Submitted via www.regulations.gov

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

RE: RDHS and DOJ Joint Notice of Proposed Rulemaking--USCIS RIN 1615-AC41; EOIR Docket No. 18-0002; A.G. Order No. 4592-2019

Innovation Law Lab respectfully submits this comment on the proposed amendments to the regulations governing asylum eligibility, published on December 19, 2019. The implementation of these amendments would wreak unnecessary havoc on our nation’s asylum system, and severely punish many individuals who face danger, violence, and death in their home countries absent the protection that asylum promises. We urge the agencies to reject the proposed changes in their entirety.

Innovation Law Lab is a nonprofit organization dedicated to upholding the rights of immigrants and refugees. Founded in 2014 in response to the mass detention and deportation of asylum-seeking immigrant families, Innovation Law Lab specializes in the creation of scalable, highly replicable, and connected sites of resistance that create paradigm shifts in immigration representation, litigation, and advocacy. By bringing technology to the fight for immigrant justice, Innovation Law Lab empowers advocates to scale their impact and provide effective representation to immigrants in detention and in hostile immigration courts across the country. Innovation Law Lab works directly with low-income immigrants and the pro bono attorneys who
serve them, providing legal services, direct representation, and tactical support before USCIS and the Executive Office for Immigration Review (EOIR).

We describe below how the proposed amendments to the asylum eligibility regulations will impact our organization and our clients, and the reasons for our opposition. Omission of any proposed change from this comment should not be interpreted as tacit approval. We oppose all aspects of the proposed implementation.

I. The Proposed Rules unnecessarily and cruelly eliminate asylum eligibility for bona fide refugees

The proposed rules would cruelly expand the already-broad criminal eligibility grounds for asylum, punishing many immigrants with minor criminal histories by sending them back to countries where they face significant harm and possible death.

Our immigration laws already contain sweeping- and harsh- provisions that exclude immigrants with criminal justice involvement from the protection of our asylum laws. For example, anyone convicted of an aggravated felony- an extraordinarily vague term that encompasses a broad range of petty offenses\(^1\) is per se ineligible for asylum. Additionally, convictions deemed to be, on a case-by-case basis, “particularly serious crimes” will bar asylum eligibility.\(^2\) Apart from the outright bars, a grant of asylum remains ultimately discretionary-meaning that USCIS or EOIR may, and do, deny cases based on even the most minor criminal histories.\(^3\)

In light of these existing restrictions- which Innovation Law Lab believes should be narrowed, not expanded- there is no need for the proposed rule, which would apply a staggering seven new grounds of criminal ineligibility to asylum seekers. The particularly serious crime bar, which was statutorily enacted, would be rendered virtually meaningless if all of the minor crimes listed in the proposed rules become additional ineligibility grounds. Moreover, the proposed rules are arbitrary and capricious, as the agency has offered no convincing evidence that the expanded ineligibility grounds are needed.

The expanded criminal bars are especially troubling in light of the purpose of our nation’s asylum laws- to protect persons fleeing persecution and death on account of a protected ground. Though lesser forms of humanitarian protection, like the Convention Against Torture, remain available to individuals regardless of criminal history, as described in section three below, the standard of proof for these forms of relief is much higher than that of asylum, and the protections

\(^1\) 8 U.S.C. §§ 1158(b)(2)(A)(ii) and (B)(i).
\(^2\) See 8 U.S.C. § 1158(b)(2)(A)(ii); see also Kankamalage v. INS, 335 F.3d 858, 864 (9th Cir. 2003)
offered are far less generous. Asylum remains the paramount protection available to persons fleeing harm worldwide, and was enacted as part of Congressional efforts to create a protective framework that conforms to the United Nations’ Protocols. Indeed, the consequence of denying asylum to an applicant not based on the facts of their asylum case can often be the equivalent of a death sentence.

