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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO

PANGEA LEGAL SERVICES, *et al.*,

Plaintiffs,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY *et al.*,

Defendants.

Case No. 3:20-cv-7721

PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE

Assigned to Hon.

Date:
Time:
Courtroom:

RELIEF REQUESTED BY 5:00 P.M., NOVEMBER 19, 2020

EX PARTE MOTION FOR A TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE WHY A PRELIMINARY INJUNCTION SHOULD NOT ISSUE

PLEASE TAKE NOTICE that Plaintiffs Pangea Legal Services, Dolores Street Community Services, Inc., Catholic Legal Immigration Network Inc., and Capital Area Immigrants' Rights Coalition will, and do, move the Court under Federal Rule of Civil Procedure 65 for a temporary restraining order (TRO) and order to show cause why a preliminary injunction should not issue against Defendants Department of Homeland Security; Chad F. Wolf, in his purported official capacity as Acting Secretary of the Department of Homeland Security; United States Citizenship and Immigration Services; Kenneth T. Cuccinelli, in his official capacity as the Senior Official Performing the Duties of the Director, U.S. Citizenship and Immigration Services; U.S. Immigration and Customs Enforcement; Tony H. Pham, in his official capacity as the Senior Official Performing the Duties of the Director of Immigration and Customs Enforcement; U.S. Customs and Border Protection; Mark A. Morgan, in his official capacity as Acting Commissioner of U.S. Customs and Border Protection; United States Department of Justice; William P. Barr, in his official capacity as United States Attorney General; Executive Office for Immigration Review; and James McHenry, in his official capacity as Director of the Executive Office for Immigration Review.

Plaintiffs respectfully move the Court to enter a nationwide TRO and preliminary injunction maintaining the *status quo* and enjoining Defendants from implementing or enforcing the rule titled *Procedures for Asylum and Bars to Asylum Eligibility*, 85 Fed. Reg. 67202 (Oct. 21, 2020) ("Final Rule"), pending final judicial resolution of this action. This motion is based on this Ex Parte Motion, the accompanying Complaint for Declaratory and Injunctive Relief, the accompanying Memorandum of Points and Authorities, the accompanying proposed Temporary Restraining Order, the accompanying supporting declarations, as well as the papers, evidence, and records on file in this action, and any other written or oral evidence or argument presented at or before the time this motion is heard by the Court.

As set forth in accompanying Memorandum of Points and Authorities, a TRO is necessary by **5:00 p.m. PT on November 19, 2020** to prevent immediate and irreparable harm to the Plaintiffs and

the populations they serve. The Final Rule is scheduled to take effect on **November 20, 2020**. Because Defendants set the final rule to take effect 30 days after publication—an unusually short period—Plaintiffs are unable to seek a preliminary injunction on this judicial district's ordinary schedule. Accordingly, Plaintiffs seek an expedited briefing and hearing schedule that will permit a TRO and preliminary injunction to preserve the status quo and prevent Defendants from implementing or enforcing the Final Rule. Plaintiffs request that Defendants file their opposition brief by **November 9, 2020**, and that plaintiffs file any reply by **November 12, 2020**. Plaintiffs request a hearing at the Court's convenience.

Plaintiffs' counsel have consulted with Defendants' counsel about this briefing schedule. Defendants propose that they file their opposition brief on November 10, 2020, and that plaintiffs file any reply by November 13, 2020. Should the court hold argument, Defendants are available at the Court's convenience, but propose any date the week of November 16.

Notice of this Ex Parte Motion has been and will be provided to Defendants as set forth in the accompanying Certificate Regarding Notice to Defendants of Ex Parte Motion.

November 3, 2020

Respectfully submitted,

/s/ *Naomi Igra*

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO

PANGEA LEGAL SERVICES; DOLORES STREET COMMUNITY SERVICES, INC.; CATHOLIC LEGAL IMMIGRATION NETWORK, INC.; and CAPITAL AREA IMMIGRANTS' RIGHTS COALITION,

Plaintiffs,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY;
CHAD F. WOLF, *under the title of Acting Secretary of Homeland Security*;
KENNETH T. CUCCINELLI, *under the title of Senior Official Performing the Duties of the Deputy Secretary for the Department of Homeland Security;*
U.S. CITIZENSHIP AND IMMIGRATION SERVICES;
U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT;

Case No. _____

Hon. _____

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND ADMINISTRATIVE PROCEDURE ACT CASE

DEMAND FOR JURY TRIAL

TONY H. PHAM, *under the title of Senior Official Performing the Duties of the Director of U.S. Immigration and Customs Enforcement*;
U.S. CUSTOMS AND BORDER PROTECTION;
MARK A. MORGAN, *under the title of Senior Official Performing the Duties of the Commissioner of U.S. Customs and Border Protection*;
U.S. DEPARTMENT OF JUSTICE;
WILLIAM P. BARR, *under the title of U.S. Attorney General*;
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW; and
JAMES MCHENRY, *under the title of Director of the Executive Office for Immigration Review*,

Defendants.

INTRODUCTION

1. This action challenges a final rule issued by the Departments of Justice and Homeland Security (the "Rule"). *See* Procedures for Asylum and Bars to Asylum Eligibility, 85 Fed. Reg. 67202 (Oct. 21, 2020). The Rule imposes several vague and sweeping new bars to asylum eligibility, frustrates the purpose of state criminal dispositions, and strips asylum-seekers of protections set forth in the Immigration and Nationality Act ("INA"). These changes will dramatically curtail the availability of asylum to people fleeing persecution, in contravention of the INA's plain language and the United States' international commitments. The Rule will thus have a devastating impact on asylum-seekers and immigration legal services providers—including Plaintiffs and the communities they serve.

2. The toll the Rule will take is best illustrated by the stories of real clients represented by Plaintiffs. For example, Dolores Street Community Services, Inc.'s ("DSCS") client, Bryan*, has been a lawful permanent resident for many years.[1] Bryan suffers from psychotic disorder and related substance abuse issues; as a result of these mental health challenges, he was arrested multiple times and sustained several convictions that threatened his lawful permanent resident status. Bryan was placed in removal proceedings, where he sought asylum, among other forms of relief. With DSCS's help, Bryan has been able to access—for the first time—substance abuse and mental health treatment. DSCS has also helped Bryan vacate some of his prior convictions, because he did not understand the nature or immigration consequences of the proceedings at the time. Under current law, these vacaturs carry legal weight even though they were obtained after Bryan was placed in removal proceedings, as they should: Bryan's constitutional rights were violated at the time of his criminal cases, and he should not now suffer immigration consequences as a result of those unlawful convictions. The Rule, however, would severely prejudice respondents like Bryan by requiring him to demonstrate these illegalities yet again in immigration court.

3. At least six aspects of the Rule are unlawful. *First*, the Rule would create several new categorical bars to asylum eligibility that conflict with the INA's text and structure and the United

[1] This name has been changed to protect the client's safety and preserve confidentiality.

States' international treaty obligations, which Congress has directly incorporated into U.S. law. These bars would categorically exclude from asylum eligibility any person with:

- any conviction for bringing in or harboring certain aliens under 8 U.S.C. § 1324(a)—even if the asylum-seeker was just bringing their own spouse, child, or parent to safety;
- any conviction for illegal reentry under 8 U.S.C. § 1326;
- any conviction for an offense the adjudicator knows or has some unspecified "*reason to believe* was committed in support, promotion, or furtherance of the activity of a criminal street gang";
- any conviction for an offense involving driving while intoxicated or impaired that results in serious bodily injury or death, or any second offense for driving while impaired, even if there is no injury to any person or property;
- any felony conviction under federal, state, or local law;
- any conviction under several newly defined categories of misdemeanor offenses, including any controlled substance-related offense except for a first-time marijuana simple possession offense, any offense involving possession or use of a false identification document, and any offense involving the receipt of public benefits without lawful authority;
- any conviction for an offense involving domestic violence; and
- any *accusation* of battery or extreme cruelty involving a domestic relationship, even if it does not result in a conviction.

4. The Rule asserts that these new categorical bars are proper exercises of the Attorney General's power to "establish additional limitations and conditions, *consistent with this section*, under which an alien shall be ineligible for asylum." 8 U.S.C. § 1158(b)(2)(C) (emphasis added). But the Rule's new bars are *not* "consistent with" the statutory eligibility scheme, which is narrowly drawn to exclude people "who pose a threat to society." *E. Bay Sanctuary Covenant v. Barr*, 964 F.3d 832, 846 (9th Cir. 2020). The Rule sweeps in everything from a second misdemeanor conviction for marijuana possession, to a misdemeanor conviction for using a fake ID to enter a bar, to unlawfully exporting fish—a federal felony. The Rule's bars thus bear no resemblance to those Congress wrote into the statute, which in turn reflect our international treaty obligations. The Rule also ignores Congress's

careful drafting, for example by treating *every* illegal reentry conviction under § 1326 as a categorical bar, even though Congress specified that such a conviction bars asylum eligibility *only* when "committed by an alien who was previously deported" based on an aggravated-felony conviction. 8 U.S.C. § 1101(a)(43)(O). The Rule's categorical bars thus exceed Defendants' authority and conflict with the governing statute.

5. *Second*, the Rule adopts a novel presumption: a criminal conviction still triggers asylum ineligibility even if vacated, expunged, or modified—and even if the vacatur or modification was *to correct constitutional or substantive defects*—so long as (i) the vacatur or modification order was entered after removal proceedings began, or (ii) the applicant moved for the order more than a year after conviction or sentencing. 85 Fed. Reg. at 67259–60 (to be codified at 8 C.F.R. §§ 208.13(c)(7)–(8), 1208.13(c)(7)–(8)). The asylum-seeker must try to rebut this presumption by showing that any modification was not made (i) for rehabilitative reasons or (ii) "for purposes of ameliorating the immigration consequences." *Id*. But Congress nowhere authorized Defendants to disregard state court orders curing constitutional errors based purely on their assumptions about judges' subjective reasons for ruling. This aspect of the Rule thus clashes with the text of the INA and with basic federalism principles.

6. *Third*, the Rule violates the Administrative Procedure Act ("APA") in at least three respects. First, the Rule departs dramatically from decades of consistent agency precedent without adequate explanation. For example, the Rule discards the agency's longstanding practice of treating criminal convictions (or conduct) beyond the statutory eligibility bars as merely part of "the totality of the circumstances" that "should be examined in determining whether a favorable exercise of discretion is warranted," and not a basis "to deny relief in [ ] all cases." *Matter of Pula*, 19 I. & N. Dec. 467, 473 (BIA 1987). Yet the Rule fails to explain why the agencies' good reasons for that approach no longer hold true. This unexplained departure is a textbook example of arbitrary and capricious rulemaking. Second, in issuing the Rule, Defendants entirely failed to consider important aspects of the problem, repeatedly dismissing comments and data about the Rule's harmful effects as "outside the scope of [the] rulemaking." *See, e.g.*, 85 Fed. Reg. at 67226. Third, Defendants did not provide sufficient opportunity for public comment. They provided just 30 days, spanning the 2019 end-of-

year holidays, to comment on this major overhaul of the asylum system. That is not long enough for the public to digest and comment on a sweeping proposal with such significant impacts. The Rule was also part of an improperly staggered rulemaking process, which prevented the public from seeing and commenting on the whole picture at once.

7. *Fourth*, the Rule is procedurally invalid for another three reasons. First, Defendant Chad Wolf—who purported to issue the proposed and final Rule in conjunction with Defendant William Barr—unlawfully assumed the role of Acting Secretary of Homeland Security in violation of the Appointments Clause of the U.S. Constitution, the Homeland Security Act of 2002 ("HSA"), and the Federal Vacancies Reform Act of 1998 ("FVRA"). Wolf thus lacked the authority to propose or issue the Rule. Second, the Rule violates the Regulatory Flexibility Act ("RFA"), which requires federal agencies to analyze the effects of their rules on "small entities." 5 U.S.C. §§ 603–604. Here, the Department of Homeland Security ("DHS") and the Department of Justice ("DOJ") failed to do so, stating only that the Rule "will not have a significant economic impact on a substantial number of small entities" because "[o]nly individuals, rather than entities, are eligible to apply for asylum." 85 Fed. Reg. at 67255. This conclusory statement entirely fails to acknowledge the impact the Rule will have on immigration legal services providers like Plaintiffs. Third, the Rule fails to comply with the federalism certification requirement set forth in Executive Order 13132, notwithstanding the significant federalism concerns the Rule raises. *See* 64 Fed. Reg. 43255 §1(a) (Aug. 4, 1999).

8. *Fifth*, the Rule is unconstitutionally vague, in violation of the Due Process Clause, because it fails to "give ordinary people fair warning about what the law demands of them." *United States v. Davis*, 139 S. Ct. 2319, 2323 (2019). For example, the Rule bars asylum based on a conviction of *any* offense the adjudicator "has reason to believe" was committed "in support, promotion, or furtherance" of the activity of a criminal street gang. 85 Fed. Reg. at 67258–59 (to be codified at 8 C.F.R. §§ 208.13(c)(6)(ii), 1208.13(c)(6)(ii)). The Rule does not describe what behaviors, associations, or statuses might meet this standard. Nor does it provide any guidance on the types of offenses or circumstances that may trigger such an inquiry, or the sorts of evidence that might be considered. These vague standards fail to provide fair notice and invite arbitrary and discriminatory enforcement.

9. *Sixth*, the Rule violates the equal protection component of the Fifth Amendment because it was motivated by discriminatory animus toward certain racial and ethnic groups and people of certain national origins. The discriminatory intent underlying this Rule is evinced by two primary factors. First, the Rule will disproportionately harm non-white immigrants relative to their counterparts from predominantly white countries—a concern that Defendants acknowledged, but did not seek to mitigate or resolve, in issuing the Rule. Second, the Rule was promulgated in the context of years of repeated, racist statements by members of the Trump Administration casting non-white immigrants as dangerous criminals, including statements made in the days and weeks immediately surrounding the publication of the proposed Rule in December 2019 and the final Rule in October 2020.

10. In short, the Rule is inconsistent with the INA; is arbitrary, capricious, and procedurally invalid under the APA, the HSA, the FVRA, and the RFA; and violates (i) the Appointments Clause and (ii) the Fifth Amendment's Due Process Clause, including its equal protection component. It also conflicts with the international law obligations that Congress directly incorporated into U.S. law and on which our asylum system is founded. The Rule thus threatens to send bona fide asylum-seekers to countries where they will likely face violence, torture, and even death. The Court should hold the Rule unlawful, set it aside, and enjoin its enforcement.

JURISDICTION AND VENUE

11. The Court has subject matter jurisdiction under 28 U.S.C. § 1331 because Plaintiffs' claims arise under the Constitution and federal statutes, including the INA, 8 U.S.C. § 1101 *et seq*., and the APA, 5 U.S.C. § 551 *et seq*. This Court also has subject matter jurisdiction under 5 U.S.C. § 702. Additionally, the Court has remedial authority under the Declaratory Judgment Act, 28 U.S.C. §§ 2201–2202.

12. Defendants' promulgation of the final Rule in the Federal Register on October 21, 2020 constitutes final agency action and is therefore subject to judicial review. 5 U.S.C. §§ 704, 706.

13. Plaintiffs have standing to challenge the Rule under 5 U.S.C. § 702 because they have been and will be injured by the Rule's operation. Plaintiffs are also within the zone of interest of the INA, which establishes asylum eligibility requirements. *See, e.g.*, *E. Bay Sanctuary Covenant v.*

Trump, 950 F.3d 1242, 1270 (9th Cir. 2020); *La Clinica de la Raza v. Trump*, No. 19-cv-04980-PJH, 2020 WL 4569462, at *9–11 (N.D. Cal. Aug. 7, 2020).

14. Venue is proper in this District because Defendants are officers or employees of the United States or agencies thereof acting in their official capacity or under color of legal authority, or are federal agencies of the United States. 28 U.S.C. § 1391(e)(1). Venue is also proper because both Pangea Legal Services and DSCS have their principal place of business in San Francisco, California. Consequently, both reside in this judicial district under 28 U.S.C. § 1391(c)(2).

PARTIES

15. Plaintiff Pangea Legal Services ("Pangea") is a non-profit organization based in California's Bay Area with offices in San Francisco and San Jose. Pangea's mission is to stand with immigrant communities and to provide services through direct legal representation. Pangea serves the immigrant community in the Bay Area by providing direct legal services, including filing both affirmative and defensive asylum applications, engaging in policy advocacy, and providing educational programs aimed at legal empowerment. The publication and impending effective date of the Rule has required Pangea to divert resources from its core activities to address the impact of the Rule on the communities it serves.

16. Plaintiff DSCS is a non-profit organization based in San Francisco, California, that provides a variety of services to low-income and immigrant communities in San Francisco, including through its Deportation Defense & Legal Advocacy Program. DSCS's mission is to cultivate collective power among low-income and migrant communities to create a more just society. DSCS serves San Francisco's immigrant community in part by providing direct legal services—including filing both affirmative and defensive asylum applications—and by partnering with other organizations to carry out local and national advocacy. The publication and impending effective date of the Rule has required DSCS to divert resources from its core activities to address the impact of the Rule on the communities it serves.

17. Plaintiff Catholic Legal Immigration Network, Inc. ("CLINIC") promotes the dignity and protects the rights of immigrants in partnership with its network organizations. CLINIC implements its mission by providing substantive legal and program management training and support for

organizations within its network, including organizations engaged in completing affirmative and defensive applications for asylum; providing direct representation and legal orientation to asylum-seekers; and engaging in advocacy and providing advocacy support to network organizations at state, local, and national levels. CLINIC is the largest charitable legal immigration network in the United States, with almost 400 nonprofit organizations spanning 48 states, including the state of California. Many of its affiliates appear on the List of Pro Bono Legal Service Providers maintained by the Executive Office for Immigration Review ("EOIR") as required by 8 C.F.R. § 1003.61. CLINIC maintains an office with three staff members in Oakland, California, and has staff in a dozen states around the country. The publication and impending effective date of the Rule has required CLINIC to divert resources from its core activities to address the impact of the Rule on the communities it serves.

18. Plaintiff Capital Area Immigrants' Rights Coalition ("CAIR Coalition") is a non-profit organization serving the Washington, D.C. region. It appears on the List of Pro Bono Legal Service Providers maintained by the EOIR as required by 8 C.F.R. § 1003.61. CAIR Coalition's mission is to ensure equal justice for all immigrant adults and children at risk of detention and deportation in the Washington, D.C. region and beyond. CAIR Coalition implements its mission by providing direct legal representation to children and adults in immigration proceedings, including representing unaccompanied alien children ("UACs") in interviews before the Asylum Office; conducting educational programming, including know your rights presentations and training of attorneys to defend immigrants; and engaging in impact litigation and advocacy on key policy issues. The publication and impending effective date of the Rule has required CAIR Coalition to divert resources from its core activities to address the impact of the Rule on the communities it serves.

19. Defendant DHS is a cabinet-level department that enforces the immigration laws of the United States.

20. Defendant Chad F. Wolf is purportedly the Acting Secretary of DHS. He is being sued in his official capacity. In this capacity, he directs each of the component agencies within DHS, including United States Immigration and Customs Enforcement ("ICE"), United States Citizenship and Immigration Services ("USCIS"), and United States Customs and Border Protection ("CBP"). The

Secretary of DHS is responsible for the administration and enforcement of immigration laws under 8 U.S.C. § 1103(a).

21. Defendant Kenneth T. Cuccinelli is the Senior Official Performing the Duties of the Deputy Secretary for DHS. He is being sued in his official capacity.

22. Defendant USCIS is the agency within DHS responsible for adjudicating affirmatively filed asylum applications and conducting credible and reasonable fear interviews.

23. Defendant ICE is the agency within DHS responsible for carrying out removal orders and overseeing immigration enforcement and detention.

24. Defendant Tony H. Pham is the Senior Official Performing the Duties of the Director of ICE. He is being sued in his official capacity.

25. Defendant CBP is the agency within DHS responsible for the initial processing and detention of noncitizens who are apprehended at or near the border and placed in expedited removal or reinstatement of removal proceedings.

26. Defendant Mark A. Morgan is the Senior Official Performing the Duties of the Commissioner of CBP. He is being sued in his official capacity.

27. Defendant DOJ is a cabinet-level department of the federal government.

28. Defendant William P. Barr is the U.S. Attorney General. He is being sued in his official capacity. Under 8 U.S.C. § 1103(g), the Attorney General is responsible for the administration of immigration law.

29. Defendant EOIR is a sub-agency of DOJ responsible for adjudicating administrative claims concerning federal immigration laws, including asylum applications filed in immigration court.

30. Defendant James McHenry is the Director of EOIR. He is being sued in his official capacity.

GENERAL ALLEGATIONS

I. Background on the INA

31. Federal law affords several humanitarian protections for non-citizens who fear persecution and violence in their home countries. Congress incorporated international humanitarian principles into U.S. law through the INA, which ensures that asylum and related protections are accessible

to asylum-seekers who fear returning to their home country because of the persecution, torture, or other harm they would endure.

32. The U.S. asylum system was founded on its international obligations under the 1951 Convention Relating to the Status of Refugees ("Refugee Convention") and the 1967 United Nations Protocol Relating to the Status of Refugees ("1967 Protocol"). Opened for signature in 1951, the Refugee Convention was designed to avoid the horrors experienced by refugees during World War II. The 1967 Protocol, which the United States ratified in 1968, expanded the Convention's protections, allowing them to be applied universally.

33. Congress incorporated the 1967 Protocol into U.S. law with the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102. The Refugee Act amended the INA to include a formal process for people fearing persecution in their home country to apply for asylum. *Id.* § 101(a) (codified at 8 U.S.C. § 1521 Note).

34. The Refugee Act thus codified the United States' longstanding tradition of "welcoming the oppressed of other nations." H.R. Rep. No. 96-781, at 17–18 (1980) (Conf. Rep.). Congress deliberately sought to bring the United States into compliance with its international obligations under the 1967 Protocol and the Refugee Convention. *See* H.R. Rep. No. 96-608, at 17 (1979) (noting that proposed asylum and withholding provisions were designed to "conform[] United States statutory law to our obligations under Article 33 [of the Refugee Convention]"); S. Rep. No. 96-256, at 4 (1979) (same). "Congress imbued these international commitments with the force of law when it enacted the Refugee Act . . ." *R-S-C- v. Sessions*, 869 F.3d 1176, 1178 (10th Cir. 2017); *see also INS v. Cardoza-Fonseca*, 480 U.S. 421, 436–37 (1987) (explaining that Congress enacted the Refugee Act of 1980 "to bring United States refugee law into conformance with the [1967 Protocol]").

35. Today, asylum may be granted to a person who has suffered persecution or who has a "well-founded fear of persecution" on account of one of five enumerated protected grounds: "race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1158(b)(1)(B); *id.* § 1101(a)(42)(A). Among other requirements, to be eligible for asylum, a person must not fall within any mandatory bars to asylum. Specifically, they must not (i) have participated in the persecution of others; (ii) have been convicted of a "particularly serious crime" that makes them

a danger to the United States; (iii) have committed a "serious nonpolitical crime outside the United States"; (iv) represent a danger to the security of the United States; (v) have engaged in "terrorist activity"; or (vi) have resettled in a third country prior to arriving in the United States. *See id.* § 1158(b)(2)(A)(i)–(vi).

II. Criminal Bars to Asylum Eligibility under the INA

36. The INA specifies two crime-related bars to asylum eligibility: (i) the particularly serious crime ("PSC") bar, and (ii) the serious nonpolitical crime bar. *See id.* § 1158(b)(2)(A)(ii) (PSC bar); *id.* § 1158(b)(2)(A)(iii) (serious nonpolitical crime bar). Both bars have specific definitions and scopes of application.

37. Like most of the asylum provisions in the INA, the PSC bar closely mirrors the language of the same bar in the Refugee Convention. The Refugee Convention's bar was designed to be narrow, so as not to preclude a bona fide refugee from protection unless they had been convicted of a very serious criminal offense and thus posed a danger to the community. The INA PSC bar thus requires a conviction for a "*particularly* serious crime" that renders the applicant "a danger to the community of the United States." *Id.* § 1158(b)(2)(A)(ii) (emphasis added).

38. The United Nations High Commissioner for Refugees (UNHCR) has noted that, to be considered a serious crime, an offense must generally be a "capital crime or a very grave punishable act," such as murder, arson, rape, or armed robbery. UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, U.N. Doc. HCR/4/IP/Eng/REV. ¶¶ 154–155 (1979, reissued 2019) ("*UNHCR Handbook*"). The danger to the community must be both serious and posed by the asylum-seeker themselves. Convention Relating to the Status of Refugees art. 33(2), Apr. 22, 1954, 189 U.N.T.S. 150.

39. Under the Refugee Convention, adjudicators determining whether an offense is a PSC must conduct an individualized analysis, considering the nature of the act, the actual harm inflicted, how the offense is prosecuted, and whether most jurisdictions would consider the act a serious crime. UNHCR, *Criminal Justice and Immigration Bill: Briefing for the House of Commons at Second Reading* ¶ 10 (July 2007), http://www.unhcr.org/en-us/576d237f7.pdf. Adjudicators must also consider

mitigating or extenuating factors in their determinations. UNHCR, *The Nationality, Immigration and Asylum Act 2002: UNHCR Comments on the Nationality, Immigration and Asylum Act 2002 (Specification of Particularly Serious Crimes) Order 2004* 4 (2004).

40. Adjudicators in the United States similarly apply a fact-specific analysis to determine whether an offense is a PSC under the INA (except for aggravated felonies, *see* 8 U.S.C. § 1158(b)(2)(B)(i)). This analysis considers, among other things, the nature of the offense, the criminal sentence imposed, and whether the offense itself indicates that the person is likely to be a danger to the community. *See Matter of Frentescu*, 18 I. & N. Dec. 244, 247 (BIA 1982), *superseded on other grounds by statute*, Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, *as recognized in Matter of N-A-M-*, 24 I. & N. Dec. 336, 339 (BIA 2007).

41. Moreover, the INA PSC bar requires a "convict[ion] by a final judgment" of a PSC. 8 U.S.C. § 1158(b)(2)(A)(ii). Accusations of criminal activity, or reasonable suspicion of criminal activity, do not trigger the PSC bar.

42. The "serious nonpolitical crime" bar requires a showing that "there are serious reasons for believing that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States." *Id.* § 1158(b)(2)(A)(iii). This provision also corresponds to an exclusion clause in the 1951 Refugee Convention: Article 1F(b) provides that the Convention does not apply to "any person with respect to whom there are serious reasons for considering that . . . [h]e has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee." Convention Relating to the Status of Refugees art. 1F(b).

