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Submitted via www.regulations.gov

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

Dear Assistant Director Alder Reid and Chief Dunn,

On behalf of the Immigration and Nationality Law Committee of the New York City Bar Association ("City Bar"), we respectfully submit this comment in response to the above-referenced Proposed Rules to publish regulations relating to eligibility for asylum published in the Federal Register on December 19, 2019. For the reasons detailed in the comments that follow, the City Bar opposes the proposed changes to asylum eligibility and urges that the proposed rule be withdrawn in its entirety.

With 24,000 members, the City Bar has a longstanding mission to equip and mobilize the legal profession to practice with excellence, promote reform of the law, and advocate for access to justice in support of a fair society. In doing so, the City Bar uses its voice to address a broad range of policy issues, which includes civil rights, housing law, immigration and nationality law, social welfare law, disability law, and laws affecting children and families.

The Proposed Rules would cause grave harm in shutting out asylum-seekers from safety and refuge when there are already significant legal barriers to being recognized as an asylee in the United States. A single wrongful asylum denial potentially carries fatal stakes. These Proposed Rules represent a significant departure from existing domestic and international refugee laws and

further erode longstanding protections under our country's asylum system. Further, these Proposed Rules will have significant, harmful effects on the Constitutional rights of individuals in criminal proceedings, as well as undermine the full faith and credit due to state court decisions. The City Bar opposes these new rules in full and urges that the Departments of Justice and Homeland Security instead focus on how to include, rather than exclude, more people into the safety and freedom offered in the United States.

I. THE PROPOSED RULES IMPOSE UNNECESSARY ADDITIONAL EXCLUSIONS ON ASYLUM SEEKERS WHO ALREADY FACE SWEEPING LEGAL AND PRACTICAL BARRIERS TO RELIEF

For those individuals seeking asylum in the United States, the stakes are often a matter of life and death—the cruel persecution, extreme violence, and, often, death that await those whose claims have been denied are ongoing and well-documented. Asylum seekers must build their case for eligibility by decoding a byzantine universe of federal laws, state laws, agency regulations, and procedural requirements, often in a language they do not understand, without any appointed counsel, and often from a remote immigration jail. In some parts of the country and before certain immigration judges, almost no one succeeds in overcoming these hurdles to achieve safety.[1]

Under existing law, asylum seekers are already limited by broad, mandatory bars to asylum based on allegations of criminal conduct. The scope of disqualifying conduct includes conviction of an "aggravated felony," a term of art unique to immigration law that is deemed a "particularly serious crime" which, in turn, creates a statutory bar to asylum eligibility.[2] Originally limited to murder, weapons trafficking and drug trafficking,[3] "aggravated felonies" today include hundreds of offenses, many of them neither a felony nor aggravated, including petty offenses and misdemeanors such as shoplifting, simple battery, or sale of counterfeit DVDs. A single one of these past offenses eliminates an individual's eligibility for asylum, with no regard to the danger that person will face if sent back to their country.

Even if individuals overcome the practical and legal barriers to fully presenting their asylum claims, the immigration adjudicator maintains full discretion to deny asylum, including based on criminal conduct. Adjudicators may find that an individual has proven that they will face persecution if sent back and meets the definition of a refugee, but they can still deny asylum based on criminal conduct beyond the threshold criminal bars. The Proposed Rules would add seven new sweeping categories of barred conduct to the asylum eligibility criteria that are overbroad and unnecessary, especially in light of the existing broad categories of barred conduct and the

[1] *See generally* Manuel Roig-Franzia, *Migrants Risk It All Seeking Asylum. The Answer in Court is Almost Always 'No.'*, THE WASHINGTON POST, Jul. 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; Gustavo Solis, *Remain in Mexico Has a 0.1 Percent Asylum Grant Rate*, THE SAN DIEGO UNION TRIBUNE, Dec. 15, 2019, https://www.sandiegouniontribune.com/news/border-baja-california/story/2019-12-15/remain-in-mexico-has-a-0-01-percent-asylum-grant-rate. (All links in this letter were last visited on January 21, 2020).

[2] 8 U.S.C. 1158(b)(2)(B)(i) (2020).