II. The Proposed Rules violate the letter and spirit of United States international treaty obligations, as incorporated in U.S. law

Under the 1967 Protocol Relating to the Status of Refugees, which binds parties to the United Nations Convention Relating to the Status of Refugees, the United States is obligated 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. 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.” 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.” The United Nations High Commissioner for Refugees (UNHCR) has clarified 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

---


9 Id. at art. 33(2).

crimes perpetrated by them in the country of asylum."\textsuperscript{11} 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."\textsuperscript{12} Finally, under the Convention, 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.\textsuperscript{13}

Innovation Law Lab works with asylum-seekers all across the country and has seen the importance of an individualized analysis and consideration of mitigating factors when adjudicating claims for asylum seekers who have a criminal history. Expanding the mandatory bars to asylum to include DUls, convictions for simple drug possession, and convictions for minor felony offenses would penalize asylum-seekers for the past trauma they have experienced. Virtually all of the asylum seekers the Innovation Law Lab serves have suffered some form of severe past trauma, such as childhood physical or sexual abuse, long-term physical, sexual, and psychological abuse at the hands of their partners, torture by government officials, or witnessing extraordinary violence such as the rape or murder of family members. Research shows that mental health disorders, substance use, and other risky behaviors are linked with traumatic experiences.\textsuperscript{14} Innovation Law Lab has observed this link firsthand through its work with asylum seekers. Many of the asylum seekers we help suffer from mental health disorders (diagnosed and undiagnosed), such as major depressive disorders, anxiety disorders, post-traumatic stress disorder (PTSD), and other serious mental health conditions as a result of their past traumatic experiences. Many of these individuals are therefore predisposed to substance use and risky behaviors associated with criminality because of the past trauma they have experienced.\textsuperscript{15} Their underlying trauma and access to treatment is an important mitigating factor that an adjudicator should be permitted to consider when determining whether they are a danger to the community. However, under the Proposed Rules, and adjudicator would be prevented from considering an individual’s underlying trauma and mental health condition in determining whether they are a danger to the community. This would directly violate the Protocol and the U.S.’s obligations under international law.

Innovation Law Lab is also gravely concerned with the proposed expansion of the asylum bar to include individuals who have been convicted of reentering the United States without

\textsuperscript{11} U.N. High Comm’r for Refugees (UNHCR), \textit{Criminal Justice and Immigration Bill: Briefing for the House of Commons at Second Reading} ¶ 7 (July 2007), \url{http://www.unhcr.org/enus/576d237f7.pdf}.
\textsuperscript{12} Id. at ¶ 10.
\textsuperscript{14} \url{http://www.samhsa.gov/trauma-violence}
\textsuperscript{15} See id.
inspection pursuant to INA § 276. This bar is 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. 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.

Innovation Law Lab works with asylum seekers who recount widespread misinformation and illegal actions by Customs and Border Patrol (CBP), such as CBP officers issuing expedited removal orders for asylum seekers who have expressed a fear of return, refusing to process asylum claims, and telling asylum seekers there is “no more asylum.” These illegal CBP actions, in conjunction with recently enacted U.S. policies such as the so-called Migrant Protection Protocols (also known as Remain in Mexico), have pushed asylum seekers to enter the United States at areas other than designated ports of entry and to re-enter the United States following an unlawful removal (such as where an asylum seeker expresses a fear of return but the CBP officer ignores it and instead issues an expedited removal order). Under the Proposed Rules, these asylum seekers would be categorically barred from asylum and the adjudicator would be prevented from considering the circumstances underlying the illegal re-entry (such as illegal or abusive action by CBP) in determining whether to grant asylum. This expansion plainly contradicts the Convention and the Innovation Law Lab vehemently opposes it.

III. Individuals denied from asylum eligibility will be gravely impacted even if granted withholding of removal or relief 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. The availability of these alternatives 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

---

16 Proposed Rules at 69659, 69660.
17 Refugee Convention, supra, at art 31.
18 See, e.g., Proposed Rules at 69644.
account for that risk. CAT and withholding protections demand a higher level of proof than asylum claims: a clear probability of persecution or torture.\textsuperscript{19} 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.