43. This treaty provision serves a dual purpose: (i) "to protect the community of a receiving country from the danger of admitting a refugee who has committed a serious common crime," and (ii) "to render due justice to a refugee who has committed a common crime (or crimes) of a less serious nature or has committed a political offence." UNHCR Handbook ¶ 151. Under the treaty, reconciliation of these twin purposes demands an individualized analysis that accounts for all factors relating to "the nature of the offence presumed to have been committed"—including all aggravating or mitigating circumstances—balanced against "the degree of persecution feared," such that "[i]f a person

has well-founded fear of very severe persecution . . . a crime must be very grave in order to exclude him." *Id.* ¶¶ 155–157.

44. Adjudicators in the United States similarly apply an individualized, fact-specific analysis in determining whether an offense qualifies as a serious nonpolitical crime. That analysis requires judges to assess in each case whether the "political aspect of his offense may not fairly be said to predominate over its criminal character." *INS v. Aguirre-Aguirre*, 526 U.S. 415, 429–30 (1999); *see also McMullen v. INS*, 788 F.2d 591, 596 (9th Cir. 1986) (noting that "a balancing approach including consideration of the offense's 'proportionality' to its objective and its degree of atrocity makes good sense"), *overruled on other grounds by Barapind v. Enomoto*, 400 F.3d 744 (9th Cir. 2000).

III. The Rule

A. The Rulemaking Process

45. Defendants DOJ and DHS jointly published the proposed Rule in the Federal Register on December 19, 2019. *See* Procedures for Asylum and Bars to Asylum Eligibility, 84 Fed. Reg. 69640 (Dec. 19, 2019). The Rule proposed parallel amendments to the immigration regulations administered by DHS (8 C.F.R. pt. 208) and those administered by EOIR, a sub-agency of DOJ (8 C.F.R. pt. 1208). Defendants' stated purposes in issuing the proposed Rule were to (i) amend regulations governing the bars to asylum eligibility; (ii) clarify the effect of criminal convictions; and (iii) remove regulations governing the automatic reconsideration of discretionary denials of asylum. *Id.* at 69640.

46. Although the RFA requires federal agencies to analyze the effects of their rules on "small entities," the proposed Rule disposed of this requirement by stating that "[the] rule will not have a significant economic impact on a substantial number of small entities" because "[o]nly individuals, rather than entities, are eligible to apply for asylum." *Id.* at 69657.

47. Defendants gave the public just 30 days to comment on the proposed Rule, ending January 21, 2020. This already-brief period included multiple federal and religious holidays, including Hanukkah, Christmas Eve, Christmas Day, New Year's Day, and the Birthday of Martin Luther King, Jr., leaving just 15 business days for comment. Even so, Defendants ignored requests to extend the comment period.

48. On October 21, 2020, the final Rule was published in the Federal Register. *See* Procedures for Asylum and Bars to Asylum Eligibility, 85 Fed. Reg. 67202 (Oct. 21, 2020). Despite 581 comments on the proposed Rule, most of which opposed it—including 78 comments from organizations such as legal advocacy groups, non-profit organizations, and religious organizations, *all* of which opposed it—the final Rule is nearly identical to the proposed text published ten months earlier.

49. The proposed Rule cited two purported sources of authority for the new bars to asylum eligibility: 8 U.S.C. § 1158(b)(2)(B)(ii), which allows the Attorney General to "designate by regulation offenses that will be considered" particularly serious crimes that trigger the PSC bar, and § 1158(b)(2)(C), which allows the Attorney General to "establish additional limitations and conditions, consistent with this section, under which an alien shall be ineligible for asylum." The final Rule reflects that commenters raised numerous concerns about the invocation of the PSC bar:

> In general, commenters alleged that the [notice of proposed rulemaking] was untethered to the approach set out by Congress regarding particularly serious crimes and that if Congress had sought to sweepingly bar individuals from asylum eligibility based on their conduct or felony convictions, as outlined in the [notice of proposed rulemaking], it would have done so in the Act. Commenters stated that adding seven new categories of barred conduct rendered the language of section 208(b)(2) of the Act (8 U.S.C. 1158(b)(2)) essentially meaningless and drained the term "particularly serious crime" of any sensible meaning because the Departments were effectively considering all offenses, regardless of seriousness, as falling under the particularly serious crime bar to asylum.

85 Fed. Reg. at 67206. Rather than revising the scope of the Rule to address these concerns, Defendants simply disclaimed reliance on the Attorney General's power to designate PSCs in the final Rule. Although the final Rule repeatedly draws analogies to the PSC bar, stating that the new bars are "similar to" PSCs, Defendants dismissed commenters' concerns by stating that the rule "does not designate any offenses . . . as specific particularly serious crimes," rather, it "sets out seven new 'additional limitations' . . . on asylum eligibility." *Id.* at 67207.

50. On many other issues raised by commenters—including issues that go to the heart of the Rule—Defendants failed to provide a meaningful response, stating that various comments and concerns were "beyond the scope of" the rulemaking. Supposedly "outside the scope" were comments and data showing the Rule "will exacerbate harms caused by racially disparate policing practices or that the result of this rule will disproportionately affect people of color," *id.* at 67226, "barriers" that

prevent domestic violence victims from seeking waivers that would prevent the Rule's bars from applying to them, *id*. at 67230, "how the rule might affect working conditions of aliens," *id*. at 67233, "issues involving evidence gathering" under the Rule's vacatur presumption, *id*. at 67239, "humanitarian concerns for asylum seekers," *id*. at 67243, "treatment, support, and services for children who have experienced trauma," *id*. at 67244, the "complex 'web' of asylum laws and regulations," *id*., "dangerous conditions in Mexico, the effects of the ['migrant protection protocol'], and the third-country transit bar," *id*. at 67245, "access to healthcare, food, and housing," *id*. at 67246, "increased likelihood of convictions for minor offenses for certain vulnerable groups," *id*. at 67247, and "representation in immigration proceedings or during asylum adjudications," *id*. at 67249. On most of these points, Defendants just "reiterate[d] their statutory authority to limit and condition asylum eligibility." *Id*. at 67239.

51. Moreover, like the proposed Rule, the final Rule did not analyze the effects of the Rule on "small entities" as required by the RFA. Rather, the final Rule concluded without analysis that "[the] rule will not have a significant economic impact on a substantial number of small entities" because "[o]nly individuals, rather than entities, are eligible to apply for asylum." *Id*. at 67255.

52. The Rule is currently scheduled to take effect on November 20, 2020.

B. Additional Categorical Bars to Asylum Eligibility

53. Although the Attorney General may impose additional "limitations and conditions" on asylum eligibility, those limitations must be "consistent with" the INA's asylum provisions. *See* 8 U.S.C. § 1158(b)(2)(C). None of the Rule's new asylum eligibility bars pass this test.

54. The Rule purports to establish several new categorical bars to asylum eligibility, regardless of the circumstances of the crime, the punishment imposed, or whether the offense indicates dangerousness to the community—in direct contravention of Congress's intent in establishing asylum protection. While the Rule asserts similarities between these new bars and the PSC bar, *see* 85 Fed. Reg. at 67216 & n. 16, the new bars are not tailored to address the touchstone of the statutory eligibility bars, including the PSC bar: dangerousness to the community or the nation. The Rule thus attempts to add new criminal bars that ignore the boundaries Congress articulated in the statute.

55. The Rule radically expands the list of offenses triggering a categorical bar to asylum eligibility to include:

- any conviction for bringing in or harboring certain aliens under 8 U.S.C. § 1324(a);
- any conviction for illegal reentry under 8 U.S.C. § 1326;
- any conviction for an offense the asylum officer knows or has some unspecified "*reason to believe* was committed in support, promotion, or furtherance of the activity of a criminal street gang";
- any conviction for an offense involving driving while intoxicated or impaired that results in serious bodily injury or death, or any second offense for driving while impaired, even if no injury results;
- any felony conviction under federal, state, or local law;
- any conviction under several newly defined categories of misdemeanor offenses, including any controlled substance-related offense except for a first-time marijuana possession offense, any offense involving possession or use of a false identification document, or any offense involving the receipt of public benefits without lawful authority;
- any conviction for an offense involving domestic violence; and
- any *accusation* of battery or extreme cruelty involving a domestic relationship, even if it does not result in a conviction.

56. These new bars are inconsistent with the INA's asylum provisions because they (i) involve offenses (or alleged conduct) far less serious, and less dangerous, than Congress deemed necessary to deny asylum eligibility; (ii) allow people to be barred from asylum eligibility based on mere accusation or suspicion of misconduct; and (iii) seek to impose *categorical* eligibility bars, with no individualized analysis (for example, to determine whether the asylum-seeker constitutes a danger to the community).

57. Nor can this inconsistency be remedied by vague references to the Attorney General's authority to "designate by regulation offenses that will be considered" PSCs. 8 U.S.C. § 1158(b)(2)(B)(ii). The PSC bar applies only where the person (i) is "convicted by final judgment" (ii) of a "*particularly* serious crime" and (iii) "constitutes a danger to the community of the United

States." 8 U.S.C. § 1158(b)(2)(A)(ii). The Rule's categorical bars involve crimes that are not serious, let alone *particularly* serious; they are largely unrelated to whether the asylum-seeker poses a danger to the community; and some of them apply even absent a conviction.

58. Some of these new categorical bars also fail to provide fair notice of what convictions—or what suspicions, based on which materials—will trigger them. For example, the Rule says that an asylum-seeker is barred if they are convicted of *any* crime the adjudicator "knows or has reason to believe" was committed in "support, promotion, or furtherance" of the activity of a criminal street gang. The Rule does not explain these nebulous standards or otherwise cabin adjudicators' discretion in a way that would provide fair notice to asylum-seekers or stave off discriminatory or arbitrary enforcement.

C. Change in the Effect of Vacated, Modified, and Expunged Criminal Convictions

59. The Rule presumes that criminal convictions remain effective (and thus trigger the asylum bars) despite any vacatur, expungement, or modification, if (i) the vacatur or modification order was entered after removal proceedings began or (ii) the applicant moved for the order more than a year after conviction or sentencing, even if the modification was made to correct constitutional or legal defects. 85 Fed. Reg. at 67259–60 (to be codified at 8 C.F.R. §§ 208.13(c)(7)–(8), 1208.13(c)(7)–(8)). The Rule places the burden on the asylum-seeker to establish that any modification to their underlying criminal conviction or sentence was not made for rehabilitative purposes or "for purposes of ameliorating the immigration consequences of the [underlying] conviction or sentence." *Id.* Moreover, the Rule empowers immigration adjudicators to consider evidence beyond the face of the court order itself to determine the ruling state judge's "purposes." *Id.* at 67259–60 (to be codified at 8 C.F.R. §§ 208.13(c)(9), 1208.13(c)(9)).

60. This portion of the Rule does not reflect a permissible interpretation of the INA. Treating as valid a conviction vacated to correct a constitutional error is "so foreign, so antithetical, to the long-standing principles underlying our criminal justice system and our notions of due process that we would expect Congress to have spoken very clearly if it intended to effect such results." *Alim v. Gonzales*, 446 F.3d 1239, 1249 (11th Cir. 2006). Yet Congress nowhere authorized defendants to do

so. Nor does the INA contain the clear statement that courts require before they allow federal agencies to upset the federal–state balance. Indeed, this novel regime may violate the Full Faith and Credit Act, 28 U.S.C. § 1738, and the underlying constitutional guarantees thereof, U.S. Const. art. IV, § 1.

D. Elimination of Automatic Review of Discretionary Denials of Asylum

61. Finally, the Rule eliminates 8 C.F.R. §§ 208.16(e) and 1208.16(e), which provide for automatic review of a discretionary denial of asylum where an asylum-seeker is denied asylum but granted withholding of removal under 8 U.S.C. § 1231(b)(3), and the refugee is thereby precluded from reuniting with their spouse and/or children and from obtaining permanent residence or citizenship.

62. If asylum is granted to an applicant, they may petition to have their spouse and/or minor children admitted as derivative asylees. 8 U.S.C. § 1158(b)(3). Recipients of withholding of removal are not able to do the same. *Id.*; *see also id.* § 1231. As a result of the Rule, an asylum applicant who is denied asylum solely in the exercise of discretion, but who is then granted withholding of removal, will not receive automatic review of that decision, even if it results in the inability to petition for their spouse and/or minor children.

63. Defendants have failed to offer any satisfactory justification for this fundamental change in policy. The Rule relies primarily on unsubstantiated assertions that §§ 208.16(e) and 1208.16(e) are "inefficient, unclear, and unnecessary," 85 Fed. Reg. 67251; however, instead of adding detail or clarifying language to resolve any such confusion, Defendants have eliminated these regulatory provisions entirely. In so doing, Defendants have not articulated any explanation for the provisions' alleged inefficiency. Nor have they articulated a basis for depriving applicants who are not granted asylum solely in the exercise of discretion but who later win withholding of removal the opportunity to achieve family unity. Family unity has been a cornerstone of U.S. immigration policy for decades, and this change would prevent spouses and children from finding safety in the United States.

IV. Defendant Chad Wolf Lacked Authority to Propose or Issue the Rule

64. The Rule was jointly issued by DHS and DOJ and sets forth parallel provisions to amend 8 C.F.R. pt. 208, which operationalizes immigration laws administered by DHS (including

those that govern affirmative asylum applications), and 8 C.F.R. pt. 1208, which operationalizes immigration laws administered by the EOIR, a sub-agency of DOJ.

65. Insofar as the Rule relies on authority from DHS—including to implement amendments to 8 C.F.R. pt. 208—the Rule was not validly issued because Defendant Chad Wolf lacked authority under the Appointments Clause of the U.S. Constitution, the HSA, and/or the FVRA to propose or issue the Rule.

66. On August 14, 2020, the U.S. Government Accountability Office ("GAO") issued a decision stating that the "incorrect official assumed the title of Acting Secretary" when former DHS Secretary Kirstjen Nielsen resigned in April 2019 and that "subsequent amendments to the order of succession made by [Kevin McAleenan] were invalid and officials who assumed their positions under such amendments, including Chad Wolf and Kenneth Cuccinelli, were named by reference to an invalid order of succession." GAO, *Decision in the Matter of Department of Homeland Security—Legality of Service of Acting Secretary of Homeland Security and Service of Senior Official Performing the Duties of Deputy Secretary of Homeland Security* 1 (Aug. 14, 2020), https://www.gao.gov/assets/710/708830.pdf ("GAO Decision").

67. While the GAO decision focused primarily on the validity of Wolf's appointment pursuant to the HSA, Wolf's claim to the role of Acting Secretary fares no better under the FVRA. The FVRA states that a person serving as an acting officer may serve in the office "for no longer than 210 days *beginning on the date the vacancy occurs*," except under narrow circumstances. 5 U.S.C. § 3346(a)(1) (emphasis added).

68. The relevant vacancy occurred, at the latest, by April 10, 2019, the purported effective date of former DHS Secretary Kirstjen Nielsen's resignation.

69. Kevin McAleenan resigned, and Wolf purported to assume the role of Acting Secretary of DHS, on November 13, 2019—217 days after April 10, 2019, and thus beyond the 210-day period set forth in the FVRA. Accordingly, Wolf's assumption of the role of Acting Secretary was not lawful pursuant to the FVRA.

70. On December 19, 2019, DOJ and DHS jointly released the proposed Rule. *See* 84 Fed. Reg. 69640. Wolf signed the proposal, notwithstanding that—as the GAO Decision explained—he lacked the authority to do so.

71. On October 21, 2020, the Departments jointly released the final Rule. Defendant Wolf signed the final Rule under his purported authority as Acting Secretary of DHS. Specifically, Wolf, "having reviewed and approved" the Rule, "delegated the authority to electronically sign" the Rule to Chad R. Mizelle (the Senior Official Performing the Duties of the General Counsel for DHS).

72. Because Defendant Wolf is not validly serving as Acting Secretary of DHS, he could not lawfully exercise the authority of that office, including by proposing or issuing the Rule. To the extent the Rule relies on authority from DHS, including to amend the procedures for asylum and withholding of removal set forth at 8 C.F.R. pt. 208, the Rule must be set aside.

V. The Rule Is Motivated by Racial Animus

73. Additionally, the Rule is motivated by racial, ethnic, and national origin-based animus. As a threshold matter, the Rule reflects that DHS and DOJ received a number of comments expressing concern about the ways in which it would disproportionately harm non-white immigrants. *See, e.g.*, 85 Fed. Reg. at 67223 (describing comments about the disparate racial impact that a bar based on allegations that an offense was committed in "furtherance of criminal street gang activity" may have). The Departments did not refute these comments, did not meaningfully engage with them, and did not revise the Rule to address these concerns. Rather, the Rule includes only a hollow assertion that "[t]o the extent that the rule disproportionally affects any group referenced by the commenters, any such impact is beyond the scope of this rule, as this rule was not drafted with discriminatory intent toward any group, and the provisions of the rule apply equally to all applicants for asylum." *Id.* at 67226. This statement is belied by countless racist, xenophobic comments made by members of the Trump Administration and by the outsized impact that the Rule will have—and that DHS and DOJ were made aware the Rule will have—on non-white immigrants.

74. Statements by President Trump and others lay bare the Trump Administration's discriminatory motives against non-white, non-European immigrants, especially those accused or convicted of criminal conduct. The statements below are just a few examples; there are many more.

75. President Trump launched his 2016 campaign by raising the specter of violence from supposedly criminal immigrants. When he announced his presidential bid, he infamously said: "When Mexico sends its people, they're not sending their best. . . . They're sending people that have lots of problems, and they're bringing those problems with [*sic*] us. They're bringing drugs. They're bringing crime. They're rapists. And some, I assume, are good people." *Donald Trump Announces a Presidential Bid*, Wash. Post (June 16, 2015), https://www.washingtonpost.com/news/post-politics/wp/2015/06/16/full-text-donald-trump-announces-a-presidential-bid/. Three days later, he repeated a variation of the same statement on Twitter, writing, "Druggies, drug dealers, rapists and killers are coming across the southern border. When will the U.S. get smart and stop this travesty?" President Donald Trump (@realDonaldTrump), Twitter (June 19, 2015, 10:22 PM), https://twitter.com/realdonaldtrump/status/612083064945180672.

76. President Trump has continued to make similar remarks throughout his presidency. For example, in 2018, reports circulated that a group of several thousand asylum-seekers were approaching the U.S.-Mexico border seeking refuge. President Trump tweeted about the event repeatedly over the next several weeks, writing:

- "I am watching the Democrat Party led . . . assault on our country by Guatemala, Honduras and El Salvador, whose leaders are doing little to stop this large flow of people, INCLUDING MANY CRIMINALS, from entering Mexico to U.S....." President Donald Trump (@realDonaldTrump), Twitter (Oct. 18, 2018, 7:25 AM), https://twitter.com/realdonaldtrump/status/1052883467430694912.
- "Sadly, it looks like Mexico's Police and Military are unable to stop the Caravan heading to the Southern Border of the United States. Criminals and unknown Middle Easterners are mixed in. I have alerted Border Patrol and Military that this is a National Emergy [*sic*]. Must change laws!" President Donald Trump (@realDonaldTrump), Twitter (Oct. 22, 2018, 8:37 AM), https://twitter.com/realdonaldtrump/status/1054351078328885248.
- "There are a lot of CRIMINALS in the Caravan. We will stop them. Catch and Detain! Judicial Activism, by people who know nothing about security and the safety of our citizens,

is putting our country in great danger. Not good!" President Donald Trump (@realDonaldTrump), Twitter (Nov. 21, 2018, 4:42 PM), https://twitter.com/realdonaldtrump/status/1065359825654169600.

77. Around the same time, President Trump aired a midterm campaign ad that featured footage of an undocumented Mexican immigrant, Luis Bracamontes, bragging about his murder of two police officers in California. It juxtaposed footage of Bracamontes with images of the so-called "migrant caravan" moving toward the United States border—even though Bracamontes had nothing to do with the caravan—and stated: "Dangerous illegal criminals like cop-killer Luis Bracamontes don't care about our laws." Michael M. Grynbaum & Niraj Chokshi, *Even Fox News Stops Running Trump Caravan Ad Criticized as Racist*, N.Y. Times (Nov. 5, 2018), https://www.nytimes.com/2018/11/05/us/politics/nbc-caravan-advertisement.html.

78. President Trump's attempts to paint immigrants (particularly those from Central America) as gang members and dangerous people continued into the weeks surrounding the publication of the proposed Rule in 2019. Less than two weeks before the proposed Rule was published in the Federal Register, President Trump posted a tweet reading in part, "Without the horror show that is the Radical Left . . . the Border would be closed to the evil of Drugs, Gangs and all other problems!" President Donald Trump (@realDonaldTrump), Twitter (Dec. 6, 2019, 11:00 AM), https://twitter.com/realdonaldtrump/status/1202981139155210241. The day after the proposed Rule was published, President Trump took to Twitter to share a link to an article about a number of purported gang-related arrests in New York, writing, "We are getting MS-13 gang members, and many other people that shouldn't be here, out of our Country!" President Donald Trump (@realDonaldTrump), Twitter (Dec. 20, 2019, 5:41 PM), https://twitter.com/realDonaldTrump/status/1208155412962447360.

79. Similarly, during a presidential debate held on October 22, 2020—the day after the final Rule was published—President Trump described noncitizen children separated from their parents at the U.S. border as having been brought to the United States "through cartels and through coyotes and through gangs." ABC News, *Biden and Trump Discuss Their Views on Immigration Policy*, YouTube (Oct. 22, 2020), https://www.youtube.com/watch?v=DZ9vIzVZjS4. In criticizing "catch

and release" (the practice of allowing asylum-seekers to await their immigration hearings in the community rather than detaining them), President Trump further stated, "Catch and release is a disaster. A murderer would come in, a rapist would come in, a very bad person would come in . . . we [would] have to release them into *our* country." *Id.* (emphasis added).

80. These comments are part of a broader pattern of racist and xenophobic remarks made by members of the Trump Administration. For example, in 2017, at the height of litigation surrounding the Administration's travel bans, President Trump tweeted, "That's right, we need a TRAVEL BAN for certain DANGEROUS countries, not some politically correct term that won't help us protect our people!" President Donald Trump (@realDonaldTrump), Twitter (June 5, 2017, 9:20 PM), https://twitter.com/realdonaldtrump/status/871899511525961728. A few months later, he tweeted again, "The travel ban into the United States should be far larger, tougher and more specific – but stupidly, that would not be politically correct!" President Donald Trump (@realDonaldTrump), Twitter (Sept. 15, 2017, 6:54 AM), https://twitter.com/realdonaldtrump/status/908645126146265090.

81. Around January 2018, President Trump met with lawmakers to discuss protections for immigrants from Haiti, El Salvador, and African countries. According to those present at the meeting, the President asked, "Why are we having all these people from shithole countries come here?" Josh Dawsey, *Trump Derides Protections for Immigrants from 'Shithole' Countries*, Wash. Post (Jan. 12, 2018), https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94_story.html. He also suggested that the United States should allow more people from countries like Norway instead. Alan Fram & Jonathan Lemire, *Trump: Why Allow Immigrants from 'Shithole Countries'?*, AP News (Jan. 12, 2018), https://apnews.com/fdda2ff0b877416c8ae1c1a77a3cc425/Trump:-Why-allow-immigrants-from-'shithole-countries'.

82. Similarly, Defendant Kenneth Cuccinelli has made a number of troubling comments about immigrants and their families. During a radio interview in 2012, Cuccinelli criticized Washington, D.C.'s pest control policy, stating that "it is worse than our immigration policy," and noting, "You can't break up rat families. Or raccoons, and all the rest, and you can't even kill 'em." Nick Wing,

Ken Cuccinelli Once Compared Immigration Policy to Pest Control, Exterminating Rats, Huffington Post (July 26, 2013), https://www.huffpost.com/entry/ken-cuccinelli-immigration-rats_n_3658064?guccounter=1.

83. More recently, in August 2019, Cuccinelli was asked whether he agreed that the words of Emma Lazarus appearing on the Statue of Liberty, "Give me your tired, your poor," are part of the American ethos. Devan Cole & Caroline Kelly, *Cuccinelli Rewrites Statue of Liberty Poem to Make Case for Limiting Immigration*, CNN (Aug. 13, 2019), https://www.cnn.com/2019/08/13/politics/ken-cuccinelli-statue-of-liberty/index.html. He responded, "They certainly are: 'Give me your tired and your poor who can stand on their own two feet and who will not become a public charge.'" *Id.* He later noted that Lazarus's poem "was referring back to people coming from Europe." *Id.*

84. The Trump Administration has repeatedly used racist rhetoric to cast non-white immigrants as dangerous and to curb their entry into the United States. These statements leave no doubt about the racial, ethnic, and national origin-based animus driving the new Rule, which will dramatically expand bars to asylum eligibility for people convicted—or simply *accused*—of various relatively minor offenses. The Rule will cause significant harm to non-white immigrants.

85. It is well documented that current law enforcement policies harm immigrants of color. For example, as a result of racially biased policing practices, Black people are disproportionately likely to be arrested, convicted, and imprisoned in the United States. *See* NYU Law Immigrant Rights Clinic, *The State of Black Immigrants Part II: Black Immigrants in the Mass Criminalization System* at 15, https://www.immigrationresearch.org/system/files/sobi-fullreport-jan22.pdf (last visited Nov. 1, 2020) (noting in part, "These disparities exist even when crime rates are the same; for example, although Blacks and whites use marijuana at roughly equal rates, Black people are 3.7 times more likely than whites to be arrested for marijuana possession.").

86. The harm caused by racial bias in policing is further compounded by the immigration consequences that often accompany arrests and convictions. *See, e.g.*, Elizabeth Aranda & Elizabeth Vaquera, *Racism, the Immigration Enforcement Regime, and the Implications for Racial Inequality in the Lives of Undocumented Young Adults*, Soc. of Race and Ethnicity 88 (2015) ("[W]ith the exception of Salvadorans, Latino and black immigrants are disproportionately represented among those being

apprehended, detained, and deported from the country when compared with their shares of the undocumented population"); *see also* Refugee and Immigrant Ctr. for Educ. and Legal Servs., *Black Immigrant Lives Are Under Attack*, https://www.raicestexas.org/2020/07/22/black-immigrant-lives-are-under-attack/ (last visited Nov. 1, 2020) ("While 7% of non-citizens in the U.S. are Black, they make up a full 20% of those facing deportation on criminal grounds[.]").