[3] 8 U.S.C. § 1101(a)(43) (1988).

additional discretion afforded to immigration adjudicators to deny asylum claims – indeed, if anything, the existing, overbroad criminal bars should be narrowed.

II. THE PROPOSED CATEGORICAL BARS GO BEYOND ANY COLORABLE DEFINITION OF A "PARTICULARLY SERIOUS CRIME" AND WILL NOT MAKE PEOPLE SAFER

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

There is no reason to believe that the Proposed Rules will identify individuals who "constitute a danger to the community of the United States."[6] The agencies have proffered no evidence or data to support these proposed changes, and in fact, the data supports an opposite conclusion—the fact of a past conviction is not a reliable predictor of an individual's future dangerousness.[7] In New York, the number of people who return to prison due to new offenses has declined. A 2017 report from the New York Department of Corrections and Community Supervision found that, of all individuals released from prison during 2012, only 9% were reincarcerated within three years for a new felony conviction.[8] Of those individuals who were newly convicted and returned to prison, the vast majority (78%) were reincarcerated for technical parole violations.[9] By implementing additional mandatory bars based on past offenses, the Proposed Rule would exclude even more individuals who are unlikely to commit new serious offenses, or any new offenses at all.

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[4] 8 U.S.C. § 1324(a).

[5] 8 U.S.C. § 1326.

[6] 84 Fed. Reg. 69643 (Dec. 19, 2019).

[7] *See* U.S. Sentencing Commission, *The Effects of Aging on Recidivism Among Federal Offenders* (2017) https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171207_Recidivism-Age.pdf (noting that recidivism rates fall substantially with age); U.S. Sentencing Commission, Recidivism Among Federal Violent Offenders (2019) https://www.ussc.gov/research/research-reports/recidivism-among-federal-violent-offenders (noting that non-violent offenders recidivate at significantly lower rates); J. Ramos and M. Wenger, *Immigration and recidivism: What is the Link?* JUSTICE QUARTERLY (2019) https://www.tandfonline.com/doi/abs/10.1080/07418825.2019.1656763 (finding no correlation between recidivism rates and citizenship status among those formerly incarcerated for felonies in Florida prisons).

[8] Department of Corrections and Community Supervision, *Return Rate for Parolees Committing New Felony Crimes Hits Historic Low*, Nov. 24, 2014, http://www.nycourts.gov/reporter/webdocs/Recidivism_Rates_2010.pdf.

[9] *Id.*

In addition, a conviction may not accurately reflect a person's behavior or "dangerousness." The Proposed Rules fail to address or account for the reality of plea negotiations, in which a person may plead guilty to an offense for a variety of reasons, such as to avoid a severe sentence, to be released from pretrial detention, or to return to work and family obligations. In addition, research studies have found statistically significant racial disparities in the way white and black defendants have been charged and convicted. A study of misdemeanor marijuana cases in New York City found that black defendants were less likely than white defendants to be offered a charge reduction.[10] And a study of the plea bargaining process in Wisconsin found that white defendants are about 25% more likely than black defendants to have their principal initial charge dropped or reduced to a lesser crime, and that white defendants initially charged with misdemeanors were more likely than black defendants to be convicted for crimes carrying no possible incarceration, or not to be convicted at all.[11] Given these questions about the correlation between a person's alleged criminal conduct and the final conviction, additional mandatory bars based on the fact of a conviction alone are flawed gating mechanisms for naming who deserves safe passage. A conviction that results from the plea negotiation process cannot be taken at face value as a complete accounting of an individual's past action. It is even further attenuated from an indication of future dangerousness to others.

a. The Seven Proposed Categorical Bars Are Overbroad And Will Sweep In Conduct Far Beyond The "Particularly Serious Crime" Standard

Additionally, outside of the aggravated felony context, it has generally been well understood by the Board of Immigration Appeals (BIA) and the Courts of Appeals that low-level, "run-of-the-mill" offenses do not constitute "particularly serious crimes" [12] Under this long-standing interpretation of the particularly serious crime bar in the Immigration and Nationality Act (INA), there is no precedent for low-level offenses—like infraction or misdemeanor level driving under the influence convictions where no injury is caused to another, or simple possession of a controlled substance or paraphernalia—to constitute a "particularly serious crime."