Even for those who meet the higher standard, withholding and CAT recipients are still subject to significant prejudice. Withholding and CAT recipients face permanent separation from their spouses and children. Because international travel is prohibited, these individuals cannot reconnect with their families in a third country. Moreover, they 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.\textsuperscript{20} 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,"\textsuperscript{21} 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.\textsuperscript{22} 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.

\textsuperscript{19} 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." \textit{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. \textit{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).

\textsuperscript{20} 8 C.F.R. § 1208.16(a).

\textsuperscript{21} 8 C.F.R. § 1208.13(c)(4).

\textsuperscript{22} Adolfo Flores, \textit{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.
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.23

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.24 Asylum, once granted, protects an asylee against removal unless and until that status is revoked.25 None of these protections exists for withholding and CAT recipients. They have no access to permanent residency or citizenship.26 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.27

Finally, Innovation Law Lab writes to highlight a different form of prejudice that will flow from the rule: one relating to judicial efficiency. 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, which should be avoided in a system that already contains a significant backlog of pending cases.28

24 See, e.g., 8 C.F.R. 245.1(d)(1) (defining “lawful immigration status” to include asylees).
26 Matter of Lam, 18 L&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).
27 See R–S–C v. Sessions, 869 F.3d 1176, 1180 (10th Cir. 2017).
The Proposed Rules will produce inappropriate “mini-trials” about gang connection and criminal conduct in immigration court, resulting in racially-biased decision-making and undermine judicial efficiency

In two significant ways, the Proposed Rules inappropriately 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 Proposed Rules would enable immigration adjudicators to consider “all reliable 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. Second, the agencies proposed that immigration judges be permitted 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.”

The Proposed Rules’ categorical bar on asylum based on gang-related activity would wrongfully exclude asylum seekers from relief, with devastating effects

The Proposed Rules would have devastating effects by allowing immigration judges to invoke a categorical bar to asylum based on their “reason to believe” that an offense was “related to” or “in furtherance of” gang-related activity. Creating such 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 asylum seekers from receiving protection.

Such a vague “gang related” bar should not be introduced. The Immigration and Nationality Act and existing regulations already provide overly broad bars to asylum based on an adjudicator’s concern about an asylum seeker’s criminal behavior. Adding a categorical bar on asylum seekers accused of “gang-related” activities creates an additional, superfluous layer of complication and, significantly, risks erroneously excluding bona fide asylum seekers from protection without adding any useful adjudicatory tool to the process. Moreover, Congress has explicitly declined to adopt any bars to immigration benefits concerning suspicions of gang membership and behavior related to gang association. Adding such a bar through administrative rulemaking thus contravenes Congressional intent.

In recent years, it has been well-documented how allegations of gang affiliation have been erroneously attached to many individuals of color based on “evidence” such as wearing clothing or shoes of certain colors, or being sighted in proximity of another alleged gang

---

29 See Proposed Rules at 69649.
30 See Proposed Rules at 69652.
member. So-called gang databases in many major cities have been the subject of investigations due to their notoriously inaccurate, outdated, and racially biased information. Young men of color are particularly susceptible to these baseless allegations, which can have a devastating impact on their lives.

In the course of their immigration practice, attorneys at Innovation Law Lab have experienced the high propensity that unsubstantiated and false allegations of gang memberships can have on young men of color. The use of these arbitrary, racially disproportionate, and unsubstantiated gang allegations often results in the violation of Due Process Rights of many juveniles of color.

