequences of a conviction, and denies the full faith and credit to which state court orders are entitled. Specifically, the Rule would subject state court orders to a searching inquiry by asylum adjudicators. It would also create an unreasonable presumption that postconviction relief is for an illicit purpose if ordered while the asylum seeker is in immigration proceedings or if sought more than one year after the original conviction.⁸⁴

As the Supreme Court held in *Padilla v. Kentucky*, the Sixth Amendment guarantees noncitizens competent advice on the immigration consequences of a guilty plea. The Proposed Rule undermines this right by creating a rebuttable presumption that asylum seekers are engaging in gamesmanship if they receive postconviction relief based on *Padilla* while in immigration proceedings or move for such relief more than one year after the underlying conviction. Asylum seekers would thus face a heightened standard in showing ineffective assistance of counsel and would be unfairly prejudiced for not identifying a deficiency before consulting with an immigration attorney. As the Court stated in *Padilla*, “[t]here is no reason to doubt that lower courts . . . can effectively and efficiently use [the ineffective assistance] framework to separate specious claims from those with substantial merit.” 559 U.S. at 372.

The Proposed Rule, furthermore, instructs asylum adjudicators to second-guess the reasoning of state court orders beyond what has previously been permitted by circuit and agency precedent. The agencies claim that this requirement would “codify the principle set forth in *Matter of Thomas and Thompson*,” a recent decision holding that any state court postconviction altering of sentences must be based “on a procedural or substantive defect in the underling proceedings” in order to be valid for immigration purposes.⁸⁵ (That standard had previously applied only to vacatur.) However, the Proposed Rule in fact goes far beyond this standard. Instead of requiring asylum seekers to show the legal basis of the postconviction order, the Proposed Rule would require them to prove that the state court’s “purpose” in entering the order was *not* related to rehabilitation or immigration considerations. The Rule would further authorize asylum adjudicators to “look beyond the face of [the] order” in making this determination.⁸⁶ The

⁸³ 84 Fed. Reg. at 69654-56.

⁸⁴ *Id.*

⁸⁵ The authority of the Attorney General to decide *Thomas & Thompson* in the manner that provides support for this rule change may constitute policymaking beyond the scope of his power and contravening principles of administrative law providing that that an adjudication be limited to the facts and law applicable to the case. See 5 U.S.C. § 554(b) (requiring that the parties have notice of “the matters of fact and law asserted.”)

⁸⁶ 84 Fed. Reg at 69655.

legal support for this proposal is shaky at best.⁸⁷ Adjudicators would have indefinite authority to search for an impermissible immigration “purpose” not present on a facially valid postconviction order.

Taken together, these requirements obscure the meaning of “conviction” for immigration purposes. If an asylum adjudicator can reject the validity of any state court order based on anything in the record, then it becomes unclear whether a vacated or modified conviction still stands, or whether any subsequent plea or new conviction is itself valid. For example, where a New York appeals court reversed the conviction based on a constitutional deficiency, and the individual then entered a plea that did not have the serious immigration consequences of the original conviction. Under the Proposed Rule, the asylum adjudicator would be able to look beyond the constitutional deficiency identified in the court order and determine that an invisible immigration purpose underlay the grant of relief. The asylum adjudicator would then be faced with two irreconcilable convictions that are both ‘valid’ for immigration purposes. The example illustrates the confusion and unfairness that the Proposed Row would create.

E. The Proposed Rule Will Disparately Impact Vulnerable Communities

The Proposed Rule will disparately impact vulnerable populations, including asylum seekers hailing primarily from Central America and the Global South, and those who are routinely criminalized because of their nationality or identities, because of racially disparate policing practices, or in connection with experiences of trafficking and domestic violence.⁸⁸ As a result of trauma, asylum applicants may have been homeless, in abusive relationships, or have dealt with substance abuse—all of which can lead to low-level offenses. During an individualized assessment before an asylum adjudicator, they may be able to provide important context for the offense or arrest, and explain the steps taken since. By categorically barring eligibility for asylum, the proposed bars would prevent any such inquiry.

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. The mental health problems facing refugees and asylum seekers may be acute, and can include, among other issues, depression, anxiety, post-traumatic stress disorder

⁸⁷ The Proposed Rule cites two cases from the Third Circuit, *Rodriguez v. U.S. Attorney General* and *Cruz v. Attorney General*, to support this change, however, the Departments fail to note the lack of consensus among the circuits on this issue. See *Pinho v. Gonzales*, 432 F.3d 193, 215 (3d Cir. 2005) (permitting adjudicators to look behind the order in only certain circumstances and cautions against extrapolating about the motives of state officials); *Pickering v. Gonzales*, 454 F.3d 525, 528 (6th Cir.), opinion amended and superseded on other grounds, 465 F.3d 263 (6th Cir. 2006) (explaining that “the motive of the Petitioner in seeking to have his conviction quashed is of limited relevance to our inquiry” and that it has relevance only if the court relied on it in quashing the conviction).

⁸⁸ D’Vera Cohn et al., “Rise in U.S. Immigrants from El Salvador, Guatemala and Honduras Outpaces Growth from Elsewhere,” *Pew Research Center*, Dec. 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>.