The reason for this is common sense and a matter of interpreting the statutory language as it is written. As Judge Reinhardt observed in a concurring opinion in *Delgado v. Holder*,[13] a decision the Proposed Rules cite in support of these expanded bars, when the statute specifies "particularly serious" crimes, this distinction must be given the common sense, textual meaning it holds. "[R]un-of-the-mill" offenses like driving under the influence or petty theft have "little in common" with those offenses the BIA has deemed particularly serious—e.g., felony menacing with a deadly weapon, armed robbery, or burglary of a dwelling in which the offender is armed or causes injury.[14] As Judge Reinhardt further explained, public opinion vindicates such a common sense distinction: "American voters would be unlikely to elect a president or vice president who

[10] *See* Besiki Luka Kutateladze et al., *Opening Pandora's Box: How Does Defendant Race Influence Plea Bargaining?*, 33 JUST. Q. 398, 414 (2016) https://www.tandfonline.com/doi/abs/10.1080/07418825.2014.915340.

[11] *See* Carlos Berdejó, *Criminalizing Race: Racial Disparities in Plea Bargaining*, 59 BOST. COLL. L. REV. 1187, 1191 (2018) https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=3659&context=bclr.

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

[13] *Id.*

[14] *Id.*

had committed a particularly serious crime, yet they had no difficulty in recently electing to each office a candidate with a DUI record."[15] Barring individuals from asylum based on these relatively minor offenses renders the "particularly serious" part of the "particularly serious crime" bar meaningless.

The Board of Immigration Appeals has cautioned that, "in light of the unusually harsh consequences which may befall a [noncitizen] who has established a well-founded fear of persecution; the danger of persecution should generally outweigh all but the most egregious of adverse factors."[16] Yet because of the categorical nature of the seven new bars proposed here, asylum seekers will be precluded from obtaining protection on the basis of a vast array of conduct, without any discretion left to the immigration adjudicator to determine whether the circumstances merit such a harsh penalty. Indeed, in the case of the domestic-violence related ground, the categorical bar will be imposed based on mere allegations of conduct without any adjudication of guilt.

i. The proposed controlled substance offense bar

The proposal to create an eligibility bar based on a conviction for possession or trafficking of a controlled substance or controlled-substance paraphernalia, other than a single use offense involving possession for one's own use of 30 grams or less of marijuana,[17] is an overbroad exclusion that will not make anyone safer, but will put bona fide asylees back in danger. As discussed above, this proposed bar would go far beyond any common sense meaning or established legal definition of a "particularly serious crime." In New York, the proposed controlled substance offense eligibility bar would include misdemeanor drug offenses that have specifically been found not to be "particularly serious" by the BIA.[18] For example, an individual with a past conviction for misdemeanor simple possession of marijuana in the 4th degree[19] would be newly barred from asylum under the Proposed Rules, with no chance to present any mitigating circumstances. For drug-related offenses, the categorical bar is particularly concerning because it erases individual mitigating circumstances that are commonly associated with such conduct, like addiction, self-medication, and any subsequent treatment or rehabilitation.

ii. The proposed felony and "punishable by more than one year" bars

The Departments propose to implement a new eligibility bar for felony convictions, including felonies under federal, state, tribal, or local law, and crimes punishable by more than one year's imprisonment.[20] Reliance on the grade or potential sentences attached to offenses to define seriousness without examining the nature of the underlying conduct also erodes the common sense meaning of "particularly serious." There are several felonies in New York State that are not and

[15] *Id.*.

[16] *Matter of Pula*, 19 I.&N. Dec. 474 (BIA 1987).

[17] 84 Fed. Reg. 69654 (Dec. 19, 2019).

[18] *See Matter of Juarez*, 19 I&N Dec. 664 (BIA 1988) ("Without unusual circumstances, a single conviction of a misdemeanor offense is not a "particularly serious crime.")

[19] N.Y.P.L. 221.15

[20] 84 Fed. Reg. 69645 (Dec. 19, 2019).

should not categorically be considered "particularly serious crimes." For example, under these proposed rules, anyone who pleads guilty to causing $250 worth of property damage,[21] to having recorded a movie in a theater two times,[22] or to simple possession of a narcotic as little as 500 milligrams or half an ounce[23] would be categorically barred from asylum regardless of the severity of past persecution suffered or future persecution feared.