Innovation Law Lab has seen firsthand how unfounded gang allegations have reflected pervasive racial bias and had a devastating impact on clients’ lives. Many juveniles are included in gang databases based on reports prepared by unknown members of local police forces and Law Enforcement Officers (“LEO’s”) in their schools and community. They are not provided the opportunity to dispute their inclusion in the gang database nor the evidence used to determine whether they are alleged gang members until they are placed in immigration proceedings. Often, juveniles are not aware that their names or that of their friends are in these databases until they come into contact with immigration authorities. One juvenile client, for example, was determined by the local police department to be a gang member although he had no criminal history, no contact with the police, and had never been present when other individuals were arrested. He was profiled as a gang member based on his high school friends on social media and pictures that featured Latinx music lyrics. Despite no involvement in gang activity at all, this client was labeled a gang member due to his social media presence, including his friendships and interactions with other juveniles suspected of being gang members (including individuals he was related to) that were themselves not aware they had been labeled as suspected gang members.

In Innovation Law Lab’s experience, the evidence the government presents to support “gang-related” allegations is often wholly inaccurate or provides no basis for linking the client to gang activity. In their experience, attorneys at Innovation Law Lab have observed the use of arbitrary criterion to classify individuals as “gang members” or “associates”. Such events that

---


resulted in allegations of gang membership include but are not limited to the use of rosary beads, a commonly worn religious symbol throughout Central America; posting social media pictures captioned with lyrics from popular Latinx urban artists; and juveniles wearing gear containing or posting on social media logos of professional basketball and football teams that have nationwide fan bases. In one case, a juvenile client earned a gang label because he had supposedly “self-disclosed” to the police department that he was in a gang in a country he had never been to and was not from. Additionally, in the report from a purported gang expert generated by Homeland Security, a juvenile’s use of a pocket knife during a period of homelessness was also considered indicia of gang membership. In another case, based on a report generated by purported gang experts, a government attorney pushed a juvenile client to reveal the “gang” meaning behind a hand symbol in one of his Facebook pictures – in which the client was merely showing his middle finger to the camera.

As Innovation Law Lab has seen, in the asylum context, the stakes of wrongful gang allegations are extremely high: an erroneous claim of gang affiliation can effectively be a death sentence for individuals who are denied protection and deported back to the countries they initially fled. 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 categorically exclude asylum applicants from protection on the basis of such spurious allegations will inevitably result in the return of many refugees back to harm.34

And the room for error is immense. The Proposed Rule would confer on immigration adjudicators—who generally are not criminologists, sociologists, or criminal law experts—the responsibility to determine the vague standard of whether 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 are vulnerable to being erroneously entered into gang databases. It will also punish individuals who have experienced racial profiling in a fraught criminal legal system whose flawed structure often incentivizes guilty pleas, particularly to misdemeanors, regardless of actual guilt.

The Departments’ argument that all gang-related offenses should be construed as “particularly serious crimes” is disingenuous and perpetuates racial bias within the immigration court system.35 The agencies cite statistics from up to sixteen years ago in an attempt to show 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

35 Proposed Rules at p. 69650.
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.

_The Proposed Rules will result in slanted “mini-trials” on criminal activity in immigration court, leading to unjust outcomes and undermining efficiency_

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.

Additionally, asylum applicants subject to these “mini-trials” will be severely disadvantaged by lack of legal representation. While criminal defendants have a constitutionally protected right to counsel, asylum applicants have no such right; they may be represented by counsel only if they can find and pay for their own lawyer. Finding pro bono counsel in the immigration space is already a major challenge for asylum applicants - finding pro bono immigration counsel who are willing and qualified to defend against complicated criminal allegations is even harder. Without competent representation, many individuals will lose cases regardless of the merits of their claims.

The agencies’ proposals would also exacerbate already existing backlogs in the immigration courts. As the immigration courts contend with backlogs that now exceed one million cases,36 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.37 Yet requiring adjudicators to engage in mini-trials to determine the applicability of

36 Esthimer, _supra_ note 28.
37 See Proposed Rules at 69646, 69656-8.
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. 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 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. As the Supreme Court has explained, this approach “promotes judicial and administrative efficiency by precluding the re-litigation of past convictions in minitrials conducted long after the fact.” 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.

V. The Proposed Rules include problematic definitions of “conviction” and “sentence” that improperly limit asylum eligibility for individuals 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.