87. The specific nature of several of the newly imposed bars to asylum eligibility is likely to augment these harms. For example, the use of convictions for bringing in or harboring certain aliens as a bar to asylum eligibility will be particularly harmful to people entering the country through the Southwest border of the United States. In fiscal year 2019, 3,487 convictions for "alien smuggling" offenses were reported to the United States Sentencing Commission. *See* U.S. Sentencing Comm'n, *Quick Facts: Alien Smuggling Offenses* (2019), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Alien_Smuggling_FY19.pdf. A staggering 94% of those convictions were brought in districts along the Southwest border. *Id.* Data from CBP reflects that in the same year, nearly 88% of single adults apprehended at the Southwest border—i.e., the population of people statistically most likely to be convicted for smuggling or harboring illegal aliens—came from the same four countries: El Salvador, Guatemala, Honduras, and Mexico. *See* U.S. Customs and Border Prot., *U.S. Border Patrol Southwest Border Apprehensions by Sector: Fiscal Year 2019* (Nov. 14, 2019), https://www.cbp.gov/newsroom/stats/sw-border-migration/usbp-sw-border-apprehensions-fy2019.

88. Similarly, barring asylum where a person is convicted of a crime that the adjudicator knows or "has reason to believe" was committed in furtherance of gang activity—an extremely low standard—will harm asylum-seekers from communities of color.[2] *See* 85 Fed. Reg. at 67258–59 (to be codified at 8 C.F.R. §§ 208.13(c)(6)(ii), 1208.13(c)(6)(ii)). For example, the Boston Regional Intelligence Center ("BRIC") maintains a "Gang Assessment Database" that tracks suspected gang members. *See* Bos. Police Dep't, *Rule 335 – Gang Assessment Database* (Mar. 23, 2017),

[2] This harm will only be exacerbated by the Executive Order on Combating Race and Sex Stereotyping issued by President Trump on September 22, 2020. The Executive Order prohibits, in part, training on implicit bias for certain federal employees, characterizing such training—perplexingly—as "promot[ing] race or sex stereotyping or scapegoating." As a result of the interplay between the Rule and this Executive Order, adjudicators will now be empowered to make a subjective determination about whether an offense was committed in furtherance of gang activity without the benefit of any training on the impacts of implicit bias on such determinations.

https://bpdnews.com/rules-and-procedures. People are added to the BRIC Gang Assessment Database based on a highly flawed point system, pursuant to which law enforcement officers assign people a "score" based on various purported markers for gang involvement. *Id.* at 2 (describing the "10 Point Verification System"). The point system allows law enforcement officers to assign points to a person even where there is no allegation that the person has engaged in criminal activity. For example, a person may receive points against them based on nicknames, attire, "drawings," tattoos, or "[w]alking, eating, recreating, communicating, or otherwise associating with" a purported gang member—even if that person is a friend, neighbor, or family member. *Id.* at 3, 5–6. Data from the Boston Police Department reflects that 66% of the people tracked in the BRIC Gang Assessment Database are Black, 24% are Latino, and just 2% are white, notwithstanding that Black and Latino residents make up 25% and 20% of the Boston population, respectively. Phillip Marcelo, *Inside The Boston Police Gang Database*, WGBH (July 30, 2019), https://www.wgbh.org/news/local-news/2019/07/30/inside-the-boston-police-gang-database.

89. Moreover, available data suggest that empowering immigration adjudicators to determine whether there is "reason to believe" that a crime was gang-related is likely to result in harm to people from communities of color, who are often labeled by police as gang-involved even when they are not. Government audits of gang databases have routinely found significant error rates. *See, e.g.*, Cal. State Auditor, The CalGang Criminal Intelligence System 2 (Aug. 2016), https://www.auditor.ca.gov/pdfs/reports/2015-130.pdf (finding that 23% of the CalGang designations reviewed lacked adequate support); City of Chi. Office of Inspector Gen., Review of the Chicago Police Department's "Gang Database" 2 (Apr. 2019), https://igchicago.org/wp-content/uploads/2019/04/OIG-CPD-Gang-Database-Review.pdf (finding that over 15,000 people designated as gang members in Chicago's gang database "had no specific gang membership listed and no reason provided for why the individual was listed as a gang member").

90. By way of additional example, in April 2016, officers in New York arrested 120 people in the Bronx (the "Bronx 120") in what was then-described as the "largest gang takedown in New York City history." Babe Howell & Priscilla Bustamante, CUNY Sch. Of Law, *Report on the Bronx*

120 Mass "Gang" Prosecution 4 (Apr. 2019), https://bronx120.report/. Notwithstanding this characterization, approximately half of those arrested were not ultimately alleged to be gang members in the indictment. *Id.* at 9. 88% of those arrested were Black, and not one was identified as white. *Id.* at 13. The outcome of the Bronx 120 incident is emblematic of both the impact that a bar to asylum eligibility based on purported gang activity will have on non-white immigrants and the unreliable nature of subjective determinations of whether conduct is gang-related.

91. The Rule does not articulate a standard to be applied in determining whether an offense was committed in furtherance of gang activity, nor even criteria for what should prompt such an inquiry. Under the Rule, a conviction for something minor, like disorderly conduct, could lead to deportation of a young person to a country where they face persecution when paired with even minimal evidence or a mere allegation of gang involvement. This outcome is manifestly unjust and exemplifies the harm the Rule will cause asylum-seekers from low-income communities and communities of color.

VI. The Rule's Harm to Plaintiffs

92. Plaintiffs are non-profit organizations that provide direct representation to, and advocate on behalf of, immigrant communities, and provide training and educational programming to immigration practitioners and/or immigrant communities. The significant changes the Rule will impose—including by creating several new categorical bars to asylum eligibility and eroding protections set forth in the INA—will harm Plaintiffs in a number of ways.

A. The Rule Frustrates Plaintiffs' Missions

93. Each of the Plaintiffs shares a mission to support and provide legal services to as many low income and vulnerable noncitizens as possible, including to asylum-seekers. For example, CLINIC operates the nation's largest network of nonprofit legal immigration services programs as part of its mission to embrace the Gospel value of welcoming the stranger by promoting the dignity and protecting the rights of immigrants. The Rule frustrates Plaintiffs' missions by establishing a number of new barriers to asylum eligibility that will make it far more difficult for Plaintiffs to serve their clients—many of whom the Rule will render ineligible for asylum.

94. For CLINIC (and the nearly 400 affiliated immigration programs in its network), the Rule will impede its core aims of "welcoming the stranger" and protecting the rights of immigrants by

categorically excluding many from asylum eligibility, leaving CLINIC and its affiliates without a means of securing a pathway to permanent residency for many of the people it serves.

95. Moreover, the Rule allows immigration adjudicators to undertake a number of subjective inquiries, including determining whether an offense was committed in furtherance of the activity of a criminal street gang, whether a person engaged in battery or extreme cruelty involving a domestic relationship (even if it did not result in a conviction), and the purposes for which a prior conviction was vacated or modified. These changes will increase the proportion of resource-intensive cases arising within the communities Plaintiffs serve, necessarily reducing the number of asylum-seekers Plaintiffs are able to assist and causing ripple effects felt throughout Plaintiffs' organizations.

96. For example, in 2019 alone, CAIR Coalition was able to provide 4,090 individual consultations for adults and children in detention to ascertain their asylum options, spending 4,000 hours conducting jail visits. As a result of the sweeping impact of the new Rule, each consultation is likely to take significantly more time—indeed, CAIR Coalition estimates that the number of adults its staff could prepare during each jail visit will be reduced by a third.

97. Similarly, the number of intake interviews CAIR Coalition has traditionally been able to provide is driven in part by its ability to rely on appropriately supervised legal assistants and law student volunteers to conduct such interviews. Given the increased complexity resulting from the new Rule (including the need to assess the applicability of a number of new categorical bars to asylum eligibility and the impact of any prior convictions an asylum-seeker may have), CAIR Coalition anticipates that it will no longer be able to staff client intake interviews with legal assistant or law student volunteers. The new need to staff such interviews with CAIR Coalition staff members and volunteer lawyers will (i) significantly reduce the overall amount of intake interviews CAIR Coalition is able to conduct and (ii) reduce CAIR Coalition's capacity to assist as many clients as possible in other aspects of the asylum process, including in trial-stage proceedings.

98. The Rule will significantly reduce the amount of cases in which Plaintiffs can support and represent asylum-seekers going forward, as their attorneys will need to expend an increased amount of time and resources on each client's case to establish eligibility under the Rule (including, among other things, the time and resources required to obtain and assess criminal conviction and arrest

records, prepare for and put on a "mini-trial" in immigration court regarding whether there is a "reason to believe" an offense was committed in furtherance of gang activity or is a domestic violence offense, and engage expert witnesses). The Plaintiffs will also need to expend an increased amount of time and resources on the cases of applicants who are barred from asylum by the Rule and bear the burden to meet a higher standard under withholding of removal than asylum.

99. The ability of the Plaintiffs to take on new clients will also be harmed by the Rule's impact on family members of the asylum-seekers the Plaintiffs serve, many of whom are parents who fled their home countries with their young children. If a parent who flees to the United States is subject to one of the Rule's new eligibility bars, and thereby forced to seek withholding of removal, they will no longer be able to ensure that their child or spouse can also obtain protection in the United States, regardless of whether the parent is granted withholding of removal. The de facto decoupling of family cases contemplated by the new Rule will likely result in increased family separation, as family members who no longer qualify for asylum are removed, but will also have a significant impact on the Plaintiffs, who will be faced with an increased number of cases where they must assist each family member in seeking asylum as a principal, rather than being able to rely on derivative status, at the same time as they face a decrease in the number of resources they have available.

100. The resulting reduction in the number of people Plaintiffs are able to support will frustrate their missions, including by directly conflicting with CAIR Coalition's mission to expand access to counsel within the population it serves.

B. The Rule Diverts Resources from Plaintiffs' Core Programs

101. The Rule is also causing and will continue to cause Plaintiffs to divert resources from their core programs. Before the effective date of the Rule, each Plaintiff will need to expend significant resources—including by diverting resources from its core programs—to analyze and interpret the Rule, create new informational materials and resources to address the Rule, and provide training to its staff and, in the case of CLINIC, its large network of affiliates, almost half of whom provide asylum representation. For example, CAIR Coalition will need to update its client database and intake process to add questions and responses relevant to the new Rule's asylum eligibility bars, a process that will

take days of staff member time and require deferring previously planned updates due to cost and timing reasons.

102. Additionally, several of the Plaintiffs provide training and support to other practitioners and/or directly to immigrant communities, which will require them to expend substantial resources in the near term on tasks such as drafting client alerts, designing and hosting webinars, and updating any website content concerning asylum eligibility. For example, Pangea provides Know Your Rights presentations to hundreds of immigrants each year, and DSCS conducts advocacy work for ICE detainees and assists undocumented youth with DACA registrations. In 2020, Pangea piloted a program that provides in-depth assistance to *pro se* asylum applicants that has already served ten clients, while CAIR Coalition hosted 182 workshops for *pro se* asylum-seekers and provided *pro se* assistance to 241 individuals in 2019 alone. To continue offering these programs, Pangea, CAIR Coalition, and DSCS will need to analyze the new Rule, revise their training materials, and create new curricula promptly. They will also need to spend more staff time on each workshop to explain the complexities of the rule to *pro se* asylum-seekers.

103. Likewise, all Plaintiffs anticipate needing to rework their existing training materials to ensure their staff understand the Rule's new eligibility and processing framework requirements, and especially on the complexities of criminal law, which will take a tremendous amount of time and workforce effort that the Plaintiffs cannot afford to spare.

104. Moreover, because CLINIC is the hub of the largest network of immigration legal services providers in the nation, its affiliate programs will look to it to provide real-time guidance regarding the new Rule, including through in-depth articles and news alerts and multi-platform social media announcements. Among other tools, CLINIC provides its affiliates with access to the "Ask-the-Experts" portal on its website, which allows attorneys and accredited representatives at its affiliates to submit inquiries regarding individual immigration matters. In order to ensure that it is adequately prepared to field questions from affiliate legal staff about the impact of the Rule on asylum-seeking clients, CLINIC will need to devote substantial resources to training its legal staff. If a submitted question is broadly applicable, CLINIC staff may also spend additional weeks developing trainings or written resources designed to answer it. Indeed, due to the substantial number of questions CLINIC

has already received from its affiliates regarding the intersection of criminal law and immigration law, CLINIC hired a consulting attorney who specializes in this area to respond specifically to such inquiries. Because the attorney charges CLINIC an hourly rate, CLINIC expects to realize a negative impact to its budget, especially given the number of queries the organization will continue to receive regarding the implications of the new Rule alone.

105. Each of the tasks and expenses necessary to respond to the new Rule—including those described above—requires Plaintiffs to divert their finite resources from other aspects of the programs they provide. As a result of the Rule, Plaintiffs anticipate the need to make changes including reallocating staffing, devoting less time to advocacy projects and community initiatives, and taking on fewer cases.

C. The Rule Jeopardizes Plaintiffs' Funding

106. The Rule will also jeopardize Plaintiffs' funding. Plaintiffs rely in part on grants from sources such as states, counties, and foundations. Such grants are often conditioned on Plaintiffs' ability to achieve certain targets, such as a total number of clients served or asylum applications filed each year. In 2020, grants of this nature constituted approximately 65% of Pangea's budget and approximately 95% of the budget for DSCS's Deportation Defense & Legal Advocacy Project. CAIR Coalition, too, receives funding from grants and foundations tied to the number of adults CAIR Coalition is able to represent each year. Because the Rule will necessarily reduce the number of Plaintiffs' clients eligible for asylum, and will require Plaintiffs to spend significantly more time on each client's case, Plaintiffs are unlikely to be able to comply with existing funding requirements—and thus expect to lose a substantial amount of their funding once this Rule goes into effect.

107. Similarly, CAIR Coalition has established pro bono partnerships with a number of law firms with which it places asylum cases. In addition to providing pro bono legal services, many of these law firms donate money to CAIR Coalition, often in exchange for opportunities to provide direct assistance with and staffing of asylum matters. Currently, law firm donations of this kind account for close to 5% of CAIR Coalition's annual budget. Under the new Rule, fewer of CAIR Coalition's clients will be eligible for asylum, as a result of which it will necessarily have fewer asylum cases to place with partner law firms. CAIR Coalition expects that this shift could result in a decrease in the

amount of law firm donations it receives. CLINIC expects to see a similar decrease in law firm donations in connection with the impact the Rule may have on its BIA Pro Bono Project, through which CLINIC matches vulnerable immigrants with pro bono counsel to defend their cases before the Board of Immigration Appeals ("BIA").

108. Even under the best of circumstances, the loss of a significant source of funding could have devastating impacts for the Plaintiffs. With respect to the new Rule, the harm caused by the loss of funding will be further exacerbated by the concomitant increase in demands on Plaintiffs' resources.

D. The Rule Harms the Populations Plaintiffs Serve

109. In addition to the harmful outcomes described above, if permitted to take effect, the Rule will cause serious harm to the populations Plaintiffs serve.

110. To start, the harm caused by the Rule will be exacerbated by the manner in which it intersects with other rules recently issued by DHS. For example: the Rule will impose a categorical bar against asylum-seekers convicted of "possession or use of an identification document, authentication feature, or false identification document without lawful authority." 85 Fed. Reg. at 67258–60 (to be codified at 8 C.F.R. §§ 208.13(c)(6)(vi), 1208.13(c)(6)(vi)). However, this Rule follows close behind a separate rule entitled Asylum Application, Interview, and Employment Authorization for Applicants, published on June 26, 2020, which prohibits asylum-seekers from applying for work authorization until at least one year after submission of an asylum application. *See* 85 Fed. Reg. 38532, 38626 (June 26, 2020) ("EAD Rule"). At the same time, asylum-seekers are generally not eligible to receive federal public benefits until they are granted asylum. *Id.* at 38566. As a result of the EAD Rule, asylum-seekers will be unable to work *or* to receive federal public benefits for a prolonged period of time, which may drive some to seek and/or use false identification out of necessity. This harm will be further exacerbated by the ongoing unemployment and health impacts of the coronavirus pandemic. Under the Rule, even people seeking false identification as a means of survival (due to the impacts of the EAD Rule) may be barred from asylum eligibility as a result.

111. Moreover, the Rule will summarily exclude many people from asylum eligibility in violation of U.S. asylum laws, decades of asylum jurisprudence, and international treaty obligations. As a direct result of the Rule, thousands of people fleeing persecution, violence, and even death in

their countries of origin will be ineligible for the life-saving relief asylum is meant to provide, in direct contravention of the Refugee Convention and the Refugee Act of 1980. The Rule will also impact their family members, who will be rendered ineligible for derivative asylum and family reunification. Moreover, the Rule will leave thousands ineligible for adjustment of status based on asylum, as a result of which—even if they are permitted to remain in the United States—they will no longer have a pathway to citizenship.

112. The Rule will disproportionately impact the most vulnerable people who are fleeing persecution and seeking asylum. Asylum-seekers are often impacted by the trauma of persecution, ranging from torture, rape, and severe bodily injury to death threats, pervasive discrimination, imprisonment, and subjugation of their beliefs and identities. These populations have also often suffered the additional traumas of witnessing the persecution of family members and friends; harrowing journeys from their countries of origin to the United States; and even facing additional discrimination and hardship once they arrive here.

113. The trauma refugees and asylum-seekers have faced frequently manifests as mental illness, and studies suggest that more than one out of every three asylum-seekers struggles with depression, anxiety, and/or post-traumatic stress disorder. Giulia Turrini et al., *Common Mental Disorders in Asylum Seekers and Refugees: Umbrella Review of Prevalence and Intervention Studies*, 11 Int'l J. Mental Health Sys. 51 (Aug. 2017), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5571637/. In many cases, the behavior that serves as the basis for criminal convictions is a direct result of these traumatic experiences. For example, asylum-seekers, and even asylum-seeking unaccompanied children, often have little or no access to mental health care and may turn to self-medication through drugs or alcohol.[3] This behavior, in turn, places them at high risk for substance-related convictions; *e.g.*, convictions for drug possession or driving under the influence. Under the new Rule, any such conviction could bar someone from eligibility for asylum, even if it were a one-time offense and the applicant demonstrated extensive evidence of rehabilitation. The Rule eliminates

[3] Moreover, many may refrain from seeking help due to concerns about the applicability of the Inadmissibility on Public Charge Grounds Rule (the "Public Charge Rule"). *See* 84 Fed. Reg. 41292 (Aug. 14, 2019). Under the Public Charge Rule, a person may be rendered inadmissible to the United States if they are "likely at any time to become a public charge." *Id.* at 41294; *see also* 8 U.S.C. § 1182(a)(4).

immigration adjudicators' discretion to consider the underlying circumstances of these types of offenses and thus to treat these asylum-seekers with the compassion that trauma-related addiction issues deserve.

114. The Rule's categorical bar against asylum-seekers convicted or accused of acts of domestic violence will similarly impact the most vulnerable applicants. While plaintiffs unequivocally condemn domestic violence in all of its forms, the Rule as drafted fails to account for the complex dynamics of such violence and its treatment under criminal law—a failure that puts even survivors of domestic violence at risk. For example, in many states, any incident involving intimate partners, or parents and children, is treated as a domestic violence case from the outset, regardless of circumstance. *See* Kari Hong & Philip L. Torrey, *What* Matter of Soram *Got Wrong: "Child Abuse" Crimes that May Trigger Deportation Are Constantly Evolving and Even Target Good Parents*, Harv. Civ. Rts. Civ. L. Rev. (Oct. 15, 2019) ("In 1999, Minnesota enacted legislation requiring a child's exposure and proximity to domestic violence to be 'a statutorily specified form of reportable child abuse and neglect.' . . . 'Parents, primarily mothers, who themselves were victims of domestic violence thus became the subjects of neglect reports based on their alleged failure to protect their children from exposure to the violence.'"). Additionally, instances of domestic violence often result in the arrest of *both* the victim and the perpetrator, and victims may face criminal charges for harming perpetrators in self-defense. Even if these charges are eventually dropped, the sweeping language of the Rule could render these people ineligible for asylum simply as a result of having been charged in the first instance.

115. As the Rule reflects, commenters noted that this portion of the Rule could be particularly harmful for populations with overlapping vulnerabilities, such as members of the LGBTQ community (who are prone to experience inaction by law enforcement in response to domestic violence and may be more likely to have both partners arrested) and people with limited English proficiency, who may be unable to describe the abuse to police officers. 85 Fed. Reg. at 67228. Critically, the Rule permits immigration adjudicators to determine that a person is ineligible for asylum if the adjudicator "knows or has reason to believe" that the applicant engaged in battery or extreme cruelty involving a domestic relationship even if the alleged conduct did not result in a conviction. *Id*. at 67258–60. The Rule does not articulate a standard to be applied in making such determinations, nor even

criteria for what should prompt such an inquiry. The end result is that any asylum-seeker arrested for any offense, whether convicted or not, could be subject to a nebulous, subjective inquiry—without fair notice as to what such an inquiry may entail—and could be barred from asylum eligibility as a result. The exceptionally far reach of this portion of the Rule harms asylum-seekers by leaving them vulnerable to assessments of their culpability by an immigration adjudicator without the same level of due process protection they would receive in court. Moreover, such assessments may involve the adjudicator's consideration of alleged conduct that is years old and that never resulted in a conviction.

116. Although the Rule purportedly provides an exception from the domestic violence bar for survivors who "have been battered or subjected to extreme cruelty and aliens who were not the primary perpetrators of violence in the relationship," *id.* at 67230, this weak exemption does not mitigate the damage done by the Rule. Even for those who may seek to avail themselves of this exception, the reality is that many abusers isolate, intimidate, and control their victims in ways that will make it very difficult for survivors to produce evidence of being "battered or subjected to extreme cruelty" such that they can successfully rely upon the exception.

117. Similarly, using convictions for "harboring certain aliens" as a bar to asylum eligibility disproportionately targets the most vulnerable. When asylum-seekers flee, their family members are often also in danger and being persecuted; thus, asylum-seekers may help their relatives seek safety in the United States as well. Under the new Rule, asylum-seekers will be rendered ineligible for asylum if they assist loved ones in dire circumstances. For example, parents who are trying to help their minor children escape life-threatening situations—something virtually every parent would feel compelled to do—will be barred from asylum eligibility. *Id*. at 67258–59 (to be codified at 8 C.F.R. §§ 208.13(c)(6)(i), 1208.13(c)(6)(i)).

118. The Rule's provision on conviction and sentence vacaturs and modifications will also lead to the expulsion of countless people. The Rule will bar many people who no longer have convictions at all by creating a temporally-based presumption that orders vacating, expunging, or modifying criminal convictions were entered "for the purpose of ameliorating immigration consequences" if the relevant order was entered (i) after the initiation of removal proceedings or (ii) more than one year after the date of the original order of conviction or sentencing. *Id*. at 67259–60 (to be codified at 8

C.F.R. §§ 208.13(c)(7)–(8), 1208.13(c)(7)–(8)). The Rule will thus preclude from asylum eligibility countless people who have appropriately had their sentences modified because of their rehabilitation and/or their efforts to overcome addiction or escape from domestic violence or gang pressure—people who have turned their lives around and who do not pose any danger to their community.

119. This provision will also impact those immigrants whose convictions and sentences are procedurally or substantively defective, but who only realized that fact (i) more than one year after they were convicted or sentenced and/or (ii) at the time of their immigration proceedings, or those who lack the legal resources and evidence to ensure that the change to their criminal record conforms to this contorted interpretation of the law. As with other provisions of the Rule, this provision will disproportionately impact the most vulnerable asylum-seekers: those who are low income, who speak the least English, or who have limited education and resources. Moreover, the Rule will unlawfully deny essential protection to asylum-seekers by refusing to give full faith and credit to valid criminal court decisions and allowing an adjudicator to "look beyond the face of" any such court order to determine the purpose for which it was issued. *Id*. at 67259–60.

120. The Rule's rescission of automatic review of discretionary asylum denials under 8 C.F.R. §§ 208.16(e) and § 1208.16(e) will also have a devastating impact on the families of asylum-seekers. People will face the impossible choice of either abandoning their spouse and children or risking return to a country where their lives or freedom would be threatened in order to reunite. Those spouses and children may also face persecution themselves. This provision—like all the others set forth in the Rule—will thus leave more vulnerable people unprotected, particularly if those spouses and children lack the resources or are otherwise unable to travel to the United States and apply for asylum independently. The Rule contravenes the principles of family cohesion and unification that underpin United States immigration law, that have been part of our country's tradition since its founding, and that were first codified more than fifty years ago in 1965 and later expanded in 1980. *See* Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911; *see also* Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102.

121. Jointly, the three provisions of this Rule will upend the United States' entire regime for asylum protection. It will place thousands of bona fide refugees in peril of persecution, bodily harm,

and even death. The Rule violates our country's obligations under international and domestic law and runs counter to our country's proud history and tradition of providing refuge for the oppressed.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

The Rule is not in accordance with law, or is in excess of statutory jurisdiction, authority, or limitations, or short of statutory right under the INA and the APA

122. Plaintiffs incorporate and reallege the allegations above.

123. The APA requires a court to set aside agency action that is "not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(A)–(C).

124. The Rule's new categorical eligibility bars exceed the Attorney General's authority to set further conditions and limitations on asylum eligibility and conflict with the text, structure, and history of the INA's asylum provisions. The only domestic crimes that render a refugee ineligible for asylum under Section 1158 are "particularly serious crimes"—that is, those crimes that (i) correspond to an actual conviction, rather than suspicions or accusations; (ii) are "*particularly* serious"; and (iii) reflect a danger to the community. *See* 8 U.S.C. § 1158(b)(2)(A)(ii) (emphasis added). Likewise, the other statutory eligibility bars (apart from the firm-resettlement bar, which is irrelevant here) involve serious conduct that renders someone a danger to others or to the nation.

125. The Rule's new categorical bars, by contrast, sweep in offenses that are not serious—let alone particularly serious—and do not suggest a danger to others or to the community. Some of them are also triggered by mere "reason to believe" that domestic criminal conduct occurred or had certain characteristics, a dynamic found nowhere in the asylum statute. The bars are thus not "consistent with" the statutory scheme, as required by the sole provision on which the Rule relies for its authority. *Id.* § 1158(b)(2)(C). For the same reasons, they conflict with the governing statutory language.