The Departments' purported goal of creating more uniformity cannot be achieved simply by incorporating a grade-based felony bar. In many cases, applying the "felony" designation as a categorical bar will lead to inconsistent results because offenses are categorized very differently across jurisdictions. For example, felony theft threshold amounts among the states range from $200 to $2,500 or more,[24] yet the Proposed Rules would consider all such felony convictions equivalent. Adding a felony bar that penalizes such a broad range of conduct does not address anomalous outcomes, but rather invites more incongruity and unequal treatment.[25] This overbroad exclusion fails to exercise the special caution called for in the asylum context, where the stakes are so high and the possible penalty so severe.

Further, the proposed bar based on any conviction "punishable by more than one year imprisonment" is also overbroad and unrelated to identifying threats to public safety. This exclusion would sweep in minor "felony" level conduct like the New York offenses described above, as well as misdemeanors from jurisdictions like New Jersey and Pennsylvania, without regard to the actual sentence imposed by the judge based on the particular factual record in the case. Especially in jurisdictions where sentencing judges explicitly weigh the specific facts and conduct at issue in the crime, the actual sentence is a more faithful and accurate measure of whether an individual's conduct was "particularly serious."

iii. The proposed illegal reentry and document fraud bars

The proposed bars for illegal reentry convictions under 8 U.S.C. 1326[26] and convictions for the possession or use, without lawful authority, of an identification document, authentication feature, or false identification document,[27] ignore and fundamentally mischaracterize the

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[21] N.Y.P.L. 145.05.

[22] N.Y.P.L. 275.34.

[23] N.Y.P.L. 220.06.

[24] *See* Marella Gayla, The Marshall Project, *What's the Punishment for Theft? Depends on What State You're In*, Aug. 9, 2017, https://www.themarshallproject.org/2017/08/09/what-s-the-punishment-for-theft-depends-on-what-state-you-re-in.

[25] Categorical bars based on sentence length and nomenclature also creates dangerous incentives for lawmakers to amend criminal statutes to stack federal penalties against noncitizens. *See* Amit Jain and Phillip Dane Warren, *An Ode to the Categorical Approach*, 67 UCLA L. REV. DISC. 132, 149-50 (2019), https://poseidon01.ssrn.com/delivery.php?ID=624013110082095066006024017105093011052056061029027087091072065125102070125123068074053002099029105061121073066017065070072071039041082054021074083028123121079000100062032055071007072004096031125107076123095104066125126122111091076025102001090091111027&EXT=pdf.

[26] 84 Fed. Reg. 69648 (Dec. 19, 2019).

[27] 84 Fed. Reg. 69653 (Dec. 19, 2019).

circumstances that asylum seekers face in coming to the United States. The expansion of the asylum bar to include individuals who have been convicted of reentering the United States without inspection pursuant to INA § 276 is unlike any of the other bars previously established or interpreted by the BIA or Circuit Courts of Appeals. It is an offense with no element of danger or violence to others. Most significantly, and more so than other bars contained in the Proposed Rules, barring asylum based on the manner of entry directly violates the prohibition on imposing penalties based on a refugee's manner of entry or presence in the United Nations Convention Relating to the Status of Refugees ("the Convention"). This prohibition is a critical part of the Convention because it recognizes that refugees and asylum seekers often have little control over the place and way they enter the country where they are seeking refuge.

Likewise, many people who are fleeing persecution do not have the financial means to navigate the journey to safety, and may see no other choice than to use fraudulent means to enter the United States to remain here safely while their applications are pending. To suggest such conduct makes someone unfit to remain in the U.S., or renders them a serious threat to public safety, is arbitrary and irrational. It would also contradict decades of settled law directing that violations of law arising from an asylum applicant's manner of flight should constitute only one of many factors to be consulted in the exercise of discretion.[28] In addition, many such migrants are victims of unscrupulous individuals who offer false assurances and documentation that turns out to be fraudulent.