---

40 Moncrieffe, 569 U.S. at 200-201.
41 Id. at 201.
42 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 harm immigrants unfamiliar with the complex criminal and immigration framework governing prior convictions

The Proposed Rules outline a new multi-factor process asylum adjudicators must use to determine whether a conviction or sentence remains valid for the purpose of determining asylum eligibility; 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.43

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.44 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.45 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, as explained above.

43 Proposed Rules at 69655.
44 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…”
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. 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.” 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. 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. Similarly, in Reyes-Torres the Ninth Circuit Court of Appeals held that the motive of the respondent was not the relevant

inquiry. Rather, "the inquiry must focus on the state court’s rationale for vacating the conviction." 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." 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." 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.

Additionally, requiring immigration judges to engage in this kind of analysis is particularly problematic given immigration judges’ supervision by the Attorney General - the nation’s top prosecutor. Innovation Law Lab has documented how the Attorney General has consistently failed to correct for bias and error in immigration court adjudication; and under the current administration, judges are subject to extralegal pressures when deciding cases, including case quotas against which their performance is assessed. These structural factors make it particularly inappropriate for immigration judges to be second-guessing state court decisions and reopening asylum applicants’ facially valid vacatur.

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

50 Reyes-Torres v. Holder, 645 F.3d 1073, 1077-78 (9th Cir. 2011) (citing Cardoso-Tlateca v. Gonzalez, 460 F.3d 1102, 1107 n.3 (9th Cir. 2006) and Pickering v. Gonzalez, 454 F.3d 525 (6th Cir. 2006), amended and superseded by Pickering, 465 F.3d at 263.
51 Id.
52 Rodriguez v. U.S. Att’y Gen., 844 F.3d 392, 397 (3d Cir. 2006). (noting that “[T]he JJ may rely only on reasons explicitly stated in the record and may not impute an unexpressed motive for vacating a conviction.”).
53 Id. (“Put simply, ‘[w]e will not . . . permit . . . speculation . . . about the secret motives of state judges and prosecutors,’” quoting Pinho v. Gonzalez, 432 F.3d 193, 214-215 (3d Cir. 2005)).
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.”55 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.

Moreover, as applicants for immigration benefits or relief from removal, asylum seekers already bear the burden of demonstrating their eligibility for asylum.56 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 echo the current administration’s repeated attempts to stack the deck against asylum seekers by undermining the credibility of their claims as well as the ethics of the attorneys who represent them.57 The Proposed Rules thus unfairly interfere with asylum seekers’ efforts to establish their meritorious claims, contrary to the intent of Congress - particularly for applicants who do not have counsel to represent them or who lacked effective counsel in their underlying criminal proceedings.

VI. 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 those convicted of offenses that are coincident to their flight from persecution from safety and a pathway to citizenship. They also do not accomplish the agencies’ ostensible goal of making communities safer. They will disparately impact vulnerable populations, including asylum seekers hailing primarily from Central America and the Global South, and those routinely criminalized because of their identities, as a result of

racially disparate policing practices, or in connection with experiences of trafficking and domestic violence. The discretion currently delegated to asylum adjudicators is crucial for those populations. The imposition of additional categorical bars to asylum will only further marginalize asylum seekers already struggling with trauma and discrimination.

The Proposed Rules would prevent the use of discretion where it is most needed and most effective in the asylum system. 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. Furthermore, asylees with convictions that render them inadmissible must apply for a waiver at the time of their applications for permanent residence. Those 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.

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. The vast expansion of migrant prosecutions at the border under the current Administration has created administrative chaos and

---


59 Apart from the statutory aggravated felony bar to asylum, the Board of Immigration Appeals and Attorney General have historically utilized a highly circumspect 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).

60 8 U.S.C. § 1159(c) (2012).