126. The Rule also conflicts with Section 1158 because categorical bars to asylum eligibility are inconsistent with the Refugee Convention, as incorporated by the INA. "Where fairly possible, a United States statute is to be construed as not to conflict with international law or with an international

agreement with the U.S." *Serra v. Lappin*, 600 F.3d 1191, 1198 (9th Cir. 2010) (alteration omitted) (quoting *Munoz v. Ashcroft*, 339 F.3d 950, 958 (9th Cir. 2003)). The Refugee Convention—relevant portions of which are incorporated into the INA—requires an individualized analysis of whether a particular crime disqualifies an asylum applicant, no matter which of the criminal bars is at issue. The government's proposed categorical bars simply ignore that requirement, and raise concerns about compliance with the United States' non-refoulement obligation. The bars are accordingly in conflict with the INA and the treaty obligations it effectuates.

127. The Rule's presumption that criminal convictions vacated to cure substantive or constitutional errors remain valid based purely on when they were vacated has no basis in the INA, conflicts with basic due process principles, and fails to give full faith and credit to state court rulings.

SECOND CLAIM FOR RELIEF

The Rule is arbitrary, capricious, or an abuse of discretion under the APA

128. Plaintiffs incorporate and reallege the allegations above.

129. Under the APA, an agency action must be set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

130. The agency's broad shift away from individualized, multi-factor asylum determinations and toward categorical bars—in violation of the Refugee Convention—represents a dramatic and unexplained break. In *Matter of Pula*, 19 I. & N. Dec. 467 (BIA 1987), the BIA concluded that asylum determinations call for an examination of "the totality of the circumstances" in which no one factor "should be considered in such a way that the practical effect is to deny relief in virtually all cases," *id.* at 473, and "the danger of persecution should generally outweigh all but the most egregious of adverse factors," *id.* at 474; *see also In re Kasinga*, 21 I. & N. Dec. 357, 367–68 (BIA 1996) (applying *Matter of Pula* and holding same); *Hussam F. v. Sessions*, 897 F.3d 707, 718–19 (6th Cir. 2018) (per curiam) (summarizing BIA precedent and concluding that "failure to disclose that . . . passport was not obtained in the usual manner" could not "be reasonably termed the 'most egregious' of adverse factors"). Nevertheless, the agency has departed from this precedent by determining that the conditions that are the subject of each of its categorical bars are the only factors of importance in any circumstance in which

one of those conditions is satisfied. The agency explanation does not account for the sudden unimportance of the expressed considerations that drove its prior policy for decades, does not provide a reasoned explanation for disregarding such policy, does not meaningfully discuss the consequences of this shift on populations relevant to Congress's statutory purpose, and does not adequately explain what statutorily grounded objectives would be achieved by the shift. The agency's failure to consider these and other significant factors renders the Rule arbitrary and capricious. *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125–27 (2016).

131. The Rule is also arbitrary and capricious because DHS and DOJ have failed to "examine[ ] [the] relevant data" in issuing it. *Genuine Parts Co. v. EPA*, 890 F.3d 304, 311–12 (D.C. Cir. 2018) (alterations in original) (quoting *Carus Chem. Co. v. EPA*, 395 F.3d 434, 441 (D.C. Cir. 2005)). The agencies do not fully consider the effects of the Rule on asylum-seekers, as they fail to give any kind of estimate of the additional number or percentage of asylum-seekers who would be barred from asylum based on the mandatory bars and their serious reliance interests in the agencies' prior position.[4] *See Encino Motorcars*, 136 S. Ct. at 2125–27. DHS and DOJ instead unhelpfully note that "[t]he [proposed] expansion of the mandatory bars for asylum would likely result in fewer asylum grants annually" and allege that they are unable to provide any estimates of "the expected decrease" "because asylum applications are inherently fact-specific, and because there may be multiple bases for denying an asylum application." 85 Fed. Reg. at 67256. The Departments further admit that "the full extent of the impacts [of the Rule] . . . is unclear." *Id.* at 67257.

132. The Rule also fails to offer any substantial evidence or reasoned explanation to support how its provisions will serve the stated purposes of more predictable results and judicial efficiency. *See* 85 Fed. Reg. at 67209 (asserting that the Rule will "create a more streamlined and predictable approach that will increase efficiency in immigration adjudications" (citing 84 Fed. Reg. at 69647)). In the absence of evidence to the contrary, it is difficult to see how proposing a categorical bar based

[4] *See* 84 Fed. Reg. at 69658. DHS and DOJ provide an estimate of the number of cases that will be impacted by a section of the proposed Rule that removes the provisions at 8 CFR §§ 208.16(e), 1208.16(e) regarding reconsideration of discretionary denials of asylum but do not provide any estimate for the number of cases affected by these other changes. *See also* 85 Fed. Reg. at 67256–57 (noting the absence of data).

on circumstances described in unreliable documents—including police reports, rap sheets, and probation reports—rather than actual convictions could avoid creating additional burdens for the already overwhelmed immigration court system by tasking adjudicators with additional, highly nuanced, resource-intensive assessments. The agency's failure to provide any evidence or explanation addressing how efficiency would be improved by a requirement for adjudicators to engage in mini-trials on the applicability of categorical criminal bars is arbitrary and capricious. *See Moncrieffe v. Holder*, 133 S.Ct. 1678, 1690 (2013) (describing how the avoidance of "minitrials" "promotes judicial and administrative efficiency").

133. The Rule fails to offer any substantial evidence or reasoned explanation to support its conclusions relating to the "seriousness" or "dangerousness" of the offenses (or conduct) that are the subject of its automatic bars. For instance, the Rule's reliance on criminal history, recidivism, and their connection to "dangerousness" in general establishes nothing about the danger to the community associated with the specific offense of illegal reentry. *See* 84 Fed. Reg. at 69648; 85 Fed. Reg. at 67243. The same is true of the Rule's reliance on decade-old, non-targeted studies to support its bar on offenses involving criminal street gangs. 84 Fed. Reg. at 69649–50; 85 Fed. Reg. at 67225. This absence of substantial evidence or reasoned explanation renders the rule arbitrary and capricious.

134. Finally, the Rule also entirely fails to consider numerous important aspects of the problem. The Rule repeatedly states that material and foreseeable impacts associated with its novel constraints on asylum eligibility were "outside the scope of the rulemaking"—including the effect of the rule on the asylum system itself. *See* 85 Fed. Reg. 67244–45. The agency's failure to acknowledge and consider these matters renders the rule arbitrary and capricious.

THIRD CLAIM FOR RELIEF

Defendants failed to provide adequate notice and opportunity to comment under the APA

135. Plaintiffs incorporate and reallege the allegations above.

136. The APA requires a court to hold unlawful and set aside agency action that is arbitrary, capricious, or "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (D).

137. The APA also requires an agency proposing a new rule to provide public notice and to "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation." 5 U.S.C. § 553(c).

138. The 30-day notice-and-comment period provided was inadequate in light of the proposed rule's evident complexity and potential for far-reaching impact. The Rule was also part of an improperly staggered rulemaking process, which prevented the public from understanding and commenting on the final regulatory regime. Further, the Agency did not respond adequately to public comments, repeatedly declaring that foreseeable impacts of the Rule—including "humanitarian concerns for asylum seekers" facing deportation to countries in which they face persecution—were "outside of the scope of this rulemaking." 85 Fed. Reg. at 67243. The Rule is therefore invalid.

FOURTH CLAIM FOR RELIEF

Defendant Wolf lacked the authority to issue the Rule under the Appointments Clause of the U.S. Constitution, the Homeland Security Act, and the Federal Vacancies Reform Act

139. Plaintiffs incorporate and reallege the allegations above.

140. The Secretary of Homeland Security is a principal officer of the United States whose appointment requires Presidential nomination and Senate confirmation. *See* 6 U.S.C. § 112(a)(1); *see also* U.S. Const. art. II, § 2, cl. 2.

141. Defendant Chad Wolf purports to serve as the Acting Secretary of DHS; however, he has not been confirmed by the Senate to hold that office and has no valid legal claim to the role.

142. The HSA mandates that, in the event of the "absence, disability, or vacancy in office" of the DHS Secretary, the Deputy DHS Secretary is first in the order of succession, followed by the Under Secretary for Management. 6 U.S.C. § 113(g)(1). After the Deputy Secretary and the Under Secretary for Management, the HSA allows the Secretary to "designate such other officers of the Department in further order of succession to serve as acting secretary." *Id.* § 113(g)(2).

143. Although Wolf's predecessor, Kevin McAleenan, attempted to invoke § 113(g)(2) to amend the order of succession on November 8, 2019, the GAO has since issued a decision concluding that the "incorrect official assumed the title of Acting Secretary at [the time of former Secretary Nielsen's resignation]" and that "subsequent amendments to the order of succession made by [McAleenan]

were invalid and officials who assumed their positions under such amendments, including Chad Wolf and Kenneth Cuccinelli, were named by reference to an invalid order of succession." *See* GAO Decision 1. The GAO's interpretation is correct.

144. Wolf's claim to the role of Acting Secretary fares no better under the FVRA. The FVRA states that a person serving as an acting officer may serve in the office "for no longer than 210 days *beginning on the date the vacancy occurs*," except under narrow circumstances. 5 U.S.C. § 3346(a)(1) (emphasis added).

145. The relevant vacancy occurred, at the latest, by April 10, 2019, the purported effective date of former Secretary Kirstjen Nielsen's resignation.

146. Wolf purported to assume the role of Acting Secretary of DHS on November 13, 2019, after the 210-day period set forth in the FVRA had passed. Both the proposed and final Rule were also issued well beyond the statutory time limit.

147. Because Defendant Wolf is performing the functions and duties of the Secretary of DHS without having been confirmed by the Senate, in reliance on invalid orders of succession, and far past the 210-day period set forth in the FVRA, he did not have valid authority to issue the Rule under the Appointments Clause of the U.S. Constitution, the HSA, and/or the FVRA.

148. The Rule, to the extent it relies on authority from DHS and/or Defendant Wolf, is thus invalid and should not be permitted to take effect.

FIFTH CLAIM FOR RELIEF

The Rule violates the Regulatory Flexibility Act

149. Plaintiffs incorporate and reallege the allegations above.

150. The RFA requires federal administrative agencies to analyze the effects on "small entities" of rules they promulgate, and to publish initial and final versions of those analyses. *See* 5 U.S.C. §§ 603–604.

151. Under the RFA, the court may set aside, stay, or grant other relief for agency action in violation of the RFA, *id.* §§ 601, 604, 605(b), 608(b), and 610. *Id.* 5 U.S.C. § 611.

152. The Rule is a "rule" within the meaning of the RFA. *Id.* § 601(2).

153. The RFA defines "small entities" to include small businesses, small nonprofit organizations, and small governmental jurisdictions. *Id.* § 601(6). Each of the Plaintiffs is a "small entity" within the meaning of the RFA and is directly affected by the Rule, which, among other things, will require them to devote substantial resources to addressing the new restrictions on asylum eligibility imposed by the Rule and will jeopardize their funding.

154. DOJ and DHS's regulatory flexibility analysis does not comply with the RFA because DOJ and DHS concluded that the Rule will not have a significant impact on small entities. In lieu of an adequate explanation, the Rule simply asserts that "[o]nly individuals, rather than entities, are eligible to apply for asylum," a statement that wholly ignores the impact of the Rule on Plaintiffs and other organizations that serve asylum-seekers. 85 Fed. Reg. at 67255.

155. The RFA requires DOJ and DHS to describe and estimate the number of small entities that would be affected by the Rule. 5 U.S.C. § 604(a)(4). DOJ and DHS did not do so and refused to include small nonprofit organizations affected by the Rule. 85 Fed. Reg. at 67255.

156. The RFA requires DOJ and DHS to describe "the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the [Rule] and why each one of the other significant alternatives to the [Rule] considered by the agency which affect the impact on small entities was rejected." 5 U.S.C. § 604(a)(6). Again, DOJ and DHS failed to describe any such steps and failed to consider the "stated objectives of applicable statutes," *id.*, including the INA, the Refugee Act, and the HSA. 85 Fed. Reg. at 67255.

157. As a result of the foregoing, the Rule's regulatory flexibility analysis does not comply with the RFA.

158. The Rule's regulatory flexibility analysis is also arbitrary and capricious because it does not reflect reasoned decision-making and fails to support its conclusions with substantial evidence.

159. The Rule is therefore unlawful and must be set aside. *See* 5 U.S.C. § 611; *id.* § 706.

SIXTH CLAIM FOR RELIEF

The Rule violates the Fifth Amendment's Due Process Clause

160. Plaintiffs incorporate and reallege the allegations above.

161. The Due Process Clause of the Fifth Amendment prohibits laws and regulations that fail to "give ordinary people fair warning about what the law demands of them." *United States v. Davis*, 139 S. Ct. 2319, 2323 (2019). The requirement of fair notice applies in civil contexts just as in criminal. *Sessions v. Dimaya*, 138 S. Ct. 1204, 1212–13 (2018) (plurality opinion). Given the "grave nature of deportation," the "most exacting vagueness standard" applies in the immigration context." *Id*. at 1213.

162. The Rule is unconstitutionally vague. It fails to provide fair notice of the conduct that may result in a bar to asylum eligibility and invites arbitrary enforcement by immigration adjudicators.

163. For example, the Rule suggests that an asylum-seeker may be barred from eligibility if they are convicted of *any* crime the adjudicator "knows or has reason to believe" was committed in support, promotion, or furtherance of the activity of a criminal street gang. 85 Fed. Reg. at 67258–59 (to be codified at 8 C.F.R. §§ 208.13(c)(6)(ii), 1208.13(c)(6)(ii)). The Rule provides no description of what behaviors, associations, or statuses could lead an adjudicator to find that an asylum-seeker was involved in gang activity or that their conduct was in furtherance of the activity of a criminal street gang. Nor does it provide any guidance on the types of offenses or circumstances that may trigger such an inquiry, or any limitation on the evidence to which an adjudicator may look to make such a determination.

164. Similarly, the Rule allows adjudicators to determine whether a conviction amounts to a domestic violence offense (for purposes of triggering an asylum eligibility bar) and, even where the asylum-seeker has *not* been convicted, allows the adjudicator to determine that an asylum-seeker is barred from eligibility if the adjudicator "knows or has reason to believe" that the person engaged in battery or extreme cruelty involving a domestic relationship. *Id*. at 67258–60 (to be codified at 8 C.F.R. §§ 208.13(c)(6)(vii), 1208.13(c)(6)(vii)). The Rule again provides no guidance for this assessment, including when such an assessment is appropriate; what factors should be considered in determining whether conduct amounts to domestic violence; and what standard should be applied.

SEVENTH CLAIM FOR RELIEF

The Rule violates the Fifth Amendment's Equal Protection Component

165. Plaintiffs incorporate and reallege the allegations above.

166. The equal protection component of the Fifth Amendment prohibits Defendants from denying equal protection of laws to persons residing in the United States. Official actions that reflect a racially discriminatory intent or purpose thus violate the Fifth Amendment's equal protection component. *See Bolling v. Sharpe*, 347 U.S. 497, 499–500 (1954), *supplemented sub. nom. Brown v. Bd. of Educ.*, 349 U.S. 294 (1955); *see also Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–66 (1977). Even facially neutral policies and practices are unconstitutional if they reflect racial animus or discrimination. *Id*. at 266.

167. In the instant case, Defendants violated the Fifth Amendment because they acted with a discriminatory purpose based on race, ethnicity, and national origin in issuing the Rule. The Rule thus violates the guarantee of equal protection under the Fifth Amendment.

168. Defendants' discriminatory intent in promulgating this Rule is evinced by, among other things, the Rule's impact on non-white immigrants and DHS and DOJ's complete dismissal of and failure to contend with this disproportionate impact as falling "beyond the scope of [the] rule." 85 Fed. Reg. at 67226.

169. Moreover, the Rule was promulgated following years of repeated comments by President Trump and others within the Trump Administration reflecting racial, ethnic, and national origin-based animus, including referring to immigrants as "rapists," "druggies," and "killers" and comparing immigrants to rats and other pests.

170. Defendants have failed to articulate a compelling governmental interest justifying the promulgation of the Rule, and they have not tailored the Rule to address any legitimate interest.

171. Plaintiffs and the communities they serve will suffer severe harm as a result of the implementation of the Rule.

JURY DEMAND

172. Plaintiffs demand a jury trial on all counts triable by jury.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request that the Court:

A. Hold unlawful and set aside the Rule under 5 U.S.C. § 706(2);

B. Declare the Rule arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law, and without observance of procedure as required by law, in violation of the APA, INA, and RFA;

C. Declare the Rule invalid for being co-issued by Defendant Chad Wolf, who lacked the authority to do so pursuant to the Appointments Clause of the United States Constitution, the HSA, and the FVRA;

D. Declare the Rule unconstitutional for violating the Due Process and Equal Protection guarantees of the Fifth Amendment of the United States Constitution;

E. Enter a preliminary and permanent nationwide injunction, without bond, enjoining Defendants, their officials, agents, employees, and assigns from implementing or enforcing the Rule;

F. Stay the implementation or enforcement of the Rule;

G. Award Plaintiffs reasonable attorneys' fees and costs pursuant to 28 U.S.C. § 2412; and

H. Grant any other and further relief this Court may deem just and proper.

Respectfully submitted,

DATE: November 2, 2020

/s/ Naomi A. Igra

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CIVIL COVER SHEET

The JS-CAND 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved in its original form by the Judicial Conference of the United States in September 1974, is required for the Clerk of Court to initiate the civil docket sheet. *(SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)*

I. (a) PLAINTIFFS

See Attachment 1

(b) County of Residence of First Listed Plaintiff
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys *(Firm Name, Address, and Telephone Number)*

See Attachment 2

DEFENDANTS

See Attachment 1

County of Residence of First Listed Defendant
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys *(If Known)*

II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*

- ☐ 1 U.S. Government Plaintiff
- ☐ 3 Federal Question *(U.S. Government Not a Party)*
- ☒ 2 U.S. Government Defendant
- ☐ 4 Diversity *(Indicate Citizenship of Parties in Item III)*

III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff and One Box for Defendant)*

(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated *or* Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated *and* Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT *(Place an "X" in One Box Only)*

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment Of Veteran's Benefits
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excludes Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☐ 190 Other Contract
- ☐ 195 Contract Product Liability
- ☐ 196 Franchise

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury
- ☐ 362 Personal Injury -Medical Malpractice

PERSONAL INJURY
- ☐ 365 Personal Injury – Product Liability
- ☐ 367 Health Care/ Pharmaceutical Personal Injury Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

CIVIL RIGHTS
- ☐ 440 Other Civil Rights
- ☐ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing/ Accommodations
- ☐ 445 Amer. w/Disabilities–Employment
- ☐ 446 Amer. w/Disabilities–Other
- ☐ 448 Education

PRISONER PETITIONS

HABEAS CORPUS
- ☐ 463 Alien Detainee
- ☐ 510 Motions to Vacate Sentence
- ☐ 530 General
- ☐ 535 Death Penalty

OTHER
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Condition
- ☐ 560 Civil Detainee–Conditions of Confinement

FORFEITURE/PENALTY
- ☐ 625 Drug Related Seizure of Property 21 USC § 881
- ☐ 690 Other

LABOR
- ☐ 710 Fair Labor Standards Act
- ☐ 720 Labor/Management Relations
- ☐ 740 Railway Labor Act
- ☐ 751 Family and Medical Leave Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Employee Retirement Income Security Act

IMMIGRATION
- ☐ 462 Naturalization Application
- ☐ 465 Other Immigration Actions

BANKRUPTCY
- ☐ 422 Appeal 28 USC § 158
- ☐ 423 Withdrawal 28 USC § 157

PROPERTY RIGHTS
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 835 Patent—Abbreviated New Drug Application
- ☐ 840 Trademark
- ☐ 880 Defend Trade Secrets Act of 2016

SOCIAL SECURITY
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS
- ☐ 870 Taxes (U.S. Plaintiff or Defendant)
- ☐ 871 IRS–Third Party 26 USC § 7609

OTHER STATUTES
- ☐ 375 False Claims Act
- ☐ 376 Qui Tam (31 USC § 3729(a))
- ☐ 400 State Reapportionment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced & Corrupt Organizations
- ☐ 480 Consumer Credit
- ☐ 485 Telephone Consumer Protection Act
- ☐ 490 Cable/Sat TV
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 890 Other Statutory Actions
- ☐ 891 Agricultural Acts
- ☐ 893 Environmental Matters
- ☐ 895 Freedom of Information Act
- ☐ 896 Arbitration
- ☒ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- ☐ 950 Constitutionality of State Statutes

V. ORIGIN *(Place an "X" in One Box Only)*

☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from Another District *(specify)* ☐ 6 Multidistrict Litigation–Transfer ☐ 8 Multidistrict Litigation–Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing ***(Do not cite jurisdictional statutes unless diversity)***:
5 U.S.C. § 702

Brief description of cause:
Violation of Administrative Procedure Act, Regulatory Flexibility Act, Fifth Amendment (Equal Protection and Due Process), Appointments Clause of the U.S. Constitution, the Homeland Security Act, and the Federal Vacancies Reform Act

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A **CLASS ACTION** UNDER RULE 23, Fed. R. Civ. P.

DEMAND $

CHECK YES only if demanded in complaint:
JURY DEMAND: ☒ Yes ☐ No

VIII. RELATED CASE(S), IF ANY *(See instructions):*

JUDGE

DOCKET NUMBER

IX. DIVISIONAL ASSIGNMENT (Civil Local Rule 3-2)

(Place an "X" in One Box Only) ☒ **SAN FRANCISCO/OAKLAND** ☐ **SAN JOSE** ☐ **EUREKA-MCKINLEYVILLE**

DATE 11/02/2020

SIGNATURE OF ATTORNEY OF RECORD /s/ Naomi A. Igra

ATTACHMENT 1

Plaintiffs	**Defendants**
PANGEA LEGAL SERVICES; DOLORES STREET COMMUNITY SERVICES, INC.; CATHOLIC LEGAL IMMIGRATION NETWORK, INC.; and CAPITAL AREA IMMIGRANTS' RIGHTS COALITION	U.S. DEPARTMENT OF HOMELAND SECURITY; CHAD F. WOLF, under the title of Acting Secretary of Homeland Security; KENNETH T. CUCCINELLI, under the title of Senior Official Performing the Duties of the Deputy Secretary for the Department of Homeland Security; U.S. CITIZENSHIP AND IMMIGRATION SERVICES; U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; TONY H. PHAM, under the title of Senior Official Performing the Duties of the Director of U.S. Immigration and Customs Enforcement; U.S. CUSTOMS AND BORDER PROTECTION; MARK A. MORGAN, under the title of Senior Official Performing the Duties of the Commissioner of U.S. Customs and Border Protection; U.S. DEPARTMENT OF JUSTICE; WILLIAM P. BARR, under the title of U.S. Attorney General; EXECUTIVE OFFICE FOR IMMIGRATION REVIEW; and JAMES MCHENRY, under the title of Director of the Executive Office for Immigration Review

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(Additional counsel listed on signature page)

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO

PANGEA LEGAL SERVICES, *et al.*,

Plaintiffs,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY *et al.*,

Defendants.

Case No. 3:20-cv-7721

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR MOTION FOR A TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE

Assigned to Hon.

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I. INTRODUCTION

The Departments of Justice and Homeland Security have—without proper procedure or reasoned decision-making—issued a Rule that conflicts directly with the statutory asylum regime. The Rule would impose several new categorical bars to asylum eligibility based on convictions for—or mere suspicion of—generally minor criminal offenses. A second misdemeanor conviction for marijuana possession; a misdemeanor conviction for using a fake ID; a misdemeanor vandalism conviction for graffiti that the government has "reason to believe" is a gang sign; literally *any* felony, from driving with a suspended license to unlawfully exporting fish—all would now bar people from asylum in the United States, even if they could show a well-founded fear of persecution in their home countries. The Rule also empowers asylum adjudicators to second-guess judges' reasons for vacating or modifying criminal convictions, and it removes regulations governing automatic reconsideration of discretionary asylum denials. If allowed to take effect, these unprecedented changes will force countless people to return to countries where they will likely be beaten, tortured, or even killed.

The Rule violates the APA because it conflicts with the Immigration and Nationality Act (INA). Consistent with the international obligations that undergird our asylum system, Congress in the INA made only narrow categories of people ineligible for asylum based on their conduct: Those who have persecuted others, who have committed a "serious nonpolitical crime" abroad or been convicted of a "particularly serious crime," who are a "danger to the security of the United States," or who have engaged in terrorist activity. 8 U.S.C. § 1158(b)(2)(A). These bars all address people "who pose a threat to society." *E. Bay Sanctuary Covenant v. Barr*, 964 F.3d 832, 846 (9th Cir. 2020) (*EBSC III*). And any additional regulatory bars must be "consistent with" this "core principle." *Id*. at 848 (quoting 8 U.S.C. § 1158(b)(2)(C)). The Rule's new bars flunk that test. They address conduct that does not come close to the level Congress specified, and they are not remotely tailored to address dangerousness. And apart from conclusory and unsupported assertions, Defendants do not really try to show otherwise. Instead, they declare that these bars exclude people who show "a disregard for the societal values of the United States" and thus "should not be rewarded with asylum." 85 Fed. Reg. at 67225, 67242. But that is not the statutory principle. Nor is it the humanitarian commitment we made to refugees and other nations. The Rule thus conflicts with Congress's carefully drawn asylum regime.

The Rule is unlawful for other reasons, too. The INA provides no support for the presumption that state court orders vacating convictions to cure constitutional or substantive errors can be ignored because they actually have other purposes. And some of the Rule's bars are so vague that they violate due process. The Rule is also arbitrary and capricious: It departs from longstanding agency precedent without adequate explanation and fails to offer substantial evidence to support its conclusions or to consider important aspects of the issues presented. What is more, the Rule is procedurally invalid. Defendants provided just 30 days, spanning the 2019 end-of-year holidays, to comment on this major overhaul of the asylum system, which was also part of an improperly staggered rulemaking process. Nor does the Rule conduct the federalism or regulatory-flexibility analyses that federal law required.

Unless this Court stops the Rule from taking effect on November 20, it will cause immediate, irreparable harm. Under the Rule, Plaintiffs—nonprofits that help low-income immigrants seek asylum and provide resources and training to others who help asylum-seekers—will be forced to "divert resources away from [their] core programs to address the new policy." *E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1280 (9th Cir. 2020) (*EBSC II*). They will have to devote significant resources to analyzing and interpreting the Rule, creating new informational materials and resources, and retraining thousands of people. The Rule's changes will also make it more difficult (or impossible) for legal assistants and law students to perform tasks like client intake. And it will cause "ongoing harms to [Plaintiffs'] organizational missions," *EBSC III*, 964 F.3d at 854, by increasing the time spent on each asylum seeker's case. Plaintiffs will thus "provid[e] fewer services to fewer individuals," frustrating their missions. *Id*. For the same reasons, the Rule "directly threatens their standard caseload, and consequently, their caseload[] dependent funding." *Id.* These harms are all irreparable.