III. THE PROPOSED RULES VIOLATE THE LETTER AND SPIRIT OF UNITED STATES INTERNATIONAL TREATY OBLIGATIONS

As a signatory to the 1967 Protocol Relating to the Status of Refugees ("the Protocol"),[29] the United States is obligated to create and interpret domestic refugee law such that it upholds the Protocol's principle of non-refoulement, which is the commitment to not return refugees or asylum seekers to a country where they will face persecution on protected grounds. This core principle holds even when potential refugees have allegedly committed criminal offenses. The Proposed Rules further deviate from the United States' treaty obligations by expanding the type of alleged conduct that can lead to a refugee's expulsion, in violation of both the language and spirit of the treaty.

The United States' existing *per se* criminal bars and asylum denials based on mere allegations of criminal activity or minor offenses already vastly exceed the categories for exclusion and expulsion set out in the Convention. The Convention allows states to exclude and/or expel individuals from refugee protection if the individual "having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."[30] However, this exception applies to "extreme cases," in which the particularly serious crime at issue is a

[28] *See Pula*, 19 I.&N. Dec. at 474.

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

[30] Convention Relating to the Statute of Refugees, July 28, 1951, 140 U.N.T.S. 1954 (hereinafter "the Convention"), at art. 33(2).

"capital crime or a very grave punishable act."[31] The United Nations High Commissioner for Refugees (UNHCR) has stated that a "particularly serious crime" bar should 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."[32]

Moreover, the UNHCR has specifically noted that the particularly serious crime bar does not encompass less serious crimes such as the proposed "felony" level offenses listed above: "[c]rimes such as petty theft or the possession for personal use of illicit narcotic substances would not meet the threshold of seriousness."[33] Finally, when determining whether a refugee should be barred from protection for a particularly serious crime conviction, the adjudicator must conduct an individualized inquiry and consider any mitigating factors. Current discretionary denials based on minimal or alleged conduct do not meet this "extremely serious threat to the country" standard of exclusion, and the *per se* bars are even more egregious in sweeping in minor offenses while ignoring mitigating evidence entirely. The Proposed Rules would push U.S. refugee law even further from its treaty obligations by slashing the number of people who will have their individual circumstances considered as required under the Convention and relying on the flawed and overbroad measures of dangerousness or threat level as discussed above.

IV. THOSE PRECLUDED FROM ASYLUM ELIGIBILITY WILL BE GRAVELY IMPACTED EVEN IF GRANTED WITHHOLDING OF REMOVAL OR PROTECTION UNDER THE CONVENTION AGAINST TORTURE

Throughout the Proposed Rules, the agencies defend their contravention of established U.S. and international refugee laws by pointing to the availability of alternative forms of relief for those categorically barred from asylum eligibility under the new rules.[34] However, the possible availability of these alternatives forms of relief—withholding of removal and protection under the Convention Against Torture ("CAT")—cannot justify the serious harm the Proposed Rule's overly harsh and broad limits on asylum will create. Critically, the relief provided under CAT and statutory withholding of removal is much narrower in scope and duration than under asylum, and these claims are adjudicated on a different, higher standard of proof—a clear probability, instead of a well-founded fear of, persecution or torture[35]—flowing from distinct international obligations. Therefore, an individual could simultaneously have a valid and strong asylum claim but be unable to meet the standard under withholding or removal or CAT and face removal to their country of origin, where persecution or even death await. Limiting bona fide asylum seekers to withholding

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

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

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

[34] *See, e.g.*, 84 Fed. Reg. 69644 (Dec. 19, 2019).

[35] *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).

of removal or CAT protection would unfairly strip them of the full extent of the protections and rights they are entitled to under our domestic and international commitments.

Even for those who meet the higher standard, withholding and CAT recipients are still subject to significant prejudice. For example, they have no ability to travel internationally. The United Nations Convention Relating to the Status of Refugees affords refugees the right to travel in mandatory terms. Article 28 states, "Contracting States shall issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory."[36] Unlike individuals granted asylum, withholding and CAT recipients do not have access to a travel document as contemplated by Article 28. And unlike individuals granted asylum, withholding and CAT recipients must legally be ordered removed, making any travel outside the U.S. a "self-deportation"[37] which prevents them from being able to return to the United States. Asylum seekers granted only withholding of removal or CAT protection are thus effectively trapped within the United States in long-term limbo.