61 8 C.F.R. § 208.24(a) (2012).

separated families that do not pose a threat to the safety of communities in the United States. The Proposed Rules would magnify the harm caused by those reckless policies by further compromising the ability of individuals 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 the Administration’s clear efforts to use smuggling prosecutions against parents and caregivers as part of its strategy of deterring families from seeking asylum in the United States. The Proposed Rules would 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 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 have 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. 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. That approach contravenes and renders meaningless the qualifying 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 may 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. Yet others may have previously entered or attempted to enter the United States before the onset of circumstances

---


65 Proposed Rules at 69648.
giving rise to their fear. Preserving discretion to grant asylum in these circumstances allows meritorious asylum seekers to be heard and corrects errors that might 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 Rules ignore 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. 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, upsends decades of settled law providing 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.

In Innovation Law Lab’s experience, migrants in vulnerable communities who are struggling to survive during the pendency of their asylum proceedings are often exploited by unscrupulous intermediaries who offer assurances and documentation that turn out to be fraudulent. Many noncitizens working in the low-wage economy face egregious workplace dangers and discrimination and suffer retaliation for asserting their rights. 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 become aware of their ability to apply for asylum only after law enforcement encounters that lead them to service providers who can educate them about their immigration

---


67 Id.


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. In Innovation Law Lab’s experience, LGBTQ immigrants often has disproportionately experienced a high degree of violence and disenfranchisement from economic and political life in their home countries.\textsuperscript{70} Further compounding that experience, hate violence towards undocumented LGBTQ immigrants in the United States is disproportionately higher than for other members of the LGBTQ population.\textsuperscript{71} Members of those communities experience isolation from their kinship and national networks after their migration. That isolation, again compounded by the continuing discrimination towards the LGBTQ population at large, leaves many in the LGBTQ immigrant community vulnerable to trafficking, domestic violence, and substance abuse, in addition to discriminatory policing practices. The expansion of criminal enforcement and prosecution of undocumented people also harms the LGBTQ immigrant community.\textsuperscript{72} The Proposed Rules will therefore have a significant and 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.\textsuperscript{73} 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.


\textsuperscript{73} Elise White, et al., \textit{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).
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.\textsuperscript{74} The Proposed Rules too broadly categorize domestic violence offenses as particularly serious and unfairly sweep both offenders and survivors into their reach. 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.\textsuperscript{75} The 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.

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.\textsuperscript{76} 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 INA does not cure the harm to asylum seekers caused by imposition of a categorical domestic-violence-related bar.\textsuperscript{77} Rather, it converts a non-adversarial asylum proceeding into a multi-factor, highly specific inquiry into culpability based

\textsuperscript{74} Marty Schladen, ICE Agents Detain Alleged Domestic Violence Victim, El Paso Times, February 16, 2017, http://www.epasotimes.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).


\textsuperscript{76} 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://scholarl.commons.law.northwestern.edu/cgi/viewcontent.cgi?article=7284&context=clc (noting that “in 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.”).

\textsuperscript{77} 8 U.S.C. § 1227(a)(7)(A).
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. 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. 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 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.

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. 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. Creating a “gang-related crime” bar will only exacerbate the

---


81 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.”).

82 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-acused-ice-of-making-up-evidence-to-prove-that-dreamer-was-gang-affiliated.html.
due process violations already occurring as the result of unsubstantiated information about supposed gang ties.\textsuperscript{83}

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.\textsuperscript{84} 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.\textsuperscript{85}

The Proposed Rules thus invite extended inquiry into the character of young men of color who otherwise have meritorious asylum claims, based on information gained through racially 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.\textsuperscript{86}

\textbf{VII. 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}


\textsuperscript{84} 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.

\textsuperscript{85} 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).