The public interest and equities also favor relief. There is a strong interest in preventing the wrongful removal and possible deaths of asylum-seekers, and in ensuring that the government follows the law. The Court should enjoin or stay the Rule's effectiveness before November 20.

II. BACKGROUND

A. The INA's asylum provisions.

The U.S. asylum system is founded on the 1951 Convention Relating to the Status of Refugees (Refugee Convention) and the 1967 U.N. Protocol Relating to the Status of Refugees (1967 Protocol),

by way of the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102. "In enacting the Refugee Act, Congress sought to bring United States refugee law into conformity with the" 1967 Protocol, which in turn "incorporates the substantive provisions" of the Refugee Convention. *Barapind v. Reno*, 225 F.3d 1100, 1106 (9th Cir. 2000). The Refugee Act amended the INA to include a formal process for people fearing persecution to apply for asylum, thus codifying our long tradition of "welcoming the oppressed of other nations." H.R. Conf. Rep. 96-608, at 17 (1979).

Today, a person may seek asylum in the United States "because of persecution or a well-founded fear of persecution" on a protected ground. 8 U.S.C. §§ 1101(a)(42)(A), 1158(b)(1)(A). Among other criteria, a person must not (i) have participated in the persecution of others; (ii) have "been convicted by a final judgment of a particularly serious crime," thus "constitut[ing] a danger to the community of the United States"; (iii) have committed a "serious nonpolitical crime outside the United States"; (iv) be "a danger to the security of the United States"; (v) have engaged in terrorist activity or been part of a terrorist group; or (vi) have "firmly resettled in another country." *See id.* § 1158(b)(2)(A)(i)–(vi). Congress codified these provisions "so that U.S. statutory law clearly reflects our legal obligations under international agreements." *See* H.R. Rep. No. 96-608, at 18 (1979).

B. The proposed Rule.

Defendants proposed the Rule on December 19, 2019, just before the year-end holidays. *See* 84 Fed. Reg. 69640. The proposal included several new categorical bars to asylum eligibility:

(i) any felony conviction under federal, state, or local law;

(ii) any conviction for specified misdemeanor offenses, including any drug-related offense (except first-time marijuana possession), any offense involving possession or use of a false identification document, or unlawfully receiving public benefits.

(iii) any conviction for "smuggling or harboring" non-citizens under 8 U.S.C. § 1324(a);

(iv) any conviction for illegal reentry under 8 U.S.C. § 1326;

(v) any conviction for a DUI offense that resulted in serious bodily injury or death, or for any second or subsequent DUI offense, even if no one was injured;

(vi) any conviction for various family- or child-related offenses like stalking or child neglect, or any situation where there are "serious reasons for believing" the person engaged in "acts of battery or extreme cruelty" in a domestic relationship, even without a conviction; and

(vii) any conviction for an offense the asylum adjudicator "knows *or has reason to believe* was committed in support, promotion, or furtherance of the activity of a criminal street gang."

84 Fed. Reg. at 69659–60 (emphasis added). As authority for these new bars, the proposal invoked 8 U.S.C. § 1158(b)(2)(B)(ii), which allows the Attorney General to designate "offenses that will be considered" particularly serious crimes, and § 1158(b)(2)(C), which allows the Attorney General to "establish additional limitations and conditions, consistent with this section, under which [a noncitizen] shall be ineligible for asylum." *See* 84 Fed. Reg. at 69643–44.

The proposed Rule also presumed that criminal convictions remain effective (and thus trigger the asylum bars) despite any vacatur, expungement, or modification, if (a) the vacatur or modification order was entered after removal proceedings began or (b) the applicant moved for the order more than a year after conviction or sentencing—even if the order was made to correct constitutional or substantive legal defects. *See id.* at 69654–55. It placed the burden on the asylum-seeker to establish that any vacatur or modification to the underlying conviction or sentence was not made for rehabilitative or "immigration purposes," and it empowered asylum adjudicators to consider evidence beyond the face of the court order to determine the ruling state judge's "purposes." *See id.*

Finally, Defendants proposed to eliminate 8 C.F.R. § 208.16(e), which provides for automatic review of a discretionary denial of asylum where an asylum-seeker is denied asylum but granted withholding of removal under 8 U.S.C. § 1231(b)(3), and bona fide refugees are thus precluded from reuniting with their spouses and minor children. *See id.* at 69656–57.

Defendants gave the public just 30 days to comment on these major changes, ending January 21, 2020. *Id.* at 69640. This already-brief period spanned Christmas Eve, Christmas Day, New Year's Day, Hanukkah, Kwanzaa, and the birthday of Martin Luther King, Jr. The comment period thus included just 15 business days. Even so, Defendants ignored requests to extend it.

C. The final Rule.

The final Rule—published on October 21, with an effective date of November 20—is essentially unchanged from the proposal. Defendants merely replaced the "serious reasons for believing" standard in the new suspicion-of-domestic-violence bar with "knows or has reason to believe." *See*

85 Fed. Reg. at 67255. Otherwise, they made only technical changes to the regulatory text. And they largely brushed aside comments opposing the rule, declaring that many issues commenters raised "are outside the scope of this rulemaking." *E.g.*, *id*. at 67226. They also backpedaled on the authority for the Rule's new eligibility bars; while the proposal said most of the bars were supported by the Attorney General's power to designate new "particularly serious crimes," the final Rule disclaims that authority, even as it continues to argue that the new bars are "similar" to particularly serious crimes. *Id.* at 67207.

III. LEGAL STANDARD

To obtain a temporary restraining order, a preliminary injunction, or a stay under 5 U.S.C. § 705, plaintiffs must show that (1) they are "likely to succeed on the merits," (2) they are "likely to suffer irreparable harm" absent relief, (3) "the balance of equities tips in [their] favor," and (4) relief "is in the public interest." *San Francisco v. USCIS*, 408 F. Supp. 3d 1057, 1078 (N.D. Cal. 2019). Also, "serious questions going to the merits" and "a hardship balance that tips sharply toward the plaintiff can support" injunctive relief. *Id*.; *M.R. v. Dreyfus*, 735 F.3d 1058, 1059 (9th Cir. 2011).

IV. ARGUMENT

A. Plaintiffs are likely to succeed on the merits.

The APA requires a reviewing court to "hold unlawful and set aside agency action" that is "arbitrary, capricious," "not in accordance with law," "contrary to constitutional right," "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," or "without observance of procedure required by law." 5 U.S.C. § 706(2). The Rule is invalid on all of these grounds.

1. The Rule conflicts with the governing INA provisions.

"Federal courts are 'the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.'" *EBSC II*, 950 F.3d at 1272. That is the case here, as the INA's text, structure, and history show.

a. The Rule's new categorical asylum bars are not "consistent with" Congress's carefully drawn regime.

The Rule's new asylum bars, based on broad categories of criminal convictions or suspected conduct, conflict with the INA. The final Rule asserts that these unprecedented measures are a valid exercise of the Attorney General's authority to "establish additional limitations and conditions" on

asylum eligibility. *E.g.*, 85 Fed. Reg. at 67236. But any such limitations must be "consistent with this section." 8 U.S.C. § 1158(b)(2)(C). The "words 'consistent with'" thus "limit[ ] the scope of that authority." *EBSC III*, 964 F.3d at 848. In fact, "Congress went out of its way to insert the 'consistent with' language," underscoring "the importance Congress attached to the constraints on the Attorney General's discretion to prescribe criteria for asylum eligibility." *Id*. at 849. Thus, any "additional limitations and conditions under § 1158(b)(2)(C) must be consistent with the core principle of" § 1158(b)'s statutory eligibility bars. *Id.* at 848.

That core principle is protecting "the safety of those already in the United States," *EBSC II*, 950 F.3d at 1275, by excluding people "who pose a threat to society," *EBSC III*, 964 F.3d at 846. The statutory eligibility bars apply if the asylum applicant (i) persecuted others, (ii) was convicted of "a particularly serious crime" and thus "constitutes a danger to the community of the United States"; (iii) "committed a serious nonpolitical crime outside the United States"; (iv) is "a danger to the security of the United States"; or (v) has engaged in terrorist activity.[1] 8 U.S.C. § 1158(b)(2)(A). Categorical exclusion is thus reserved for the most serious offenses: Terrorists, "war crim[inals]," and people who are explicitly "a danger" to domestic or national security are ineligible. *See* H.R. Rep. No. 96-608, at 10, 18. Consistent with that principle, a U.S. criminal conviction bars eligibility only if it is "particularly serious" and makes the applicant "a danger." 8 U.S.C. § 1158(b)(2)(A)(ii). And in this context, "*a 'serious' crime must be a capital crime or a very grave punishable act*." *Alphonsus v. Holder*, 705 F.3d 1031, 1038 (9th Cir. 2013) (quoting *Matter of Frentescu*, 18 I. & N. Dec. 244, 246 (BIA 1982), in turn quoting UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (1979)), *abrogated on other grounds*, *Guerrero v. Whitaker*, 908 F.3d 541, 544 (9th Cir. 2018).[2]

This high standard is unsurprising. These INA provisions implement Article 33(2) of the Refugee Convention, which renders ineligible "a refugee whom there are reasonable grounds for regarding as a danger to the security of the country" or "who, having been convicted by a final judgment of

[1] The exception is § 1158(b)(2)(A)(vi)'s bar for people "firmly resettled" in other countries, who "do not need" asylum. *EBSC III*, 964 F.3d at 846–47. The Rule does not invoke § 1158(b)(2)(A)(vi).

[2] Congress also provided that a noncitizen "who has been convicted of an aggravated felony shall be considered to have been convicted of a particularly serious crime." 8 U.S.C. § 1158(b)(2)(B)(i); *see id.* § 1101(a)(43) (listing aggravated felonies).

a particularly serious crime, constitutes a danger to the community of that country." This provision—a narrow exception to Article 33(1)'s commitment not to return people to persecution—is aimed at crimes showing "a complete or near complete lack of social and moral inhibitions," like "blowing up [ ] a passenger airplane in order to collect life insurance," or "wanton killing in a public place." *Alphonsus*, 705 F.3d at 1037 n.6. A "common crime (or crimes) of a less serious nature" do not warrant the harsh penalty of asylum ineligibility. *See UNHCR Handbook* ¶ 151. And "Congress imbued these international commitments with the force of law when it enacted the Refugee Act." *R-S-C v. Sessions*, 869 F.3d 1176, 1178 (10th Cir. 2017). In turn, "the categorical bars on eligibility in the INA are interpreted with lenience toward migrants to avoid infringing on [these] commitments." *EBSC II*, 950 F.3d at 1275.

As the Rule concedes, any new regulatory bar must be "consistent" with these standards. 8 U.S.C. § 1158(b)(2)(C); 85 Fed. Reg. at 67236. So, for example, the Ninth Circuit recently held that a categorical bar based on "method of entry" was "inconsistent with the INA" because "a migrant's method of entry" does not "per se create a danger to the United States, serve as a useful proxy for terrorist activity, or suggest the persecution of another." *EBSC II*, 950 F.3d at 1261, 1276. So too here. The Rule's new eligibility bars are not "a useful proxy" for dangerousness and do not involve "particularly serious" or "very grave" criminal acts. Instead, they would arbitrarily deny eligibility to countless bona fide refugees, contrary to our basic international and statutory commitments.

Any felony. The Rule reaches "[a]ny felony under Federal, State, tribal, or local law," 85 Fed. Reg. at 67258, meaning "any crime defined as a felony by the relevant jurisdiction" or "punishable by more than one year of imprisonment," *id*. at 67260. But Congress made only certain specified felonies an eligibility bar. *Supra* p. 6 n.2. And many felonies do not "per se create a danger" to others, *EBSC II*, 950 F.3d at 1276, and do not approach the seriousness Congress required.

In some states, "driving under a suspended license" can be a felony. *E.g.*, *State v. Hittle*, 257 Neb. 344, 355 (Neb. 1999); *Adams v. Commonwealth*, 46 S.W.3d 572, 574 (Ky. Ct. App. 2000); *cf. Guerrero*, 908 F.3d at 545 (noting that "a minor traffic infraction is not 'particularly serious'"). In Maryland, selling alcohol to a visibly intoxicated person, Md. Code, Alco. Bev. § 6-307, using a tele-

phone to make a single anonymous call to annoy or embarrass, Md. Crim. L. § 3-804(a)(l), and temporarily using someone else's car without their consent, *id.* § 7-203, are all punishable by more than a year's imprisonment. In Arizona, "recklessly . . . [d]efacing" a school building—something countless teenaged pranksters have done—is a felony. Ariz. Rev. Stat. § 13-1604(A)(2), (B)(1)(a). Federal law, too, includes many felonies that involve no danger. *See generally* HARVEY SILVERGLATE, THREE FELONIES A DAY (2011). For example, knowingly and unlawfully "export[ing] any fish or wildlife" is punishable by up to five years' imprisonment. 16 U.S.C. § 3373(d)(1). None of these offenses approach the seriousness required to categorically deny asylum eligibility.

What is more, some states punish simple drug possession or use as a felony. *E.g.*, *Waits v. State*, 56 S.W.3d 894, 895 (Tex. App. 2001) ("possession of less than one gram of cocaine"); Nev. Rev. Stat. 453.411(1), (3)(a) (using any amount of certain controlled substances); *Matthews v. State*, 296 So. 3d 887, 889 (Ala. Crim. App. 2019) ("unlawful possession of a controlled substance"). The Rule thus sweeps in many minor drug offenses. That result clashes with Congress's choice to make only drug *trafficking* an aggravated felony, 8 U.S.C. § 1101(a)(43)(B), and ignores that drug "possession for personal use . . . would not meet the threshold of seriousness" under the Refugee Convention.[3] A categorical bar reaching *any* felony conflicts with both the "core principle" of the statutory eligibility bars, *see EBSC III*, 964 F.3d at 848, and with Congress's inclusion of only certain, specified felonies.

Misdemeanors. The Rule's misdemeanor bar is equally improper. This bar would reach anyone with a misdemeanor conviction for "[p]ossession . . . of a controlled substance or controlled-substance paraphernalia, other than a single offense involving possession for one's own use of 30 grams or less of marijuana." 85 Fed. Reg. at 67260. Thus, a second misdemeanor conviction for marijuana possession—or a first conviction for possessing *any* amount of any other drug—would make someone ineligible for asylum. So would a first misdemeanor conviction for possessing "controlled-substance paraphernalia," *id.*, for example, any "object that can be used to unlawfully inject or smoke a controlled substance," Judicial Council of Cal., Crim. Jury Instr. No. 2410. Again, that result clashes with the statutory principle, Congress's treatment of drug offenses, and our treaty obligations.

[3] *See* 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.

The misdemeanor bar would also reach "possession or use of an identification document, authentication feature, or false identification document without lawful authority." 85 Fed. Reg. at 67260. So a 20-year-old convicted of using a fake ID to enter a bar, or an asylum-seeker using a false SSN to get a job to feed her family (because other recent rules make work permits harder to get), would be barred from asylum. And the bar would reach any misdemeanor conviction for "receipt of . . . public benefits" from any governmental entity "without lawful authority." *See id*. These offenses involve no danger to anyone and do not approach the "grave" seriousness required to deny asylum eligibility.

Immigration offenses. The Rule's bar for immigration-related convictions under 8 U.S.C. §§ 1324(a)(1)(A), (a)(2), and 1326 likewise clashes with Congress's design. *See* 85 Fed. Reg. at 67259. As relevant, § 1324 addresses "[b]ringing in and harboring" certain noncitizens who are not authorized to enter the country. 8 U.S.C. § 1324(a)(1)(A), (a)(2). These provisions would cover, for example, an asylum-seeker who entered the country unlawfully and brought her own spouse, child, or parent to safety in the process. Barring eligibility on that basis is not consistent with the statute. The Board of Immigration Appeals itself has recognized that such an offense can be "motivated by love, charity, or kindness, or by religious principles." *In re L-S-*, 22 I. & N. Dec. 645, 655 (BIA 1999). This bar also ignores Congress's careful drafting: A violation of § 1324(a)(1)(A) or (a)(2) is an aggravated felony *unless* the noncitizen "committed the offense for the purpose of assisting, abetting, or aiding only the [noncitizen's] spouse, child, or parent (and no other individual) to violate a provision of this chapter." 8 U.S.C. § 1101(a)(43)(N). But the Rule contains no similar carve-out, and thus denies asylum eligibility based on violations that Congress specifically exempted. That is improper.

Section 1326(a) addresses illegal reentry. *See* 8 U.S.C. § 1326(a). But as already noted, a rule "categorically denying refugees an opportunity to seek asylum only because of their method of entry" is "inconsistent with the INA." *See EBSC II*, 950 F.3d at 1261, 1276; 8 U.S.C. § 1158(a)(1). Such a rule is also "inconsistent with the treaty obligations that the United States has assumed and that Congress has enforced" by statute. *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 773 (9th Cir. 2018) (*EBSC I*). And Defendants again ignore Congress's choices. A violation of § 1326 is an aggravated felony that bars eligibility—but *only* when "committed by [a noncitizen] who was previously deported" for another aggravated felony. 8 U.S.C. § 1101(a)(43)(O). By treating *every* conviction

under § 1326 as a bar to asylum, Defendants overstep Congress's boundary. And their rationale is faulty. They say this bar ensures "the orderly and lawful admission of aliens into the United States." 85 Fed. Reg. at 67222. But that is not the principle of § 1158(b)'s eligibility bars.

Driving under the influence. The DUI bars fare no better. *See* 85 Fed. Reg. at 67259. They apply to any conviction for driving under the influence of "alcohol or drugs," whether "misdemeanor or felony," that either (i) "was a cause of serious bodily injury or death of another person" or (ii) was "a second or subsequent offense." *Id*. So even a second DUI misdemeanor would qualify—no matter the circumstances, no matter how long the gap between the two convictions, and even if no one was hurt. But DUI is not akin to the "particularly serious crimes" the Refugee Act contemplates or the aggravated-felony definition. "Driving under the influence has little in common with these sorts of crimes." *Delgado v. Holder*, 648 F.3d 1095, 1110 (9th Cir. 2011) (en banc) (Reinhardt, J., concurring). "It has not been specially targeted through federal legislation, nor is it mentioned elsewhere in the immigration laws, nor does it involve violence." *Id*. Indeed, "American voters would be unlikely to elect a president or vice president who had committed a particularly serious crime, yet they had no difficulty in recently electing to each office a candidate with a DUI record." *Id*.

Family-related offenses. The family-related-offense bars also clash with the statute. *See* 85 Fed. Reg. at 67259–60. These bars again sweep in conduct that does not approach the "particularly serious" level Congress deemed necessary to deny asylum eligibility. For example, denying asylum eligibility based on "child neglect," *id*. at 67259—and thus ensuring that the child is either permanently separated from the parent or is returned to her home country to face possible persecution too—is perverse. Child neglect is tragic, but it does not suggest that the asylum-seeker is *dangerous*; there are countless reasons why a person with limited means who fled persecution elsewhere might be accused of neglecting a child. Such conduct is nothing like the criminal offenses that bar eligibility by statute.

Likewise, the bar related to domestic "battery or extreme cruelty" is improper. To start, this bar "does not necessarily require a criminal conviction or criminal conduct." 85 Fed. Reg. at 67256 n.44. It instead applies if the adjudicator merely "has *reason to believe*" that the asylum-seeker "engaged" in such acts. *Id*. at 67260 (emphasis added). That is inconsistent with Congress's approach. Neither of the statutory eligibility bars based on criminal conduct in the United States apply based on

mere "reason to believe"—both require a final "convict[ion]." *See* 8 U.S.C. § 1158(b)(2)(A)(ii), (b)(2)(B)(i). And Defendants "are required to give effect to Congress' express inclusions and exclusions, not disregard them." *NAM v. Dep't of Def.*, 138 S. Ct. 617, 631 (2018).

But even if the "reason to believe" standard were proper, this bar sweeps too broadly. Domestic-violence incidents often result in the arrest of both the primary abuser and the survivor. These "cross-arrests" do not always yield clear determinations of victim and perpetrator. *See* 85 Fed. Reg. at 67228. Yet an arrest or a police report from such an incident could easily supply "reason to believe" that the victim "engaged . . . in acts of battery" against a "current or former spouse." *See id.* at 67260. The Rule would thus require asylum adjudicators to bar domestic-violence victims from asylum. The Rule's incorporation of the narrow exception for "victims of domestic violence" in 8 U.S.C. § 1227(a)(7)(A) does not solve this problem, *contra id.* at 67230, including because it involves a complex waiver process that applicants must know to undertake, and the waiver applies to a narrower set of offenses than the Rule does. In any event, Defendants do not and cannot contend that all domestic-violence offenses make the perpetrator a danger to the community or to national security. Instead, they argue that "such conduct must not be tolerated in the United States." 85 Fed. Reg. at 67229. Everyone can agree on that—but whether conduct should be "tolerated" is not the statutory principle.

The Rule also applies to "a crime that *involves conduct amounting to* a crime of stalking . . . or that *involves conduct amounting to* a domestic assault or battery offense." 85 Fed. Reg. at 67259 (emphasis added). As with the "reason to believe" standard, allowing asylum adjudicators to bar applicants based on unadjudicated conduct in the United States clashes with Congress's statutory approach, which nowhere incorporates such a malleable concept. In any event, the underlying conduct described here also does not rise to the level of the statutory eligibility bars. For example, many states' stalking laws can be violated by "cyberstalking," *i.e.*, maliciously engaging "in a course of conduct" through "electronic communication, directed at a specific person . . . causing substantial emotional distress to that person and serving no legitimate purpose." *E.g.*, Fla. Stat. § 784.048(1)(d), (2). That is not the kind of serious criminal violation required to bar asylum.

Suspected gang offenses. Finally, the "criminal street gang" bar is improper. This bar reaches anyone convicted of *any* offense that the adjudicator "knows or has reason to believe was committed

in support, promotion, or furtherance of the activity of a criminal street gang as that term is defined" in federal, state, or local law. 85 Fed. Reg. at 67259. So, for example, a misdemeanor vandalism conviction for graffiti would render someone ineligible for asylum if there were "reason to believe" the graffiti "promot[ed]" a gang. *Id.* Likewise, committing a petty crime while wearing a certain color or style of clothing that the government associates with a gang could exclude someone from asylum.[4] The applicant need not actually be a member of a gang or participate in any of the criminal conduct that makes it a "criminal street gang."

Contrary to the Rule's conclusory assertion, this sort of conduct is not remotely "similar" to the serious, dangerous acts Congress addressed by statute. 85 Fed. Reg. at 67225. Indeed, all of the "series of offenses" that a group of people must commit to be a "criminal street gang" under federal law, *see* 18 U.S.C. § 521(c), are already aggravated felonies, *see* 8 U.S.C. § 1101(a)(43)(B), (F), (K), (U). So if Defendants are concerned about "extortion threats, murders, kidnappings, and sexual assaults by organized criminal groups," 85 Fed. Reg. at 67205, they can rest easy—Congress has acted. But the Rule's street-gang bar is vastly overinclusive and thus is not tailored to address dangerousness. And the street-gang bar's "reason to believe" standard is also inconsistent with the statute: None of the statutory bars turn on offenses for which there is mere "reason to believe" some connection with some other kind of criminal conduct or group. In fact, as used in the street-gang bar, this standard is so vague that it violates due process, as explained below. *Infra* § IV.A.2.

* * *

In sum, the Rule sweeps in offenses (or conduct) that do not rise to the level Congress deemed necessary to bar asylum. The new bars include many crimes that in no way suggest a danger to others or to the community. Indeed, Defendants themselves describe the Rule as barring people who demonstrate "disregard" for "societal values." 85 Fed. Reg. at 67242. But that is a radically different and broader view of ineligibility than Congress adopted—or our international obligations allow. Defendants also err by declaring that people covered by the Rule's new bars "should not be rewarded with asylum." *Id*. at 67225. Asylum is not a reward; it is a humanitarian commitment. And Congress has

[4] *See* Immig. Legal Res. Ctr., *Deportation by any Means Necessary: How Immigration Officials are Labeling Immigrant Youth as Gang Members* 10–14 (2018), https://bit.ly/31TBNSD.

decided, consistent with our international obligations, that domestic criminal conduct must be *particularly serious* before it justifies consigning someone to persecution.

Indeed, Defendants effectively admit they cannot shoehorn the Rule's new bars into those Congress prescribed. The proposed Rule said the new bars were authorized in part by the Attorney General's power under § 1158(b)(2)(B)(ii) to "designate" particularly serious crimes. 84 Fed. Reg. at 69643. But the final Rule disclaims this authority, declaring that it "does not actually designate" any particularly serious crimes and instead relying solely on the power to set "additional limitations and conditions." 85 Fed. Reg. at 67207. This retreat confirms the Rule's true purpose: Defendants are trying exclude people from asylum based on domestic criminal convictions (or allegations) that do not meet the threshold Congress adopted "to conform . . . our asylum law to the United Nations Protocol to which the United States [is] bound." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987).

Nor do Defendants succeed in arguing that they need not "tailor the bar[s] to precisely identify serious conduct, [or] evaluate severity of conduct," 85 Fed. Reg. at 67227, because their power to set "additional limitations and conditions" supposedly "does not require that the offenses meet a threshold of dangerousness or seriousness," *id*. at 67224. As already explained—and as the Ninth Circuit has held—§ 1158(b)(2)(C) requires that any regulatory limitations be "consistent with the core principle of" the statutory bars. *EBSC III*, 964 F.3d at 848. And again, the core statutory principle, consistent with the underlying treaty obligations, is to exclude people "who pose a threat to society." *Id.* at 846. Because the Rule's new bars fall far short of that threshold, they are unlawful. And if any doubt remains, the Court should construe § 1158(b) "with lenience toward migrants," both to "avoid infringing" on our international commitments not to return people to persecution, *EBSC II*, 950 F.3d at 1275, and to respect the "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of" noncitizens, *Cardoza-Fonseca*, 480 U.S. at 449.

b. The Rule's treatment of conviction vacaturs or modifications is inconsistent with the statute.