Because international travel is prohibited, withholding and CAT recipients also face permanent separation from their spouses and children, as they cannot reconnect with their families in a third country. And they also cannot reunite with family in the United States because only asylees and refugees are eligible to petition for a spouse and children to join them as derivatives on that status. Thus, the Proposed Rules contribute to yet another policy of family separation. Under these new rules, even if a mother with young children flees to the United States for protection and is granted relief under withholding or CAT, her children will not be afforded the same protection and ability to stay in the United States with their mother. Instead, they will need to establish their own eligibility for protection before an immigration judge, no matter their age.

These foreseeable issues are already taking place at our southern border. Recently, a mother who had fled her home country with her young children was subject to the so-called Remain in Mexico policy and the asylum "transit ban," which made her ineligible for asylum. The immigration judge granted the mother withholding of removal and CAT protection but denied the same protection to her young children, ordering them removed, lurching the family into dangerous uncertainty.[38] Under the Proposed Rules, these types of dangerous and heart wrenching situations will increase, separating families and forcing parents to return to countries where it has been established they will more likely than not face persecution and torture, to prevent separation from their children.

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 that protects them against removal unless and until that status is terminated.[39] None of these protections exist for withholding and CAT recipients. They have no access to permanent

[36] 19 U.S.T. 6223 T.I.A.S. No. 6577 (1968).

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

[38] Adolfo Flores, "An Immigrant Woman Was Allowed To Stay In The US — But Her Three Children Have A Deportation Order," *Buzzfeed*, December 21, 2019, https://www.buzzfeednews.com/article/adolfoflores/an-immigrant-woman-was-allowed-to-stay-in-the-us-but-not.

[39] *See* 8 U.S.C. § 1158(c)(1)(A).

residency or citizenship. 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.[40]

V. THE PROPOSED RULES WILL RESULT IN "PSEUDO-CRIMINAL TRIALS" IN IMMIGRATION COURT, UNDERMINE JUDICIAL EFFICIENCY, AND RESULT IN RACIALLY-BIASED DECISION-MAKING

The proposed criminal bars furthermore pose significant challenges to fair adjudication. In two significant ways, the Proposed Rules require immigration adjudicators to engage in decision-making to determine whether an asylum applicant's conduct—outside the context of any formal admissions or findings of guilt or criminal court adjudication—categorically bars asylum eligibility. First, under these new rules, immigration adjudicators would be allowed to consider "all reliable evidence" to determine whether there is "reason to believe" an offense was "committed for or related to criminal gang evidence," or "in furtherance of gang-related activity."[41] Second, the Proposed Rules would allow immigration adjudicators to "assess all reliable evidence in order to determine whether [a] conviction amounts to a domestic violence offense;" and to consider whether non-adjudicated conduct "amounts to a covered act of battery or extreme cruelty."[42]

These proposed requirements would require extensive fact-finding and result in "pseudo-criminal trials" within the asylum adjudication process. Because "reliable evidence" is not limited to formal records or court findings, both parties before the adjudicator will potentially be permitted to present an extremely large volume of "evidence" that may or may not be relevant. Asylum trials will be bloated with submissions from both sides because strict rules of evidence do not apply in immigration proceedings.[43] Asylum seekers would be denied constitutional rights that attach to criminal proceedings as the underlying basis of criminal convictions or charges are relitigated without traditional rules that specifically guard against unfair prejudice, confusion, and delay.[44]

These "pseudo-criminal trials"—or "post hoc investigation into the facts of predicate offenses"—have "long [been] deemed undesirable" by the federal courts, including the Supreme Court.[45] For more than a century, the federal courts have repeatedly upheld the "categorical approach" as the correct standard to determine the immigration consequences of a criminal offense, wherein the immigration adjudicator relies on the statute of conviction as adjudicated by the criminal court system, without relitigating the nature or circumstances of the offense in immigration court.[46] As the Supreme Court has explained, this approach "promotes judicial and

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

[41] *See* 84 Fed. Reg. 69649 (Dec. 19, 2019).

[42] *See* 84 Fed. Reg. 69652 (Dec. 19, 2019).

[43] *Baliza v. INS*, 709 F.2d 1231 (9th Cir. 1983).