(“PTSD”), and suicidal thoughts.⁸⁹ Unable to access affordable medical care and treatments for complex trauma, asylum seekers may turn to drugs and alcohol in an effort to self-medicate.⁹⁰ The proposed new bars to asylum include drug-related conviction (with one exception for a first minor marijuana possessory offense) and any second conviction for driving under the influence. This approach ignores the evidence of the effects of trauma and is inconsistent with the movement towards emphasizing rehabilitation and recovery, over criminalizing substance abuse issues.

In addition, the expansion of asylum bars to include various non-criminal and misdemeanor offenses that were not previously considered particularly serious will harm communities with overlapping vulnerabilities, including LGBTQ asylum seekers of color, survivors of trafficking, and survivors of domestic violence. 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. LGBTQ immigrants in particular may have already experienced a high degree of violence, discrimination, and exclusion from economic and political life in their home countries.⁹¹ Members of these communities also experience isolation from their kinship and national networks following their migration to the United States. This isolation, compounded by continuing discrimination towards the LGBTQ population at large, leaves many in the LGBTQ immigrant community vulnerable to homelessness, trafficking, domestic violence, and substance abuse, in addition to discrimination and over-policing.⁹²

The Proposed Rule also unfairly targets trafficking survivors, who frequently come into contact with intervention resources and service providers only after contact with law enforcement. Innovative criminal justice reform efforts currently being adopted across

⁸⁹ Existing literature suggests that at least one out of every three asylum seekers struggles with depression, anxiety, and/or post-traumatic stress disorder (“PTSD”). 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 (Aug. 2017): 51, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5571637/>. One recent study on refugees found that more than a third of the study’s sample admitted having suicidal thoughts in the preceding two weeks. 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>.

⁹⁰ Carrier Clinic, *Trauma and Addiction* (2019), <https://carrierclinic.org/2019/08/06/trauma-and-addiction/>; 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/> (“individuals with PTSD are up to 14 times more likely to struggle with a substance use disorder”).

⁹¹ 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.

⁹² See e.g., 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/>.

the country include special trafficking courts that recognize the need for discretion in the determination of criminal culpability.⁹³ A similar approach, where an asylum applicant is viewed holistically and in the context of the trauma they suffered, should be employed in the determination of asylum eligibility where the applicant's life and safety are on the line.

The Departments attempt to defend their excessively broad proposal by noting that alternative forms of relief will not be precluded under the same scheme. The Departments do not consider, however, that the protections afforded by CAT and by statutory withholding of removal are limited in scope and duration, and they are harder to obtain. CAT and withholding protections demand a higher level of proof than asylum: a clear probability of persecution or torture.⁹⁴ Thus, an otherwise eligible asylum seeker may 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.

Furthermore, the BIA requires that an individual granted withholding and CAT—unlike an individual granted asylum—must simultaneously be ordered removed.⁹⁵ Thus, they cannot travel internationally, meaning those granted withholding of removal or CAT are trapped within the United States in long-term limbo. Withholding and CAT recipients may also face permanent separation from their spouses and children because, unlike asylees, they cannot include their spouses or children as derivatives on their applications.⁹⁶ For many, this will mean that the Proposed Rule is yet another formal policy of family separation, where parents are faced to choose between leaving their children on their own or returning to a country where it has been established that they more likely than not will face persecution and torture.⁹⁷

Most importantly, CAT and withholding do not offer the full protections afforded by asylum or allow beneficiaries the security and stability of a pathway to a green card

⁹³ 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*, Dec. 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*), <https://www.courtinnovation.org/publications/NYC-sex-trade>.

⁹⁴ 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).

⁹⁵ See *Matter of I-S- & C-S-*, 24 I.&N. Dec. 432, 434 n.3 (BIA 2008); 8 C.F.R. § 241.7.

⁹⁶ 8 C.F.R. § 208.21(a).

⁹⁷ See, e.g., Adolfo Flores, “An Immigrant Woman Was Allowed To Stay In The US — But Her Three Children Have A Deportation Order,” *Buzzfeed*, Dec. 21, 2019, <https://www.buzzfeednews.com/article/adolfoflores/an-immigrant-woman-was-allowed-to-stay-in-the-us-but-not>.

and citizenship. The Rule, thus, has the effect of excluding low-income individuals, communities of color, and other vulnerable populations from full membership to our society. A Rule that limits eligible asylum seekers to withholding of removal and CAT protection—and that has a disparate impact on low-income, communities of color, and LGBTQ individuals—would impose a very real harm on asylum seekers who have come to the United States in search of protection and constitute a violation of the United States’ non-refoulement obligation.

* * * *

For the reasons provided here, BDS requests that the Departments consider these recommendations and immediately halt the implementation of the Proposed Rule.

Please do not hesitate to contact us if you have questions regarding our comments. Thank you for your attention and consideration of our concerns.

Sincerely,

/s/ Nyasa Hickey

Nyasa Hickey

Director of Immigration Initiatives

/s/ Sonia Marquez

Sonia Marquez

Civil Rights—Immigration Attorney