The Rule also adopts a novel presumption: A criminal conviction still triggers asylum ineligibility even if vacated, expunged, or modified—and even if the vacatur was *to correct constitutional or substantive defects*—so long as (1) the vacatur or modification order was entered after removal

proceedings began, or (2) the asylum-seeker moved for the order more than a year after conviction or sentencing. 85 Fed. Reg. at 67259–60. The asylum-seeker must try to rebut this presumption by showing that any modification was not made for (i) rehabilitative reasons or (ii) "for purposes of ameliorating the immigration consequences." *Id.* Nothing in the INA allows this bizarre regime.

The BIA previously held that if "vacatur occurs because there was a legal defect in the underlying proceeding (*i.e.*, a violation of a constitutional or statutory right), then there is no longer a conviction for purposes of the INA." *See Alim v. Gonzales*, 446 F.3d 1239, 1249–50 (11th Cir. 2006); *Ramirez-Castro v. INS*, 287 F.3d 1172, 1174 (9th Cir. 2002). But the Rule goes further. It presumes that a state court order vacating a conviction *expressly because the conviction was unconstitutional* is a nullity, and thus the conviction remains valid. That view cannot be squared with the INA or with basic due process or federalism principles. Treating as valid a conviction vacated to correct a constitutional error is "so foreign, so antithetical, to the long-standing principles underlying our criminal justice system and our notions of due process that we would expect Congress to have spoken very clearly if it intended to effect such results." *Alim*, 446 F.3d at 1249. Yet the INA says no such thing.

Take this example. A noncitizen pleads guilty because he is advised—wrongly—that doing so will not affect his immigration status. This violates the Sixth Amendment, *see Padilla v. Kentucky*, 559 U.S. 356, 359 (2010), but he does not realize it until more than a year later, or (as is common) until removal proceedings begin. He then obtains an order vacating his conviction for the express reason that it violated his Sixth Amendment rights. Even so, the Rule presumes that his conviction remains valid and bars him from asylum—and puts the burden on him to prove otherwise. Even worse, the Rule empowers the asylum adjudicator "to look beyond the face of" the court order, and even beyond the court record, to divine its true "purposes." 85 Fed. Reg. at 67260. So, for example, if the non-citizen's vacatur motion notes that he will be deported unless his unconstitutional conviction is vacated, the asylum adjudicator can decide that the order was entered "for purposes of ameliorating [ ] immigration consequences" and ignore it—even if the state judge said no such thing.

Congress authorized none of this. That silence forecloses the rule, both because of the "long-standing principles" *Alim* noted, 446 F.3d at 1249, and because the Supreme Court requires a "clear indication" of congressional intent to uphold an "administrative interpretation [that] alters the federal-

state framework by permitting federal encroachment upon a traditional state power," *see Solid Waste Agency of N. Cook. Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172–73 (2001). It is hard to imagine a more obvious agency encroachment than (a) presuming the invalidity of a state order entered on constitutional grounds and (b) authorizing a federal employee to ignore a state court order because he doesn't believe the state judge's express reasons for ruling. This Rule provision is unlawful.

2. Some of the Rule's categorical bars are unconstitutionally vague.

Some of the Rule's bars also "contravene the 'first essential of due process'" because they fail to "give people 'of common intelligence' fair notice of what the law demands of them." *United States v. Davis*, 139 S. Ct. 2319, 2325 (2019). This vagueness doctrine "guards against arbitrary or discriminatory law enforcement." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018) (plurality).[5]

First, as described above, the street-gang bar applies to any conviction the adjudicator "knows *or has reason to believe* was committed *in support, promotion, or furtherance* of" gang activity. 85 Fed. Reg. at 67259 (emphasis added). The Rule says the "reason to believe" language is "used elsewhere in the INA," *id*. at 67239, and that it allows "all reliable evidence," which is "not a new standard in immigration proceedings," *id*. at 67225. But the vagueness problem here arises from the combination of the already-malleable "reason to believe" standard with the "support, promotion, or furtherance" language. As the Supreme Court has explained, "combining" two "indetermin[ate]" standards that might be constitutional on their own can result in unconstitutional vagueness. *Johnson v. United States*, 135 S. Ct. 2551, 2558 (2015). That is the case here. The phrase "support, promotion, or furtherance" appears nowhere in any federal law or rule. And while the Rule insists that this language "conveys sufficiently definite warning as to the proscribed conduct," it does not even attempt an explanation, instead "leav[ing] the determination . . . to adjudicators in the first instance." 85 Fed. Reg.

[5] The Rule says its bars "do not implicate due process" because "aliens have no cognizable due process interest in the discretionary benefit of asylum." 85 Fed. Reg. at 67237. But while asylum itself is discretionary, asylum *eligibility* is not. And the Supreme Court and the Ninth Circuit have both applied the "most exacting vagueness standard" in immigration cases, *see Dimaya*, 138 S. Ct. at 1213, including in considering "particularly serious crimes," *Guerrero*, 908 F.3d at 544.

at 67225. In combination with the "reason to believe" standard, this is precisely the sort of "'standardless sweep'" that improperly allows the government and adjudicators "to pursue their personal predilections" and indulge improper biases. *See Kolender v. Lawson*, 461 U.S. 352, 358 (1983).

Second, as noted, the domestic-offense bar applies to "a crime that involves conduct amounting to a crime of stalking . . . or that involves conduct amounting to a domestic assault or battery offense[.]" 85 Fed. Reg. at 67258. The "involves conduct amounting to" standard exists nowhere else in U.S. immigration law. And again, the Rule makes no effort to explain it, saying only that "the underlying conduct of the crime may be considered and the immigration judge is not limited to facts found by the criminal court or provided in the underlying record of conviction." *Id.* at 67259. It is not even clear what version of the "crime" adjudicators will measure "conduct" against—a federal version, the version of the state of conviction, the version of the state of residence, or some generic or ordinary-case version. This, too, is the kind of indeterminate standard that fails due process scrutiny.

3. The Rule is arbitrary and capricious.

a. The Rule does not articulate a satisfactory explanation.

An agency "must examine the relevant data and articulate a satisfactory explanation for its action," including a "rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). It cannot "offer[ ] an explanation for its decision that runs counter to the evidence." *Id.* And it must adequately explain any "departure" from prior policy or precedent. *Cal. PUC v. FERC*, 879 F.3d 966, 978 (9th Cir. 2018).

Before the Rule, committing a crime outside the statutory eligibility bars was simply part of "the totality of the circumstances" that "should be examined in determining whether a favorable exercise of discretion is warranted," and not a basis "to deny relief in [ ] all cases." *Matter of Pula*, 19 I. & N. Dec. 467, 473 (BIA 1987). The Rule departs dramatically from that regime by denying eligibility based on all manner of crimes (or conduct). And it declares that adjudicators should not "readjudicate an alien's criminal culpability"; conviction is now dispositive. 85 Fed. Reg. at 67220. To justify this sweeping change, Defendants assert that "defer[ring] to" the original prosecution and conviction will "promote adjudicative efficiency." *Id.* That explanation is insufficient, for two reasons.

First, it simply fails to grapple with the good reasons the government previously did not deny eligibility based on crimes outside the statutory bars: "[I]n light of the unusually harsh consequences which may befall an alien who has established a well-founded fear of persecution[,] *the danger of persecution should generally outweigh all but the most egregious of adverse factors*." *Pula*, 19 I. & N. Dec. at 474 (emphasis added). The Rule turns that regime on its head, and never explains why this prior reasoning no longer holds. Nor does it explain why this new approach is supposedly consistent with the international obligations codified in the INA. Agencies can change policy, but "the incumbent administration's view of wise policy," 85 Fed. Reg. at 67207, is not a sufficient explanation for doing so. The supposed seriousness of the new criminal bars is not enough either. Those crimes are no more serious today than they have been for the past three decades, during which the agency recognized that such offenses could and often should be "outweigh[ed]" by the "the danger of persecution." *Pula*, 19 I. & N. Dec. at 474. In any event, apart from conclusory assertions, the Rule offers nothing to substantiate Defendants' view that these offenses are indeed serious or dangerous.

Second, the Rule's efficiency rationale is faulty on its face. While "rule-based approaches" can "promote more efficient administration than wholly discretionary, case-by-case determinations," 85 Fed. Reg. at 67246, several of the Rule's bars are vague, subjective, and fact-intensive. In particular, the street-gang bar, the suspicion-of-domestic-violence bar, and the vacatur-presumption provision all create new, unpredictable and fact-intensive inquiries—with extremely high stakes. Before, if an asylum-seeker was accused of a misdemeanor that supposedly had a gang connection, the adjudicator could simply take all the facts into account in reaching a discretionary asylum determination. Now, everything turns on whether the offense "promoted" gang activity, and the asylum-seeker will have life-and-death reasons to try to prove it did not. Likewise, the vacatur presumption now requires adjudicators to look behind a facially valid and complete state court order to determine what "purpose" the judge really had. None of this is efficient or predictable. The Rule is thus arbitrary and capricious.

b. The rule fails to consider important aspects of the problem.

An agency also acts arbitrarily and capriciously when it "entirely fail[s] to consider an important aspect of the problem." *State Farm*, 463 U.S. at 43. That happened here, for two reasons.

1. An agency must "respond to 'significant' comments, *i.e.*, those which raise relevant points and which, if adopted, would require a change in the agency's proposed rule." *Am. Min. Congress v. EPA*, 965 F.2d 759, 771 (9th Cir. 1992). But Defendants brushed aside many commenters' concerns with a series of non-sequiturs and conclusory assertions.

To start, the final Rule "decline[s] to respond" to comments explaining that the new bars are inconsistent with the "particularly serious crime" bar because (contrary to the proposed Rule) the final Rule does not "actually designate" particularly serious crimes. 85 Fed. Reg. at 67238; *id*. at 67207. But the final Rule repeatedly argues that its new bars are permissible in part because they are "similar to 'particularly serious crimes.'" *E.g.*, *id*. at 67207. Defendants cannot justify the new bars as "similar" while refusing to engage with comments explaining that they are not, in fact, similar.

The Rule likewise declares many other topics "outside the scope," including whether current administrative practices prevent asylum-seekers from lawfully presenting themselves at the border—which is directly relevant to barring eligibility based on manner of entry. 85 Fed. Reg. at 67222. Also supposedly "outside the scope" are comments and data showing the Rule "will exacerbate harms caused by racially disparate policing practices or that the result of this rule will disproportionately affect people of color," *id*. at 67226, "barriers" that prevent domestic-violence victims from seeking waivers that would prevent the Rule's bars from applying to them, *id*. at 67230, "how the rule might affect working conditions of aliens," *id*. at 67233, "issues involving evidence gathering" under the Rule's vacatur presumption, *id*. at 67239, "humanitarian concerns for asylum seekers," *id*. at 67243, "services for children who have experienced trauma," *id*. at 67244, the "complex 'web' of asylum laws and regulations," *id*., "dangerous conditions in Mexico, the effects of the [migrant protection protocol], and the third-country transit bar," *id*. at 67245, "access to healthcare, food, and housing," *id*. at 67246, "increased likelihood of convictions for minor offenses for certain vulnerable groups," *id*. at 67247, and "representation in immigration proceedings or during asylum adjudications," *id*. at 67249. On most of these points, Defendants just "reiterate[d] their statutory authority to limit and condition asylum eligibility." *E.g.*, *id*. at 67239. That is no answer. Even if Defendants had the authority to issue these bars, they must also consider and address comments explaining that doing so is bad policy and will harm people. *See Specialty Equip. Market Ass'n v. Ruckelshaus*, 720 F.2d 124,

131 (D.C. Cir. 1983) (agency "acted arbitrarily and capriciously by failing to address adequately the practical effect of its regulations"). They failed to do so.

2. Defendants did not consider problems that arise from the Rule's interaction with other rules, and thus violated the principle that "an agency's right hand" must "take account of what its left hand is doing." *Portland Cement Ass'n v. EPA*, 665 F.3d 177, 187 (D.C. Cir. 2011). From November 2019 to June 2020, the government proposed three rules limiting noncitizens' ability to apply for asylum and related benefits based on criminal convictions or allegations, including this Rule.[6] The other two rulemakings extended this Rule's eligibility bars to apply to employment authorization documents (EADs), credible fear interviews (CFIs), and reasonable fear interviews (RFIs).[7] The rules doing so were released after the comment period on this Rule closed, but before the final Rule was issued. When this Rule was proposed in December 2019, the agencies were still accepting comments to the proposed EAD rule published a month earlier, which contained an overlapping-but-distinct set of criminal bars making asylum applicants ineligible for employment authorization. 84 Fed. Reg. at 62390. But the final EAD rule, issued in June 2020, dispensed with the separate set of criminal bars and incorporated this Rule's bars in full, *see* 85 Fed. Reg. 38532, 38537 (June 26, 2020), even though the final Rule had not yet been issued. Also in June 2020, Defendants published a proposed rule comprehensively limiting asylum eligibility and expanding the Rule's criminal bars to initial CFI and RFI screening processes that had only previously been used to flag *potential* eligibility bars for later consideration. *See id.* at 36284. This process both violated the APA's notice-and-comment requirements, as explained below, and prevented Defendants from considering two important issues.

First, belatedly incorporating the Rule's criminal bars into the final EAD rule prevented the agency from considering concerns about non-specialists applying the bars and thus wrongfully denying employment authorization—leaving asylum seekers without any means of legally supporting

[6] *See Asylum Application, Interview, and Employment Authorization for Applicants*, 84 Fed. Reg. 62374 (Nov. 14, 2019) (EAD proposal), *Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review*, 85 Fed. Reg. 36264 (June 15, 2020) (proposed asylum rule).

[7] CFI screenings are conducted by asylum officers to determine if a noncitizen subject to expedited removal can demonstrate "a significant possibility" of establishing asylum eligibility. RFI screenings are conducted in the same fashion, but the applicable standard is "reasonable possibility." Noncitizens denied the opportunity to seek asylum after a negative CFI or RFI determination may seek review by an Immigration Judge, from which no statutory appeal is possible. 8 U.S.C. § 1252(a)(2)(A)(iii).

themselves and their families while they await a decision. Government employees adjudicate EAD applications remotely and do not receive specialized training relevant to applying the Rule's bars. The final EAD rule seemed to recognize that errors would result, saying that DHS "does not view this alignment" with the criminal bars "as . . . legally obligating DHS to adopt the interpretations or procedures used by" asylum adjudicators "to determine when and if an alien's conduct bars his or her eligibility for asylum," and leaving open the possibility that an asylum adjudicator may disagree with a determination in the EAD context about whether the Rule's bars apply. 85 Fed. Reg. at 38572. That kind of error would have serious consequences. Erroneously denying work authorization (which is not appealable) could force asylum-seekers to obtain false ID papers to feed themselves and their families—which bars asylum under the Rule. Defendants should have considered these issues.

Second, the proposed incorporation of the Rule's criminal bars into the CFI and RFI screening processes prevented consideration of important due process concerns. The CFI and RFI processes are limited in scope and provide only limited appellate rights. 8 U.S.C. § 1252(a)(2)(A)(iii). Applying the Rule's bars in CFI and RFI proceedings would result in summary asylum denials, without full and fair hearings or access to meaningful judicial review. Currently, no mandatory bars apply at this stage. But if the proposed asylum rule is adopted (incorporating this Rule), the officers conducting these screenings will deny anyone they deem covered by these criminal bars the opportunity to seek asylum. The Rule's bars are problematic enough without shoehorning the extensive factual and credibility evaluations they require into the flawed and truncated CFI and RFI processes.[8] Defendants should have considered these issues before the Rule became final.

Moreover, in the broader asylum rule proposed in June, the agencies justified extending the Rule's eligibility bars to CFI and RFI screenings because "it is pointless and inefficient to adjudicate claims for relief in [removal proceedings] when it is determined that [a noncitizen] is subject to one or more of the mandatory bars to asylum . . . at the screening stage." 85 Fed. Reg. at 36272. In other words, months after the comment period on this Rule closed, Defendants declared that the central issues commenters debated would be mooted or dramatically altered by the incorporation of the Rule's

[8] *See* U.S. Comm'n on Int'l Relig. Freedom, *Serious Flaws in U.S. Treatment of Asylum Seekers in Expedited Removal: Children Especially Harmed* (Aug. 2, 2016), https://bit.ly/2Jeaigc.

bars into the CFI and RFI screenings. Agencies cannot ignore the "collateral impact[s]" of "interdependent" rules in this way. *See Portland Cement*, 665 F.3d at 185, 187 (invalidating a rulemaking whose effect the agency altered in a subsequent rulemaking before the final rule issued).

4. The Rule is procedurally invalid.

a. The Rule was adopted without sufficient opportunity for public comment.

1. Agencies must "provide for meaningful public participation in the rule-making process." *Idaho Farm Bureau Fed'n v. Babitt*, 58 F.3d 1392, 1404 (9th Cir. 1995). The government has consistently recognized that "a meaningful opportunity to comment" requires "a comment period of not less than 60 days." *See, e.g.*, *Exec. Order No. 12866*, 58 Fed. Reg. 51735 (Sept. 30, 1993); *Exec. Order No. 13563*, 76 Fed. Reg. 3821 (Jan. 18, 2011). The "usual" period is 90 days. *See Cal. ex rel. Becerra v. Dep't of Interior*, 381 F. Supp. 3d 1153, 1176 (N.D. Cal. 2019).

Defendants provided just 30 days. And that 30-day window spanned several year-end holidays, and thus included only 15 business days. As a result, Defendants received just 581 comments on this major rule—a small fraction of the number received on proposed asylum rules with 60-day comment periods. *E.g.*, 84 Fed. Reg. 62,374 (3,200 comments on the EAD proposal); *cf. N.C. Growers' Ass'n v. UFW*, 702 F.3d 755, 770 (4th Cir. 2012) (the contrast between 800 comments in a 10-day window and 11,000 comments in a 60-day window showed the 10-day window was too short). What is more, Defendants refused multiple requests to extend the 30-day period, despite extending other rulemakings over the same time period. *E.g.*, 85 Fed. Reg. 4243 (Jan. 24, 2020) (comment period ending December 16 was extended to December 30 and then to February 10).

This too-short comment period violated the APA. *Becerra* held that the Interior Department's "failure to provide a meaningful opportunity to comment [was] underscored by the brevity of the [30-day] comment period." 381 F. Supp. 3d at 1176. That reasoning applies even more strongly here, both because the comment period here spanned the holidays and because of the vital subject matter. The rule in *Becerra* addressed payments under oil-and-gas leases, *id*. at 1158, while this Rule concerns eligibility for the life-saving protection of asylum. "Matters of great import . . . should naturally be accorded more elaborate public procedures." *Vt. Yankee Nuclear Power Corp. v. NRDC, Inc.*, 435

U.S. 519, 545 (1978). Yet here, the agencies shortchanged the public in commenting on sweeping provisions governing matters of life and death. Adding insult to injury, Defendants concede that the proposed Rule "resulted in confusion regarding which authority the Departments relied on in promulgating this rule." 85 Fed. Reg. at 67207. So Defendants did not explain themselves clearly and then provided too short a time to respond. The Rule thus violates the APA and is invalid.

2. Defendants also failed to fairly apprise the public of the Rule's impact on matters beyond pure asylum eligibility. As explained above, this is one of three interrelated rules issued or proposed over the past year; the other two incorporate the Rule's bars into the EAD, CFI, and RFI processes. These staggered rulemakings formed a puzzle. The full picture, depicting just how drastically asylum-seekers were impacted, only became visible months after the comment period on this Rule closed. This piecemeal process prevented the public from ever commenting on the eligibility bars' full impact. *Cf. California v. Azar*, 911 F.3d 558, 580 (9th Cir. 2018) (rejecting the government's argument that a comment period was unnecessary because the public had an opportunity to respond to similar prior rulemakings). And these new applications of the Rule's eligibility bars are not a "logical outgrowth" of the proposed Rule. *See id.* The EAD, CFI, and RFI processes offer much more limited procedural protections than an asylum interview or hearing, and have not before been used to evaluate the effect of criminal convictions or alleged criminal conduct on applications for relief. The proposed Rule did not address, or even hint at, this use of the proposed bars. The public was thus unable to comment on the full extent and impact of the resulting regulatory regime. For example, the final Rule dismisses commenters' objections that asylum adjudicators are unsuited to make "reliability determinations of evidence already made by judicial courts," concluding that "adjudicators are well experienced at separating reliable from unreliable evidence, . . . and this rule neither inhibits their ability to do so nor changes the process for assessing evidence." 85 Fed. Reg. at 67238. But commenters had no chance to address, and no reason to anticipate, how these bars would be applied in very different procedural settings by different personnel.

b. The Rule does not properly analyze its impacts on federalism.

An agency must include a federalism certification in any final rule that will have "substantial direct effects on the States, on the relationship between the national government and the States, or on

the distribution of power and responsibilities among the various levels of government." *Exec. Order No. 13132*, § 1(a), 64 Fed. Reg. 43,255 (Aug. 4, 1999). If the rule triggers federalism concerns, the agency must also consult with state and local officials about its potential impact and publish a federalism summary impact statement in the rule. Here, the Rule raises significant federalism concerns by presuming that state court orders vacating convictions to cure constitutional or substantive defects are invalid based purely on their timing. Yet the Rule does not include a federalism impact statement or certification. Instead, it simply states that it "does not have sufficient federalism implications[.]" 85 Fed. Reg. at 67257. The Rule therefore violates the federalism certification requirements.

c. The Rule does not comply with the Regulatory Flexibility Act.

The Regulatory Flexibility Act requires agencies to analyze their rules' effects on "small entities," 5 U.S.C. §§ 603–604, including small nonprofits, *id*. § 601(4). In particular, an agency must describe "the steps the agency has taken to minimize the significant economic impact on small entities" and "the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected." *Id*. § 604(a)(6). Defendants did not do so.

The proposed Rule declares, and the final Rule simply repeats, that "this rule will not have a significant economic impact" on small entities because "only individuals are eligible to apply for asylum," so the rule does "not regulate 'small entities.'" 85 Fed. Reg. at 67255. But the RFA is not limited to rules that "regulate" small entities, *see* 5 U.S.C. § 604(a)(6), and Defendants ignore the Rule's impacts on immigration service providers like Plaintiffs. The Rule will require Plaintiffs to divert resources and staff and expend substantial sums of money on training, and will limit the overall number of clients Plaintiffs are able to service. *See infra* § IV.B. This kind of impact—making small entities' operations more expensive or burdensome—is what the RFA requires agencies to consider. *See Am. Fed. of Labor v. Chertoff*, 552 F. Supp. 2d 999, 1013 (N.D. Cal. 2007) (finding "serious questions whether DHS violated the RFA by refusing to conduct a final flexibility analysis" where the rule effectively "mandates costly compliance" measures, including "paying for the training of in-house counsel" and "dedicating . . . staff" to new tasks). The Rule is procedurally invalid.

B. The Rule will irreparably harm Plaintiffs and the people they serve.

The Rule is scheduled to take effect on November 20, 2020. Plaintiffs are already suffering irreparable harm because they have been forced to "divert resources away from [their] core programs to address the new policy." *EBSC II*, 950 F.3d at 1280. Unless the Rule is enjoined, Plaintiffs will be compelled to devote even greater resources to analyzing and interpreting the Rule, creating new materials and resources, and retraining thousands of practitioners, who not only represent clients but also advise other attorneys in affiliate groups. (Ex. A ¶¶ 17–19; Ex. B ¶¶ 21–23; C ¶¶ 16–24, 27; Ex. D ¶ 15–22.) The Rule requires highly fact-intensive and subjective inquiries, including whether an offense was committed in furtherance of gang activity, or why a prior conviction was vacated or modified. These complexities will require additional training for the new criminal law expertise required (Ex. A ¶¶ 13, 18; Ex. C ¶ 20–21, 24; Ex. D ¶¶ 13, 24) and make it difficult or impossible for legal assistants and law students to perform tasks like intake (Ex. D ¶¶ 23–25; *see* Ex. C ¶ 20). Indeed, the Rule "has already prompted [Plaintiffs] to change their core missions," *EBSC II*, 950 F.3d at 1280, by requiring them to divert resources in response (Ex. B ¶¶ 22–23; Ex. C ¶¶ 17–20).

The Rule will also cause "ongoing harms to [Plaintiffs'] organizational missions," *EBSC III*, 964 F.3d at 854, to support and provide legal services to as many low income and vulnerable noncitizens as possible (Ex. A ¶¶ 4–5, 12; Ex. B ¶¶ 11, 16; Ex. C ¶¶ 4–5, 15, 30; Ex. D ¶¶ 8–11, 29). The Rule's new eligibility bars and complexities will increase the time spent on each case, including at intake and briefing, and in obtaining records of prior convictions. (Ex. A ¶¶ 12–18; Ex. B ¶¶ 12–14; Ex. C ¶ 25; Ex. D ¶¶ 13–22.) The Rule will also prevent people from applying for asylum as a family unit if a parent is ineligible under a new bar. (Ex. A ¶ 16; Ex. B ¶ 17–18; Ex. C ¶ 26.) The cumulative effect is that Plaintiffs would "provid[e] fewer services to fewer individuals," frustrating their missions. *EBSC III*, 964 F.3d at 854.

And the Rule will harm Plaintiffs' funding. All Plaintiffs rely in part on grants and donations related to their ability to achieve certain numerical targets, such as total clients served or applications filed. (Ex. A ¶¶ 20–22; Ex. B ¶ 24; Ex. C ¶¶ 28–29; Ex. D ¶¶ 27–28.) By shrinking the pool of eligible applicants and reducing Plaintiffs' capacity, the Rule "directly threatens their standard caseload, and consequently, their caseload[] dependent funding." *EBSC III*, 964 F.3d at 854.

C. The equities and the public interest favor injunctive relief.

Finally, the equities and the public interest favor relief. "Relevant equitable factors include the value of complying with the APA, the public interest in preventing the deaths and wrongful removal of asylum-seekers, preserving congressional intent, and promoting the efficient administration of our immigration laws . . . ." *EBSC II*, 950 F.3d at 1280. These interests all weigh in Plaintiffs' favor. Most obviously, "the public has an interest in 'ensuring that we do not deliver [refugees] into the hands of their persecutors,' and 'preventing [refugees] from being wrongfully removed, particularly to countries where they are likely to face substantial harm.'" *Id*. at 1281 (citation omitted); *see EBSC III*, 964 F.3d at 854 (district court properly "found that there was a public interest in not returning refugees to their persecutors or to a country where they would be endangered"). Further, "maintaining the *status quo*" serves the important interest in "a stable immigration system." *Doe #1 v. Trump*, 957 F.3d 1050, 1068 (9th Cir. 2020). Allowing the rule to take effect will also harm immigrant communities and public safety. *E.g.*, Ex. E at 2–6 (N.Y.C. Comment Letter). And "[t]here is generally no public interest in the perpetuation of unlawful agency action. To the contrary, there is a substantial public interest in having governmental agencies abide by the federal laws that govern their existence and operations." *League of Women Voters v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016).