[44] *See, e.g.*, Fed. R. Evid. 403.

[45] *Moncrieffe v. Holder*, 569 U.S. 184, 186 (2013).

[46] *See Moncrieffe*, 569 U.S. at 191 ("This categorical approach has a long pedigree in our Nation's immigration law."). For a more fulsome history of the development of the categorical approach in immigration court, *see* Alina

administrative efficiency by precluding the relitigation of past convictions in minitrials conducted long after the fact."[47] In *Moncrieffe v. Holder*, 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.[48] This is exactly the kind of harm that would arise from these Proposed Rules.

The Proposed Rules repeatedly cite increased efficiency as justification for many of the proposed changes.[49] Yet the Departments propose to set aside final adjudications already available through the criminal system in favor of resource-intensive pseudo-criminal trials. The proposed rules thus will have the opposite effect of the rules' stated intention and will decrease efficiency in the asylum process.

The City Bar is especially concerned that creating a blanket exclusion for anyone who is convicted of a crime that an immigration adjudicator links to gang activity will erroneously prevent bona fide asylum seekers, in particular youth of color, from receiving protection. First, there have long been questions raised about the veracity of gang affiliation information used by immigration officials, such as local law enforcement gang databases that have been found to be inaccurate, outdated, and infected by racial bias.[50] Likewise, information about gang affiliations sourced from the fusion intelligence-gathering center in El Salvador has already been used against asylum seekers, even though it has been found to be inaccurate.[51] Empowering immigration adjudicators to render asylum applicants categorically excluded from protection because of such spurious allegations will inevitably result in the return of many asylum seekers back to harm and will compound the disparate racial impact of inclusion in gang databases. Creating a "gang-related crime" bar will only exacerbate the due process violations already occurring as the result of unsubstantiated information about supposed gang ties. The Immigration and Nationality Act and existing regulations already provide broad bars to asylum where criminal behavior by an asylum seeker causes concern by an adjudicator as to whether an asylum seeker merits asylum as a matter

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Das, "The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law," *New York University Law Review* 86, no. 6 (2011): 1689 - 1702, https://www.nyulawreview.org/wp-content/uploads/2018/08/NYULawReview-86-6-Das.pdf.

[47] *Moncrieffe*, 569 U.S. at 200-201.

[48] *Id.* at 201.

[49] *See* 84 Fed. Reg 69656-8 (Dec. 19, 2019).

[50] Annie Sweeney and Madeline Buckley, *Chicago Police Gang Data Collection Faulted by City's Inspector General as Unchecked and Unreliable*, CHICAGO TRIBUNE, Apr. 11, 2019, https://www.chicagotribune.com/news/breaking/ct-met-chicago-police-gang-data-04112019-story.html; Anita Chabria, *A Routine Police Stop Landed Him on California's Gang Database. Is It Racial Profiling?,* LOS ANGELES TIMES, May 9, 2019, https://www.latimes.com/politics/la-pol-ca-california-gang-database-calgang-criminal-justice-reform-20190509-story.html.

[51] *See* Melissa del Bosque, *Immigration Officials Use Secretive Gang Databases to Deny Migrant Asylum Claims,* PROPUBLICA, July 18. 2019, https://www.propublica.org/article/immigration-officials-use-secretive-gang-databases-to-deny-migrant-asylum-claims.

of discretion. Adding this additional, superfluous layer of complication risks erroneously excluding bona fide asylum seekers from protection without adding any useful adjudicatory tool to the process.

VI. THE PROPOSED DEFINITION OF "CONVICTION" AND "SENTENCE" FOR THE PURPOSES OF THE NEW BARS FURTHER EXCLUDES THOSE IN NEED OF PROTECTION

The Proposed Rules also 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. In particular, the newly created 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,[52] would unfairly penalize asylum applicants, many of whom may not have the opportunity to seek review of their prior criminal proceedings until applying for asylum.