When Congress speaks clearly through a statute, the plain meaning of that statute’s text controls.\textsuperscript{87} Congress, by statute, has authorized the Attorney General to designate certain categories of offenses as “particularly serious crimes.”\textsuperscript{88} Through that authority, the Attorney General may designate a non-aggravated felony as a particularly serious crime and thus disqualify a person from asylum. All aggravated felonies are \textit{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.\textsuperscript{89} The Attorney General’s designations are reviewable for legal error.\textsuperscript{90}

Here—seemingly in an attempt to insulate a determination under the Proposed Rules from review—the agencies seek to impose new bars to asylum by both designating certain offenses as “particularly serious crimes” pursuant to 8 U.S.C. § 1158(b)(2)(B)(ii) \textit{and} rendering them categorically exempt from a positive discretionary adjudication of asylum pursuant to 8 U.S.C. § 1158(b)(2)(C). That is unlawful. Again § 1158(b)(2)(B)(ii) permits the Attorney General to designate some classes of offenses as particularly serious crimes. Those designations, again, are reviewable for legal error.\textsuperscript{91} But if the offense is not, on review, a particularly serious crime, then a discretionary decision must be rendered on the application.

To be sure, the Attorney General may provide for “additional limitations and conditions” on asylum applications, so long as those additional limitations and conditions are “consistent” with the with the asylum statute.\textsuperscript{92} Here, 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.

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 federal courts of appeal in the context of adjustment of status for those considered by law to be “arriving aliens.” Purporting to exercise discretion, then-Attorney General Reno attempted to render noncitizens considered by law to be “arriving aliens” ineligible for adjustment of status—a determination that is ordinarily discretionary, even though the statute seemed to allow eligibility. Multiple federal courts of appeal struck down those proposed regulations, finding them to contravene the INA and Congress’s decision to carefully defined the categories of people eligible to apply for adjustment of status.\textsuperscript{93}

\textsuperscript{87} \textit{Robinson v. Shell Oil Co.}, 519 U.S. 337, 340 (1997).
\textsuperscript{89} 8 U.S.C. § 1158(b)(2)(B)(i).
\textsuperscript{90} 8 U.S.C. § 1252(a)(2)(D).
\textsuperscript{91} 8 U.S.C. § 1252(a)(2)(D).
\textsuperscript{92} 8 U.S.C. § 1158(b)(2)(C); \textit{see also} 8 U.S.C. § 1158(d)(5)(B).
\textsuperscript{93} The First and Ninth Circuits found the regulations contrary to clear statutory command. \textit{Succar v. Ashcroft}, 394 F.3d 8, 29 (1st Cir. 2005); \textit{Bona v. Gonzales}, 425 F.3d 663, 668-71 (9th Cir. 2005). Other courts invalidated the adjustment regulations under “Step Two” of \textit{Chevron}. Those courts found some ambiguity in the statute, but found a
The same logic applies here. In the asylum statute, Congress decided to make the
commission of a “particularly serious crime” a bar to asylum. Likewise, it opted not to make the
commission of other categories of crimes a bar to asylum, evidencing its intent to preclude that
as expressio unius est exclusio alterius instructs that “expressing one item of [an] associated
group or series excludes another left unmentioned”). In purporting to create numerous categories
of discretionary “pseudo-particularly serious crimes,” the Proposed Rules bar asylum through a
categorical exercise of discretion notwithstanding any later determination that those crimes are
not, indeed, “particularly serious crimes.” That effort contravenes Congressional will and is ultra
vires to the existing statutory scheme.

VIII. Conclusion

For the above stated reasons, Innovation Law Lab strongly opposes the Proposed Rule. It
is arbitrary and capricious, and if allowed to take effect, will cause untold harm to people fleeing
persecution and their families.

Thank you for the opportunity to submit these comments. Please do not hesitate to
contact us should you have any questions about our comments or require further information.

[Signature]
Jordan Cunning
Staff Attorney
Innovation Law Lab

[Signature]
Nadia Dahab
Senior Staff Attorney
Innovation Law Lab

per se discretionary bar not based on a permissible construction of the eligibility standards set forth in the governing
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.
Valentina De Fex
Staff Attorney/Legal Fellow

Tess Hellgren
Staff Attorney/Justice Catalyst Legal Fellow

Kelsey Provo
Staff Attorney
Innovation Law Lab