D. The Court should enjoin the Rule's national implementation.

The Court should enjoin the Rule's implementation nationally. "In immigration matters," the Ninth Circuit has "consistently recognized the authority of district courts to enjoin unlawful policies on a universal basis." *EBSC I*, 932 F.3d at 779. "Such relief is commonplace in APA cases, promotes uniformity in immigration enforcement, and is necessary to provide the plaintiffs here with complete redress." *Id*. Together, Plaintiffs work with asylum applicants across the nation. Indeed, Plaintiff CLINIC has affiliates in 48 states and the District of Columbia. (Ex. D ¶ 5.) Nationwide relief is warranted.

V. CONCLUSION

The Court should enjoin or stay the Rule's national implementation before November 20.

November 3, 2020

Respectfully submitted,

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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO

PANGEA LEGAL SERVICES, *et al.*,

Plaintiffs,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY *et al.*,

Defendants.

Case No. 3:20-cv-07721

[PROPOSED] ORDER TO SHOW CAUSE WHY A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION SHOULD NOT ISSUE

Assigned to Hon. _____

Date:
Time:
Courtroom:

TO DEFENDANTS Chad F. Wolf, in his official capacity under the title of Acting Secretary of Homeland Security; Kenneth T. Cuccinelli, in his official capacity under the title of Senior Official Performing the Duties of the Deputy Secretary for the Department of Homeland Security; U.S. Citizenship and Immigration Services; U.S. Immigration and Customs Enforcement; Tony H. Pham, in his official capacity under the title of Senior Official Performing the Duties of the Director of U.S. Immigration and Customs Enforcement; U.S. Customs and Border Protection; Mark A. Morgan, in his official capacity under the title of Senior Official Performing the Duties of the Commissioner of U.S. Customs and Border Protection; U.S. Department of Justice; William P. Barr, in his official capacity under the title of U.S. Attorney General; Executive Office for Immigration Review; and James McHenry, in his official capacity under the title of Director of the Executive Office for Immigration Review:

YOU (AND EACH OF YOU) ARE HEREBY ORDERED TO SHOW CAUSE at _____ *(time)* on _____ *(date)*, or as soon thereafter as counsel may be heard in the courtroom of the Honorable _____, located at _____, why you, your officers, agents, servants, employees, and attorneys and those in active concert or participation with you or them, should not be enjoined from implementing or enforcing the rule titled *Procedures for Asylum and Bars to Asylum Eligibility*, 85 Fed. Reg. 67202 (Oct. 21, 2020) ("Final Rule").

PENDING HEARING on the above Order to Show Cause, you, your officers, agents, servants, employees, and attorneys and all those in active concert or participation with you or them ARE HEREBY ENJOINED from implementing or enforcing the Final Rule. Plaintiffs have shown that because the Final Rule is scheduled to go into effect on November 20, 2020, which is 30 days after it was published, Plaintiffs cannot maintain the *status quo* on the ordinary schedule for hearing a preliminary injunction. Plaintiffs have further shown that immediate and irreparable injury will result to the Plaintiffs, which are nonprofits that help low-income immigrants seek asylum and provide resources and training to others who help asylum-seekers. Plaintiffs will be forced to "divert resources away from [their] core programs to address the new policy." *E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1280 (9th Cir. 2020). The Rule's changes will cause "ongoing harms to [Plaintiffs']

organizational missions," and Plaintiffs will thus "provid[e] fewer services to fewer individuals," frustrating their missions. *E. Bay Sanctuary Covenant v. Barr*, 964 F.3d 832, 854 (9th Cir. 2020). For the same reasons, the Rule "directly threatens their standard caseload, and consequently, their caseload[] dependent funding." *Id.* These harms are all imminent and irreparable.

This TRO is effective immediately. The Court waives the security requirement under Federal Rule of Civil Procedure 65(c) because Plaintiffs have demonstrated that Defendants will not incur any costs or damages in complying with the TRO because the Final Rule has not gone into effect and maintaining the *status quo* comes at no additional cost to the Defendants.

This Order to Show Cause and supporting papers must be served on Defendants no later than _____ days before the date set for hearing, and proof of service shall be filed no later than _____ days before the hearing. Any response or opposition to this Order to Show Cause must be filed and served on Plaintiffs' counsel through ECF no later than _____ *(date)*. Any reply shall be filed and served no later than _____ *(date)*.

SO ORDERED.

DATED:_____

_____
Hon. _____
United States District Judge

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO

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Plaintiffs,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY *et al.*,

Defendants.

Case No. 3:20-cv-07721

CERTIFICATE REGARDING NOTICE TO DEFENDANTS OF EX PARTE MOTION

Assigned to:

Date:
Time:
Courtroom:

CERTIFICATE REGARDING NOTICE TO DEFENDANTS OF EX PARTE MOTION

Plaintiffs filed this action on November 2, 2020, and commenced service by registered mail on November 3, 2020. Defendants have not yet appeared in this action or designated a counsel of record. Accordingly, Plaintiffs have taken, and will take, the following steps to notify Defendants of Plaintiffs' Ex Parte Motion for a Temporary Restraining Order and Order to Show Cause Why a Preliminary Injunction Should Not Issue (Ex Parte Motion):

On October 30, 2020—three days before filing this action and four days before filing the Ex Parte Motion—Sidley Austin LLP attorney Brian Stretch, together with Plaintiffs' counsel Naomi Igra, Jack Pirozzolo, and Tobias Loss-Eaton, sent an email to Sara Winslow, Chief of the Civil Division at the United States Attorney's Office in San Francisco, California, and informed her the Plaintiffs intended to file a Complaint in this district challenging the DHS rule titled *Procedures for Asylum and Bars to Asylum Eligibility*, 85 Fed. Reg. 67202 (Oct. 21, 2020) ("Final Rule"). The email stated that Plaintiffs' counsel anticipated filing a request for a TRO and preliminary injunction on November 2, 2020. The email also asked for contact information of whomever would handle the case so that the parties might negotiate a briefing and hearing schedule.

Also on October 30, 2020, Ms. Winslow responded that the case would be handled by Main Justice. Ms. Winslow asked that Plaintiffs' counsel send her the filings until she could determine who would handle the case.

On November 2, 2020, Plaintiffs' counsel exchanged emails with Ms. Winslow, who stated that she did not yet know who would be handling the case. Plaintiffs' Counsel filed the Complaint on the same day and sent the Complaint by email to Ms. Winslow. Plaintiffs' counsel asked if the government would accept service. Ms. Winslow responded that she was not sure if she would be able to get a response because it was after hours on the east coast.

On November 3, 2020, Plaintiffs' counsel sent an email to Ms. Winslow asking again if government counsel had been assigned to the case and informing her that, if not, they would shortly file the Ex Parte Motion seeking an expedited briefing schedule. Ms. Winslow responded that she still had not heard which lawyers would be assigned to the case. Plaintiffs' counsel later received a further email from Ms. Winslow, identifying the lawyer assigned to the case and reporting his preference for

a schedule in which the government's brief would be due during the week of November 15. Because the Final Rule is scheduled to take effect during that week, government counsel's preferred schedule would not allow time for briefing, a hearing, and a ruling before the Final Rule's effective date.

Plaintiffs' counsel then conferred directly with the government's assigned lawyer, who proposed that Defendants file their opposition brief on November 10, 2020, and that plaintiffs file any reply by November 13, 2020.

Plaintiffs will file a proof of service once such service is complete.

November 3, 2020

Respectfully submitted,

/s/ *Naomi Igra*

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO

PANGEA LEGAL SERVICES; DOLORES STREET COMMUNITY SERVICES, INC.; CATHOLIC LEGAL IMMIGRATION NETWORK, INC.; and CAPITAL AREA IMMIGRANTS' RIGHTS COALITION,

Plaintiffs,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY; CHAD F. WOLF, *under the title of Acting Secretary of the Department of Homeland Security*; KENNETH T. CUCCINELLI, *under the title of Senior Official Performing the Duties of the Deputy Secretary for the Department of Homeland Security;* U.S. CITIZENSHIP AND IMMIGRATION SERVICES;

Case No. 3:20-cv-07721

DECLARATION OF ETAN NEWMAN

U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT;
TONY H. PHAM, *under the title of Senior Official Performing the Duties of the Director of U.S. Immigration and Customs Enforcement*;
U.S. CUSTOMS AND BORDER PROTECTION;
MARK A. MORGAN, *under the title of Senior Official Performing the Duties of the Commissioner of U.S. Customs and Border Protection*;
U.S. DEPARTMENT OF JUSTICE;
WILLIAM P. BARR, *under the title of U.S. Attorney General*;
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW; and
JAMES MCHENRY, *under the title of Director of the Executive Office for Immigration Review,*

Defendants.

I, Etan Newman, declare under penalty of perjury as prescribed in 28 U.S.C. § 1746:

1. The facts contained in this declaration are known personally to me and, if called as a witness, I could and would testify competently thereto under oath. I submit this sworn declaration in support of Plaintiffs' Motion for a Temporary Restraining Order, Preliminary Injunction, and Stay.

2. I serve as an Immigration Attorney and Co-Director at Pangea Legal Services ("Pangea"), where I conduct intake consultations and represent individuals facing removal proceedings, in addition to coordinating Pangea's appellate and federal litigation efforts. I have worked at Pangea since 2016.

3. Pangea is a 501(c)(3) non-profit corporation, with its main office in San Francisco, CA, and an office in San Jose, CA.

4. Pangea's mission is to stand with immigrant communities and to provide services through direct legal representation, especially in the area of deportation defense. In addition to direct legal services, Pangea is committed to advocating on behalf of the community it serves through policy advocacy, education, and legal empowerment efforts. Pangea's efforts focus primarily on Northern California's Bay Area; however, in some instances, Pangea has also collaborated with other immigration services organizations across the nation.

5. Pangea was founded to help address the critical need for the representation of detained and non-detained individuals in the San Francisco immigration court system. That need arises from a number of factors, including (but not limited to) the complexity of immigration law, the grave negative consequences that may result from deportation, and the fact that many immigrants in removal proceedings are eligible for relief or protection under the law.

6. Pangea provides a number of immigration legal services to its clients, including: representing noncitizens completing affirmative asylum applications and other applications for relief; conducting intake consultations and referrals for noncitizens who need attorneys; representing noncitizens in immigration court removal proceedings; providing on-call, same-day legal assistance to noncitizens who are arrested by U.S. Immigration and Customs Enforcement ("ICE")

in the Bay Area; representing noncitizens in federal litigation, including in habeas corpus petitions and appeals; and, recently, representing individuals in post-conviction relief petitions in state criminal court.

7. Pangea provides direct legal services to over 400 clients annually. At present, almost 250 of Pangea's clients have asylum applications pending in either immigration court or at United States Citizenship and Immigration Services ("USCIS"), and dozens of others are either eligible for asylum, but have yet to submit an application, or have been denied asylum and are on appeal. Pangea also provides in-depth assistance to *pro se* asylum applicants, a newly launched program that has already served approximately 10 clients since its inception in 2020.

8. In addition to providing direct legal services and *pro se* assistance, Pangea advocates for and works to empower noncitizens by engaging in policy advocacy, education, and legal empowerment efforts. Pangea's community education efforts include, among others, providing Know-Your-Rights ("KYR") presentations to immigrant communities, which were attended by hundreds of individuals annually prior to the COVID-19 pandemic.

9. Pangea also provides training to other attorneys to equip them to provide further services to noncitizen communities. Pangea works closely with at least one other similarly situated non-profit organization, providing case supervision and assistance as needed. Pangea's attorneys also frequently participate in trainings hosted by organizations such as the Public Law Institute, which are open to other attorneys and to the public.

10. Pangea also participates in local and statewide advocacy for immigrants' rights. This includes partnering with coalitions to advocate for the enactment of legislation that protects immigrant communities from detention and deportation. As part of these efforts, Pangea's Community Forum Project focuses on creating forums for clients to share experiences and common fears without feeling targeted or exposed.

11. The Rule challenged in the Complaint, *Procedures for Asylum and Bars to Asylum Eligibility*, 85 Fed. Reg. 67202 (October 21, 2020) ("Rule"), would irreparably harm Pangea in multiple ways, including by frustrating Pangea's mission to serve as many immigrants lawfully

seeking asylum as possible.

12. As described in the paragraphs below, the Rule would also significantly limit the overall number of clients Pangea is able to serve, placing the organization in an impossible position: it would need to divert staff time and resources towards raising more funds to serve the same number of clients, or reduce the total number of clients it serves to fit within the organization's current budget.

13. Under the new Rule, the number of individuals potentially subject to criminal bars to asylum eligibility would increase dramatically. Consequently, Pangea's staff would have to expend more time and resources at the outset of each case to determine whether any of the asylum bars could be triggered and to assess the potential impact of any prior convictions (including those that have been modified, vacated, or expunged). Indeed, under the new Rule, asylum seekers can be categorically barred from obtaining protection on the basis of mere allegations of certain conduct without any adjudication of guilt.

14. Contrary to what including "categorical" bars may imply, the new Rule makes it significantly *less* clear as to whether someone is eligible for asylum. Many of the new bars inherently involve subjective adjudication, while simultaneously removing from the adjudicator any discretion in determining whether the circumstances merit such a harsh penalty. For these reasons, the Rule would significantly increase the amount of time and resources each asylum-seeker's case requires, including time spent on briefing eligibility issues; time and resources spent on obtaining any records of arrests and/or convictions; and resources spent on finding and preparing witnesses and experts.

15. For example, the Rule would impose a categorical bar on asylum against someone on the basis of mere allegations of domestic-violence related conduct, regardless of whether there had been any adjudication of guilt. Likewise, asylum seekers with two DUI convictions would be barred, regardless of whether they have sought treatment for alcohol addiction, and asylum-seeking mothers would be barred if they were convicted for bringing their own child across the border. Indeed, the Rule fails to address or account for the fact that a significant number of people may

agree to plead to a crime as to avoid the threat of a severe sentence; not only is a conviction an unreliable predictor of future danger, it can also be an unreliable indicator of past criminal conduct. In addition, it does not address and makes no exception for convictions for conduct influenced by mental illness or duress. Not only would Pangea's staff have to spend significant time determining the impact of these bars on their current clients, increased time and resources would have to be expended on behalf of each new potential client Pangea contemplated taking on to ensure that none of these new bars applied.

16. Moreover, the new Rule would adversely impact Pangea's ability to represent families. Pangea's current clients include many individuals seeking asylum as a family unit. At present, if an individual is granted asylum, their spouse and children already in the United States who they included on their asylum application may also be granted asylum, and they can file a petition to bring remaining eligible family members *not* in the United States to the United States. Unlike asylum, withholding of removal does not provide any relief for an eligible individual's family members, whether they are in the United States or in another country. If a parent is suddenly subject to one of the Rule's expanded asylum bars, and thus forced to seek withholding of removal only, they will no longer be able to ensure that their children will be able to obtain protection in the United States, regardless of whether they are granted withholding of removal. Instead, if their children are still in their home country, they will have to come to the United States and seek asylum on their own, likely as unaccompanied children. If their children fled to the United States with them, they will need to establish their own eligibility for protection, regardless of their age. Often, Pangea is able to present a single case on behalf of such families, because the children's claims are treated as derivative of their parents' claims. However, if parents were rendered ineligible for asylum under the new Rule, their children would no longer have a derivative claim and their cases could not be combined. Pangea would thus have to expend its already-limited resources to handle all such newly individualized cases for current clients and/or apply for additional grants and funding. This decoupling of Pangea's current cases would also impact its ability to take on new clients.

17. The added complexities posed by the new Rule will require the Pangea staff to

revise all current training materials, including in connection with recent programming launched by Pangea to provide assistance to *pro se* asylum applicants. The Rule would require Pangea to revise its training templates and spend more time educating *pro se* applicants on the nuances of the Rule's eligibility requirements.

18. Pangea will also have to continue to divert substantial time and resources to training its staff and attorneys on these new asylum eligibility and processing framework requirements, particularly in light of the nuanced and complex nature of the new bars.

19. Additionally, the Rule would force Pangea to divert resources away from other initiatives to compensate for the time and staffing resources required to respond to it. For example, Pangea is a member of formal rapid response networks in the California counties of Santa Clara, San Mateo, and San Francisco. The aim of these rapid response networks is to provide attorney response and consultations to newly-detained individuals from those counties. As part of these networks, Pangea attorneys take shifts in which they are on-call to provide consultation and representation to detained individuals, including on weekends. Pangea's ability to contribute to this and other important initiatives could be hampered if it is forced to reallocate already-scarce resources in light of the Rule.

20. The Rule would also jeopardize Pangea's funding and budget. In 2020, sixty-five percent of the organization's funding was tied to grants requiring some form of deliverables (e.g., a specific number of asylum applications filed or clients represented). If permitted to take effect, the Rule would necessarily reduce the number of Pangea's clients eligible for asylum. Moreover, the increased hours Pangea would be required to spend both assessing the impact of the Rule on its current clients and representing those impacted by the Rule would reduce the overall number of clients served. As a result, it is unclear whether Pangea could continue to comply with existing funding conditions.

21. Pangea generates approximately nine percent of its income through the low-cost services it provides to asylum-seekers who are not eligible for government or foundational grants due to prior convictions, certain geographic restrictions, or because of income or their ability to

pay. While such convictions may not have previously triggered a bar to asylum eligibility, under the new Rule, those same clients may no longer be eligible for asylum. For any current clients rendered ineligible for asylum by the new Rule, Pangea would forfeit future payments on collateral matters for which the clients would no longer be eligible, such as applications for employment authorization or obtaining a refugee travel document (both items Pangea charges for separately from court representation). This, too, would have a significant detrimental effect on Pangea's budget.

22. Pangea also generates income through services it provides to former clients who successfully obtain asylum and want to adjust their status (e.g., those who become eligible for permanent residency). Pangea typically handles approximately fifteen or twenty such cases a year, and may handle more, depending on how many derivative claims there are (for which Pangea generally charges separately). If the rule decreases the number of adults and children eligible for asylum, it will necessarily decrease Pangea's revenue stream tied to these post-asylum status changes.

23. The relief requested in the Plaintiffs' Complaint would properly address the injuries to Pangea described above. If Plaintiffs prevail in this action, Pangea would be able to devote its staff time and resources to more clients than it would be able to if the Rule were permitted to take effect.

24. Pangea is unaware of any way it can recover the increased costs that the Rule will impose on Pangea as an organization, and would suffer immediate and irreparable injury under the Rule if the rule were permitted to take effect.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: November 2, 2020

San Francisco, CA

Etan Newman

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO

PANGEA LEGAL SERVICES; DOLORES STREET COMMUNITY SERVICES, INC.; CATHOLIC LEGAL IMMIGRATION NETWORK, INC.; and CAPITAL AREA IMMIGRANTS' RIGHTS COALITION,

Plaintiffs,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY; CHAD F. WOLF, *under the title of Acting Secretary of the Department of Homeland Security*; KENNETH T. CUCCINELLI, *under the title of Senior Official Performing the Duties of the Deputy Secretary for the Department of Homeland Security;* U.S. CITIZENSHIP AND IMMIGRATION SERVICES;

Case No. 3:20-cv-07721

DECLARATION OF KATHERINE MAHONEY

U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT;
TONY H. PHAM, *under the title of Senior Official Performing the Duties of the Director of U.S. Immigration and Customs Enforcement*;
U.S. CUSTOMS AND BORDER PROTECTION;
MARK A. MORGAN, *under the title of Senior Official Performing the Duties of the Commissioner of U.S. Customs and Border Protection*;
U.S. DEPARTMENT OF JUSTICE;
WILLIAM P. BARR, *under the title of U.S. Attorney General*;
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW; and
JAMES MCHENRY, *under the title of Director of the Executive Office for Immigration Review*,

Defendants.

I, Katherine Mahoney, declare under penalty of perjury as prescribed in 28 U.S.C. § 1746:

1. The facts contained in this declaration are known personally to me and, if called as a witness, I could and would testify competently thereto under oath. I submit this sworn declaration in support of Plaintiffs' Motion for a Temporary Restraining Order, Preliminary Injunction, and Stay.

2. Paragraph 2 of the Complaint filed in connection with the above-captioned action on November 2, 2020 (the "Complaint") accurately describes a current client of Dolores Street Community Services, Inc. ("DSCS"). The client is referred to in the Complaint by a pseudonym, Bryan, to protect his safety and preserve confidentiality.

3. I serve as the Litigation Director at DSCS, where I have worked since 2019.

4. DSCS is a 501(c)(3) non-profit organization located in San Francisco, CA.

5. DSCS is a multi-issue, multi-strategy organization focused on improving the lives of low-income individuals in San Francisco, CA, and the surrounding Bay Area, by providing services spanning four interconnected areas: (i) housing and shelter; (ii) immigrants' rights; (iii) workers' rights; and (iv) community organizing and advocacy. DSCS provides immigration legal services and direct legal representation to its clients, but also partners with local and national organizations to further its mission and carry out larger-scale advocacy initiatives.

6. DSCS's immigration-focused services fall into two main programs: the Deportation Defense & Legal Advocacy Program ("DDLAP"), which was founded in 2008, and the Immigrant Rights and Community Empowerment Program ("IRCE"), which was founded in 2018.

7. IRCE was founded in 2018 and works primarily in partnership with other local collaboratives—the San Francisco Immigrant Legal and Education Network ("SFILEN"), the San Francisco Rapid Response Network ("SFRRN"), and the Northern California Rapid Response and Immigrant Defense Network ("NCRRIDIN") for the Bay Area region—to amplify the impact of DSCS's immigrant rights work in San Francisco and Northern California. DSCS is the lead organization for SFILEN and the fiscal lead for SFRRN. Through these collaboratives, DSCS works with other advocacy and legal organizations to provide legal representation and advocacy to community members throughout Northern California.

8. The Deportation Defense & Legal Advocacy Program was founded in response to immigration enforcement raids in San Francisco's Mission District in 2008. Through DDLAP, DSCS provides direct legal representation to individuals facing deportation, including individuals detained by U.S. Immigration and Customs Enforcement ("ICE") and individuals—primarily survivors of labor trafficking—filing affirmative asylum applications. DDLAP also provides limited immigration-related legal services to members of the community, including free immigration consultations and regular clinics, assistance with time-sensitive legal filings, and filing Deferred Action for Childhood Arrivals ("DACA") applications and renewals, as well as undertaking significant advocacy work through partnerships with local and national organizations and coalitions. Like IRCE, DDLAP works with regional collaboratives, including the San Francisco Immigrant Legal Defense Collaborative ("SFILDC") and the California Collaborative for Immigrant Justice ("CCIJ") to expand pro bono representation to individuals facing removal in Northern California.

9. DSCS provides full-scope direct legal services to roughly 150 clients annually, a number that includes filing approximately 25 new asylum applications, including affirmative applications, per year. Approximately 45 percent of DSCS's current clients have had some contact with the criminal justice system.

10. DSCS provides other immigration services, such as free clinics, consultations, and limited-scope representation, to roughly 240 individuals annually.

11. The Rule challenged in the Complaint, *see Procedures for Asylum and Bars to Asylum Eligibility*, 85 Fed. Reg. 67202 (October 21, 2020) ("Rule"), would irreparably harm DSCS in multiple ways absent enjoinder of the Rule. Whatever the intent of the Rule, the impact is clear: by imposing new categorical bars to asylum eligibility, the Rule disproportionately impacts some of DSCS's most vulnerable clients and frustrates the DSCS mission of helping obtain protection for people who meet the definition of refugee and others fleeing persecution in their home countries. As a result of this Rule, asylum eligibility will become even more limited and the immigrants served by DSCS who are subject to these new bars will face continued instability and uncertainty, and the possibility of removal to countries where they face severe harm or even death.

12. The Rule would significantly limit the overall number of clients DSCS is able to

serve, placing the organization in an impossible position: it would need to raise more funds and hire more staff to serve the same number of clients, or reduce the number of clients it serves to fit within its current budget. The numerous recent changes to asylum eligibility and processing, including this Rule, further frustrate DSCS's ability to carry out its mission, as the organization is forced to expend significant time and its limited resources on making adjustments to its internal processes to keep up-to-date with the frequency and scope of changes to the legal asylum framework.

13. If permitted to take effect, the Rule would dramatically increase the number of individuals potentially barred from obtaining asylum. Consequently, DSCS's staff would have to expend more time and resources at both the outset of each case, and throughout the pendency of each case, to determine whether any of the new asylum bars could be triggered and to assess the potential impact of any prior convictions, arrests, or even mere allegations. Indeed, under the new Rule, asylum seekers can be categorically barred from obtaining protection on the basis of even modified, vacated, or expunged convictions.

14. Moreover, the Rule would significantly increase the amount of DSCS staff time and resources each asylum-seeker's case requires, including time spent on analyzing and briefing eligibility issues; time and resources spent on obtaining any records of arrests and/or convictions; and resources spent on finding and preparing witnesses and experts.

15. DSCS's clients are survivors of community and domestic violence, workplace exploitation and human trafficking, and homelessness or housing instability—all populations typically subject to over-policing and over-criminalization. Under the new Rule's categorical bars, asylum seekers—and particularly clients of DSCS—will be precluded from obtaining protections on the basis of a vast array of conduct. Indeed, in the case of domestic-violence related grounds, the categorical bar will be imposed on the basis of mere allegations of conduct without any adjudication of guilt.

16. In addition, many of DSCS's clients suffer from severe mental illness, including Post-Traumatic Stress Disorder ("PTSD"). This Rule, whose new categorical bars to asylum in-

clude any drug-related conviction (with one exception for a first minor marijuana possessory offense) and any second conviction for driving under the influence, would likely have a disproportionate impact on these particularly vulnerable populations. Asylum seekers are an inherently vulnerable population because of the trauma they experienced in their countries of origin and, often, along the journey to find safety, and studies show that at least one out of every three asylum seekers struggles with anxiety, depression, and/or PTSD. It has also been shown that there is a high prevalence of comorbidity of PTSD and substance use disorders: individuals with PTSD are up to 14 times more likely to struggle with substance use disorder. DSCS's clients are often unable to access affordable medical care and treatments for complex trauma and may turn to drugs and alcohol in an effort to self-medicate. The approach taken by the new Rule ignores the evidence around the vulnerabilities of the asylum-seeking population and would significantly frustrate the mission of organizations like DSCS, whose clients are typically very low income and at-risk individuals.