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.[53] 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. In addition, some individuals may have very old convictions that no longer impact their day to day life, and they may not have had any reason to think about past infirmities until the threat of persecution and death upon deportation arose. The proposed rebuttable 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 relief who have had their Constitutional rights violated. It is particularly difficult for an uncounseled individual to adequately prepare to make a sufficient distinction between a vacated, expunged, or modified sentence that involves a violation of their Constitutional rights to receive immigration advice under *Padilla*, from what the Departments consider to be a vacatur or modification "for immigration purposes." By imposing a presumption against the validity of a withdrawal or vacatur of a plea, the Proposed Rules 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.

Reliance on timing in particular is unfounded, as the adjudication of a vacatur or withdrawal motion can depend on many administrative or jurisdiction-specific factors beyond an individual's control. The timing criteria also prejudices individuals who may have simply taken longer to collect the necessary resources or receive a competent consultation to identify the

[52] 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…" 84 Fed. Reg. 69656 (Dec. 19, 2019).

[53] *Padilla v. Kentucky*, 559 U.S. 356 (2010).

infirmities in their criminal proceedings. Regardless of whether immigration proceedings may or may not have prompted someone to examine the fairness of their case, the validity of a substantive or procedural defect in someone's criminal proceedings should in no way be tied to when a judge decides to enter that determination, something over which the individual has no control.

VII. THE PROPOSED RULES FAIL TO OFFER THE FULL FAITH AND CREDIT DUE TO STATE COURT DECISIONS

The Proposed Rules improperly authorize immigration adjudicators to second-guess state court decisions and make baseless assumptions about an applicant's motives to seek justice, even where a court 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*.[54] However, the agencies misread the applicable law, which only requires that such orders are based on substantive or procedural defects in the criminal proceedings. The Proposed Rule goes well beyond that requirement.

The authority extended to adjudicators to impute motives to applicants violates the law of multiple circuits, including *Pickering*, on which it relies,[55] and grants adjudicators vague and indefinite authority to look beyond a facially valid vacatur. Such breadth of authority undermines asylum seekers' rights to a full and fair proceeding. As an initial matter, the Proposed Rules' reliance on *Matter of Thomas and Thompson*[56] is flawed. Neither the text nor the history of the immigration statute authorizes adjudicators to ignore state court sentence modifications unless they are based on substantive or procedural defects. 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."[57] 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

[54] 84 Fed. Reg. at 69655-56 (*citing Matter of Thomas and Thompson*, 27 I.&N. Dec. 674 (A.G. 2019) (holding that sentencing modifications must be based at least in part on a procedural or substantive defect) and *Matter of Pickering*, 23 I.&N. Dec. 621 (BIA 2003), *rev'd on other grounds* by *Pickering v. Gonzales*, 465 F.3d 263, 267-70 (6th Cir. 2006) (holding that convictions vacated on the basis of a procedural or substantive defect in the underlying proceedings are not valid for immigration purposes but vacaturs due to post-conviction events, such as rehabilitation or immigration hardships remain valid)).

[55] *See Matter of F-*, 8 I.&N. Dec. 251, 253 (BIA 1959) (citing *Matter of Pickering*, 23 I.&N. Dec. 621). *See also Pickering v. Gonzales*, 465 F.3d 263, 267-70 (6th Cir. 2006) (holding that the BIA was limited to reviewing the authority of the court issuing the order as to the basis for vacatur); *Reyes-Torres v. Holder*, 645 F.3d 1073, 1077-78 (9th Cir. 2011) (*citing Cardoso-Tlaseca v, Gonzales*, 460 F.3d 1102, 1107 (9th Cir. 2006) (finding that the state court's rationale, not the respondent's motive, was the relevant inquiry); *Rodriguez v. U.S. Att'y Gen*., 844 F.3d 392, 397 (3d Cir. 2006) (noting that "[T]he IJ may rely only on reasons explicitly stated in the record and may not impute an unexpressed motive for vacating a conviction.").

[56] *Matter of Thomas and Thompson* 27 I&N Dec. 674 (A.G 2019).

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

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 reveals 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.

VIII. CONCLUSION

For the above stated reasons, the City Bar respectfully opposes the Proposed Rules because they exclude refugees from protection in violation of international treaty agreements, and in a manner that invites racial bias and will further alienate vulnerable and marginalized individuals seeking safety. Thank you for the opportunity to submit these comments. We appreciate your consideration.

Respectfully,

Victoria F. Neilson, Chair
Immigration & Nationality Law Committee