17. This Rule would also have a significant negative impact on the families DSCS serves, many of whom are mothers and fathers who fled their home countries with their young children. At present, if an individual is granted asylum, any of their family members already in the United States whom they included on their asylum application may also be granted asylum, and they can file a petition to bring remaining eligible family members *not* in the United States to the United States. Unlike asylum, however, withholding of removal does not provide any relief for an eligible individual's family members, whether they are in the United States or in another country. Moreover, although withholding of removal is available to those individuals who can establish that being removed to the proposed countries would "more likely than not" result in persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, the individual still can be removed to a third country if doing so would not threaten their life or freedom.

18. Thus, under the new Rule, if a mother who flees to the United States is suddenly subject to one of the Rule's expanded asylum bars, and thus forced to seek withholding of removal only, she will no longer be able to ensure that her children can also obtain protection in the United

States, regardless of whether she is granted withholding of removal. Instead, if her children are still in her home country, they would have 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, they would need to establish their own eligibility for protection, regardless of their age. In some cases, a child's reasons for fearing return may be derivative of their parent's fear, and thus too attenuated to meet the asylum requirements independently. Because separation from one's parents is *not*, standing alone, generally considered a basis for asylum, this de facto decoupling of family cases is likely to result in increased family separation, where some family members qualify for asylum and others do not, so are removed. The practical impact for organizations including DSCS is that the organization will see an increase in cases where it must seek relief for every member of a family as a principal, rather than being able to rely on derivative status, alongside a decrease in the number of resources the organization actually has available. This decoupling of DSCS's current cases would also impact its ability to take on new clients.

19. DSCS raised the above concerns and others in the comment it submitted in opposition to the then-proposed Rule. However, in response to those comments, the final Rule says only that the categorical bars will "create a more streamlined and predictable approach that will increase efficiency in immigration adjudications" and "increase predictability", a response which ultimately ignores the realities faced by immigration attorneys, like the staff at DSCS. To the contrary, some of the bars are so subjective that they will inevitably be applied disparately depending on the adjudicator. This will create more unpredictability for clients and result in tireless litigation over the legal questions raised by these new bars.

20. Likewise, in response to comments from DSCS and other organizations alleging that the proposed Rule violated the United States' obligations to protect refugees and asylum seekers under international law, the final Rule states only that because it does not affect withholding of removal or CAT protection, it is consistent with international law and, furthermore, that agreements like the Universal Declaration of Human Rights are non-binding and do not impose legal obligations on the United States. Again, however, this ignores the realities faced not only by immigration attorneys, but also by refugees and asylum seekers. As discussed above and in its public

comment, while withholding of removal may not be *directly* impacted by this Rule, the interplay between withholding of removal and the Rule's sweeping categorical bars can easily lead to cruel results, like the separation of parents and children, which will have a particularly adverse impact on DSCS's clients.

21. The added complexities posed by the new Rule—sections of which purport to allow immigration adjudicators to conduct their own subjective inquiries into conduct that may never have resulted in a conviction—will require the DSCS staff to review its current client list to determine which of its current clients may be affected by the Rule; how the Rule might impact those cases; how to communicate that impact to those clients; and how to revise its legal strategy, if DSCS could even continue representing those clients.

22. In response to this Rule, DSCS has already begun to divert substantial time and resources to train its staff and legal assistants on the changes to asylum eligibility, as well as to undertake a review of all of its training materials and templates, to ensure their accuracy. Likewise, DSCS staff has begun to spend more time providing consultations on the nuances of the Rule's eligibility requirements and expects to expend more time and resources on consultations in the near future.

23. Additionally, the Rule is forcing DSCS to divert resources away from other initiatives to compensate for the time and staffing resources required to respond to the rule. For example, the DSCS team conducts significant advocacy work around conditions for detainees in ICE, and also assists undocumented youth in applying for and renewing their DACA registration. DSCS's legal team also provides consultations and representation to participants in the organization's other programs, such as shelter residents and members of the organization's worker's collaborative. DSCS's ability to continue supporting these communities will be significantly impeded if it is forced to reallocate its already scarce resources in light of the new Rule.

24. The Rule would also jeopardize DSCS's funding and budget. In 2019, roughly ninety-five percent of DSCS's legal team's funding was tied to state or local funding or grants requiring some form of deliverable (e.g., a specific number of asylum applications filed or clients represented). If permitted to take effect, the Rule would necessarily reduce the number of DSCS's

clients eligible for asylum. Defending a client against even the existing criminal bars to asylum can require substantially more hours and resources as presenting a claim with no bars; because such a high percentage of our clients have had contact with the criminal justice system, the Rule would drastically increase the resources needed per case. The increased hours DSCS would be required to spend both assessing the impact of the Rule on its current clients and representing those impacted by the Rule would reduce the overall number of clients served. As a result, DSCS could not comply with existing funding conditions and would likely lose funding.

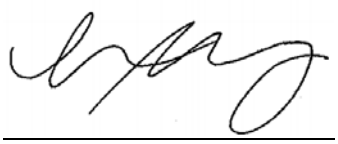
25. The relief requested in the Plaintiffs' Complaint would properly address the injuries to DSCS described above and in the public comment submitted by DSCS in opposition to the Rule. If Plaintiffs prevail in this action, DSCS would be able to devote its staff time and resources to more clients than it would be able to if the Rule were permitted to take effect.

26. DSCS is unaware of any way they can recover the increased costs that the Rule will impose on them as an organization, and would suffer immediate and irreparable injury under the Rule if the rule were permitted to take effect.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: November 2, 2020

San Francisco, CA



Katherine Mahoney

EXHIBIT C

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO

PANGEA LEGAL SERVICES; DOLORES STREET COMMUNITY SERVICES, INC.; CATHOLIC LEGAL IMMIGRATION NETWORK, INC.; and CAPITAL AREA IMMIGRANTS' RIGHTS COALITION,

Plaintiffs,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY; CHAD F. WOLF, *under the title of Acting Secretary of the Department of Homeland Security*; KENNETH T. CUCCINELLI, *under the title of Senior Official Performing the Duties of the Deputy Secretary for the Department of Homeland Security;* U.S. CITIZENSHIP AND IMMIGRATION SERVICES;

Case No. 3:20-cv-07721

DECLARATION OF MICHELLE N. MENDEZ

U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT;
TONY H. PHAM, *under the title of Senior Official Performing the Duties of the Director of U.S. Immigration and Customs Enforcement*;
U.S. CUSTOMS AND BORDER PROTECTION;
MARK A. MORGAN, *under the title of Senior Official Performing the Duties of the Commissioner of U.S. Customs and Border Protection*;
U.S. DEPARTMENT OF JUSTICE;
WILLIAM P. BARR, *under the title of U.S. Attorney General*;
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW; and
JAMES MCHENRY, *under the title of Director of the Executive Office for Immigration Review*,

Defendants.

I, Michelle N. Mendez, declare under penalty of perjury as prescribed in 28 U.S.C. § 1746:

1. The facts contained in this declaration are known personally to me and, if called as a witness, I could and would testify competently thereto under oath. I submit this sworn declaration in support of Plaintiffs' Motion for a Temporary Restraining Order, Preliminary Injunction, and Stay.

2. I am the Director of the Defending Vulnerable Populations Program at the Catholic Legal Immigration Network, Inc. ("CLINIC" or the "Organization"), whose main office is located in Silver Spring, Maryland. I have worked at CLINIC since January 2015.

3. CLINIC is a 501(c)(3) non-profit organization, with a national office in Silver Spring, Maryland, an office in Oakland, California, and attorneys and other staff who work remotely across the United States. Three attorneys with CLINIC's Training and Legal Support ("TLS") team work from the Oakland, California office, providing technical assistance to CLINIC's *entire* network of immigration legal services providers and other nonprofit agency staff throughout the United States, conducting web-based trainings on a variety of immigration matters, and issuing written resources for practitioners on immigration matters.

4. CLINIC is the nation's largest network of nonprofit legal immigration services programs. CLINIC's mission is to provide immigration legal services to low income and vulnerable populations through our network. This mission is part of CLINIC's broader purpose of embracing the Gospel value of welcoming the stranger, and promoting the dignity and protecting the rights of immigrants. CLINIC believes the United States has a moral imperative to accept asylum seekers as well as obligations under domestic and international law. Asylum seekers come to the United States fleeing persecution and many arrive with nothing more than the clothes on their back. Consequently, due to the severity of past harm suffered, many asylum seekers endure ongoing trauma-related mental health issues and those asylum seekers who lack adequate support and mental health treatment may self-medicate through substance abuse and become involved in the criminal justice system. However, this Rule places them further away from the support and treatment they need and instead places them on a path to asylum denial and deportation to the country they fled.

5. The CLINIC network includes almost 400 affiliated immigration programs, which operate in 48 states and the District of Columbia. The network includes faith-based institutions, farmworker programs, domestic violence shelters, ethnic community-focused organizations, libraries and other entities that serve immigrants. In total, CLINIC's network employs more than 2,300 attorneys, accredited representatives, and paralegals who, in turn, serve hundreds of thousands of low-income immigrants each year. Many CLINIC affiliates are on the "List of Pro Bono Service Providers" that the Executive Office for Immigration Review ("EOIR") provides to asylum seekers. For example, Catholic Charities of the East Bay in Oakland, California, is on the EOIR list and is a CLINIC affiliate. Providing free and low-cost legal services to asylum seekers is a critical part of the mission of CLINIC and our affiliates.

6. In addition to employing attorneys, members of CLINIC's network, referred to as "affiliates," employ United States Department of Justice ("DOJ") "accredited representatives." Accredited representatives are non-attorney staff or volunteers who are approved by the DOJ to represent noncitizens before the Department of Homeland Security ("DHS"), and, in some instances, in removal proceedings before the immigration court and the Board of Immigration Appeals ("BIA"). An accredited representative must work for a non-profit religious, charitable, social service, or similar organization that provides low- or no-cost immigration legal services.

7. CLINIC provides critical training and mentorship to the attorneys and DOJ-accredited representatives who work at our affiliates. CLINIC's trainings encompass topics such as courtroom skills, updates to asylum law, and changes to removal proceedings. Additionally, CLINIC staff write in-depth practice advisories to assist affiliates and other immigration practitioners to stay abreast of rapidly changing rules.

8. In addition to providing direct legal services, CLINIC provides technical support to our affiliates through the "Ask-the-Experts" portal on our website. Attorneys and accredited representatives at affiliate organizations submit inquiries regarding individual immigration matters that are particularly complex, and CLINIC staff provide expert consultations. If a submitted ques-

tion is broadly applicable, CLINIC's staff may spend weeks developing trainings or written resources designed to answer it.

9. CLINIC's affiliates provide pro bono or low-cost immigration-related services using materials, training, education, best practices, and sometimes, funding provided by CLINIC. A significant percentage of CLINIC affiliates provide legal services related to asylum claims, and CLINIC's affiliate network assists with thousands of asylum applications per year, including providing direct legal representation.

10. CLINIC is aware that gaining asylum in the United States is highly dependent on access to competent counsel. CLINIC's Defending Vulnerable Populations Program's staff leverages the organization's substantial asylum expertise to provide support to CLINIC's affiliates on asylum matters, including through trial skills trainings on representing asylum seekers in immigration court, practice advisories, and technical assistance. The Defending Vulnerable Populations Program also works to increase the number of fully accredited representatives and attorneys who are qualified to represent immigrants in immigration court proceedings through specialized curricula and training programs on immigration court trial skills. The curriculum includes training based on complicated asylum scenarios, such as how to handle an asylum case file involving a Latino youth with false gang allegations.

11. The Defending Vulnerable Populations Program has created several in-depth written resources on asylum over the past two years. These include practice advisories such as: Practice Advisory: LGBTI DACA Recipients and Options for Relief under Asylum Law (June 25, 2020); Practice Advisory: Overcoming the Asylum One-Year Filing Deadline for DACA Recipients (June 25, 2020); Practice Pointer: *Matter of L-E-A-* (April 20, 2020); A Guide to Assisting Asylum-Seekers with In Absentia Removal Orders (July 10, 2019); Practice Advisory: Asylum Seekers Stranded in Mexico Because of the Trump Administration's Restrictive Policies: Firm Resettlement Considerations (April 24, 2019). CLINIC's Defending Vulnerable Populations Program has also conducted webinars on, among other topics: changes to particular social group case law; writing asylum declarations; and motions to reopen based on changed country conditions.

12. In addition to the support provided to organizational affiliates, CLINIC's Defending Vulnerable Populations Program provides guidance and orientation to families separated pursuant to the Trump administration's "Zero Tolerance Policy" who are pursuing asylum in the United States; mentorship to the formerly separated families' legal counsel; representation on the initial I-765 employment authorization applications; and asylum application assistance for those formerly separated families who lack legal counsel.

13. CLINIC's Defending Vulnerable Populations Program also has a Remote Motion to Reopen Project, which has provided representation to formerly separated families, families released from family detention, asylum seekers, and other vulnerable people around the country, in filing motions to reopen before the immigration courts and the Board of Immigration Appeals since 2016. Through this project, CLINIC partners with pro bono attorneys to provide high quality representation on motions to reopen, and once the case is successfully reopened, CLINIC places the case with competent local counsel, providing further mentorship assistance as needed.

14. CLINIC's Defending Vulnerable Populations Program provides pro bono legal counsel to asylum seekers appealing to the BIA and the U.S. courts of appeals through our BIA Pro Bono Project, and, to a lesser extent, direct representation for asylum seekers in immigration court on a pro bono basis. If CLINIC is unable to assign pro bono matters, such as asylum applications, to a member of its network of affiliates, CLINIC staff—working individually or as part of a larger team—will often undertake the direct representation themselves.

15. The Rule challenged in the Complaint, *Procedures for Asylum and Bars to Asylum Eligibility*, 85 Fed. Reg. 67202 (October 21, 2020) ("Rule"), would irreparably harm CLINIC in multiple ways unless it is enjoined, including by frustrating CLINIC's mission to serve and support as many immigrants—and affiliate organizations providing immigration services—as possible.

16. As the hub of the largest network of immigration legal service providers in the United States, CLINIC is tasked with analyzing every significant change to immigration law and policy and creating digestible information to hundreds of organizations and thousands of practitioners nationwide. The Rule will require this analysis and creation of training materials, but at a

much larger scale because asylum-related services (including the filing of affirmative asylum applications) account for a large percentage of the services provided by CLINIC and our affiliates, approximately 45 percent of which provide asylum representation. CLINIC will also need to devote significant time and resources to informing the communities it serves, participating in further advocacy, and updating our resources.

17. As a result of the Rule, CLINIC will need to divert significant resources, prior even to the Rule's effective date, as many asylum seekers may rush to file before the new requirements take effect. CLINIC has already diverted our employees' time and efforts in advocating against this Rule, including submitting a comment during the notice and comment period, commenting on multiple subsequent proposed Rules that would affect asylum seekers, and analyzing the substantial overlap and consequences between this then-proposed Rule and the other proposed rules. Additionally, CLINIC will continue to devote significant time and resources to informing the communities it serves, participating in further advocacy, and updating relevant resources.

18. The Rule will have an immediate and tangible impact on the day-to-day work of CLINIC affiliates. Each practitioner will immediately need to know how to assist clients under the new Rule and CLINIC's job will be to provide this information. All 2,000-plus affiliate legal staff and their volunteers will need to be trained on the Rule's impact on asylum-seeking clients and prospective clients. CLINIC has already allocated considerable staff time to reviewing the proposed Rule and anticipates incurring significant additional expenses if this Rule goes into effect, as the organization will have to develop new training and legal support resources for, and respond to, technical support inquiries from our affiliate network.

19. CLINIC's affiliates depend on CLINIC to provide real-time and up-to-date guidance on immigration law and policy, a service which has become both increasingly critical and increasingly difficult in light of the volume and scope of changes to the asylum process—and the resulting interplay between these regulatory changes—that have occurred even just over the last four years. CLINIC delivers this guidance via emails, webinars, and our website.

20. In response to the large number of questions relating to the intersection of criminal

law and immigration law that CLINIC has *already* received via our network of affiliates, CLINIC hired a consulting attorney specializing in this area of law to respond to such inquiries. Because this consulting attorney charges CLINIC an hourly rate, CLINIC expects this Rule to necessarily have a negative impact on our budget, as CLINIC expects to receive a marked increase in the number of queries regarding the implications of this Rule for the consulting attorney to analyze. Furthermore, the complex and nuanced factors contemplated by *this* new Rule will require CLINIC to devote significant additional resources and staffing to develop and provide timely training on how to evaluate immigrants' eligibility for asylum, including the impact of any prior convictions, and, in some instances, criminal allegations without convictions.

21. In the past year alone, CLINIC has had to publish numerous substantive trainings and practice alerts in response to changes to the asylum framework, including a fact sheet for practitioners navigating immigration court proceedings for unaccompanied child clients pursuing initial asylum jurisdiction with USCIS; an in-depth analysis and year-to-year comparison of both the annual Human Rights Report published by the U.S. Department of State and the USCIS Asylum Office's Credible Fear Lesson Plan, which is designed to train asylum officers and set forth standards to be followed when conducting credible fear interviews; summary analysis on the "Security Bars and Processing" proposed rule that aims to bar entry of asylum applicants who have tested positive for COVID-19, come from a country where COVID-19 is prevalent, and/or exhibit COVID-19 symptoms; answers to FAQs regarding multiple changes to the employment authorization rules for asylum seekers; practical guidance regarding representation of asylum seekers with family-based claims; and a practice manual containing an overview of applicable laws, regulations, and guidance concerning the I-730 petition process for asylees and refugees to petition for family members, as well as practical information on how to navigate the application process from completing the form I-730, to compiling evidence, to troubleshooting with government agencies. In addition, CLINIC filed numerous comments on proposed rules impacting the asylum process, as well as filing several amicus briefs in matters concerning asylum.

22. As a result of the new Rule, in addition to providing the above-mentioned practical

alerts and updates, CLINIC will likely have to re-work our core existing trainings and materials to account for the proposed changes. For example, CLINIC would have to re-work its asylum e-learning course, the criminal consequences on immigration status webinars and webinar series, our legal practitioner toolkit and removal defense toolkit, and the "Representing Clients in Immigration Court" publication issued by the American Immigration Lawyers Association. Additionally, CLINIC will have to rewrite portions of existing written materials, which will need to be reviewed for potential changes in light of the new Rule, and it is likely that some will need to be fully rewritten. CLINIC will also need to write an in-depth article on the final Rule.

23. In general, the Rule will result in a significant expenditure of staff resources to respond to the various changes to the asylum eligibility guidelines. This diversion of resources will take staff away from other CLINIC initiatives. CLINIC has already had to divert resources to respond to numerous changes to immigration regulations including changes to public charge determinations, fee waivers and increases, responding to Requests for Evidence in cases pending before USCIS, and additional near-constant changes to long-established immigration practice. These changes are detrimental to immigrant clients and have resulted in CLINIC having to significantly increase the staffing levels in our Defending Vulnerable Populations Programs. CLINIC anticipates that the need to continue increasing staffing and diverting existing resources will only intensify due to the Rule, although the organization's actual ability to hire such staff may not be commensurate with demand. Much of the work that CLINIC will have to initiate in response to the changes will be brand new work. But for the need to respond to the changes in the Rule, CLINIC staff would otherwise be devoting time to helping affiliates tackle difficult legal problems under existing law, or training and teaching on other important issues including removal defense, asylum, naturalization, adjustment of status, Special Immigrant Juvenile Status, Violence Against Women Act ("VAWA") self-petitions, T and U visas, Temporary Protected Status, Deferred Action for Childhood Arrivals ("DACA"), and Liberian Refugee Immigration Fairness ("LRIF").

24. As discussed above, CLINIC expects that the Rule will increase the number of queries submitted through its ask-the-expert website portal concerning the intersection of criminal and

immigration law. Indeed, while recent regulatory changes have made it more difficult to assess asylum eligibility, this new Rule imposes substantial—and previously untested—challenges for any immigration law practitioner, including CLINIC and our affiliates. The new Rule will require immigration practitioners to engage in a more complicated analysis of whether an asylum seeker is barred from asylum eligibility, based on analyzing both state and federal criminal law, pushing immigration practitioners even further outside of their areas of expertise.

25. Moreover, the Rule would significantly increase the amount of time and resources each asylum seeker's case requires, including time spent on briefing eligibility issues; time and resources spent on obtaining any records of arrests and/or convictions; and resources spent on finding and preparing witnesses and experts. The Rule will also impact the length of the adjudication process itself. Indeed, as a result of recent decisions, even if the parties stipulate to a particular issue before the immigration judge, the asylum seeker will still have to present evidence and arguments to prove that element of asylum in order to prevent reversal by the BIA in the event of an appeal.

26. The current clients of CLINIC, our affiliates and our pro bono partners include many individuals seeking asylum as a family unit. Often, CLINIC and our affiliates are able to present a single case on behalf of such families, because the children's claims are treated as derivative of their parents' claims. However, if parents were rendered ineligible for asylum under the new Rule, their children would no longer have a derivative claim and each child would have to independently prove eligibility for asylum. The Rule will likely lead to some parents winning withholding of removal, but not asylum. With no ability to seek derivative benefits under withholding, children who do not have independent persecution-based claims would be ordered removed, forcing parents to choose between being returned to countries where they will be persecuted or being permanently separated from their children. CLINIC would have to explain these more complicated procedural postures, as well as the ethical concerns they raise, to affiliates who may have to either accept fewer cases as each family's case involves more preparation time, or figure out how to stretch their already-limited resources to handle such cases for current clients

27. In summary, at a minimum, the new Rule will require CLINIC to do the following: analyze the Rule for consequences to our affiliates and their client base; write a legal analysis of the Rule for practitioners; write an update about the Rule for our mass communications; create a webinar on the changes; update website content where asylum application language exists; update any relevant toolkits and/or other documents; field affiliate inquiries to our portals; provide program management consultations to affiliates struggling to serve low-income immigrants due to policy changes resulting in a lower number of people served and declining revenue, if not also staff reductions; and provide technical support to affiliates needing to fundraise more through grant applications due to declining numbers of open cases.

28. The Rule could also jeopardize CLINIC's funding and budget. CLINIC receives funding from a variety of sources, including funding in exchange for services such as trainings, written resources, and technical assistance. This Rule will force CLINIC to spend more time than previously planned for on asylum services. If CLINIC has to spend more time on asylum services, our funding will not extend as far, thus forcing CLINIC to seek new funding to cover this gap. However, seeking such new funding takes time and bona fide attempts to find new funding are often futile.

29. Similarly, loss of, or even reduced, funding may cause CLINIC affiliates to reduce the number of full-time staff positions available. Loss of staff time or positions altogether, in turn, will create a longer wait for one-on-one appointments and mean that those affiliates will be able to serve fewer clients. That reduced output will, in turn, give funders less cause to use their money to support CLINIC affiliates as funders seek to maximize the outcomes of their donations.

30. The changes to the Rule will undermine CLINIC's and our affiliates' ability to fulfill one of their central functions of providing asylum-related assistance, thereby dramatically disrupting CLINIC's broader mission of providing immigration legal services to low-income and vulnerable populations. As described above, if the Rule is permitted to take effect, CLINIC and our affiliates will be required to divert significant resources to address the Rule. This diversion of existing resources, combined with a concomitant loss in funding, will further exacerbate the harm

to CLINIC caused by the Rule.

31. The relief requested in the Plaintiffs' Complaint would properly address the injuries to CLINIC described above, and in the public comment CLINIC submitted in opposition to the Rule. If Plaintiffs prevail in this action, CLINIC would be able to devote our staff time and resources to more clients than it would be able to if the Rule were permitted to take effect.

32. CLINIC is unaware of any way it can recover the increased costs that the Rule will impose on CLINIC as an organization, and would suffer immediate and irreparable injury under the Rule if the rule were permitted to take effect.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: November 2, 2020

Baltimore, Maryland

Michelle N. Mendez

EXHIBIT D

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO

PANGEA LEGAL SERVICES; DOLORES STREET COMMUNITY SERVICES, INC.; CATHOLIC LEGAL IMMIGRATION NETWORK, INC.; and CAPITAL AREA IMMIGRANTS' RIGHTS COALITION,

Plaintiffs,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY; CHAD F. WOLF, *under the title of Acting Secretary of the Department of Homeland Security*; KENNETH T. CUCCINELLI, *under the title of Senior Official Performing the Duties of the Deputy Secretary for the Department of Homeland Security;* U.S. CITIZENSHIP AND IMMIGRATION SERVICES;

Case No. 3:20-cv-07721

DECLARATION OF CLAUDIA CUBAS

U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT;
TONY H. PHAM, *under the title of Senior Official Performing the Duties of the Director of U.S. Immigration and Customs Enforcement*;
U.S. CUSTOMS AND BORDER PROTECTION;
MARK A. MORGAN, *under the title of Senior Official Performing the Duties of the Commissioner of U.S. Customs and Border Protection*;
U.S. DEPARTMENT OF JUSTICE;
WILLIAM P. BARR, *under the title of U.S. Attorney General*;
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW; and
JAMES MCHENRY, *under the title of Director of the Executive Office for Immigration Review,*

Defendants.

I, Claudia Cubas, declare under penalty of perjury as prescribed in 28 U.S.C. § 1746:

1. The facts contained in this declaration are known personally to me and, if called as a witness, I could and would testify competently thereto under oath. I submit this sworn declaration in support of Plaintiffs' Motion for a Temporary Restraining Order, Preliminary Injunction, and Stay.

2. I serve as the Litigation Director for the Capital Area Immigrants' Rights Coalition ("CAIR Coalition"), an organizational plaintiff in this action. Prior to serving as Litigation Director, I was the Senior Program Director for the Detained Adult Program at CAIR Coalition. I have worked for CAIR Coalition since 2011. I manage and coordinate litigation across the organization, involving issues related to access to justice, detention, and eligibility for relief for adults and children who are detained by U.S. Immigration and Customs Enforcement ("ICE") and the Office of Refugee and Resettlement ("ORR").

3. CAIR Coalition is a 501(c)(3) nonprofit organization headquartered in Washington, D.C., with an additional office in Baltimore, Maryland, and is listed on the Executive Office for Immigration Review's list of Pro Bono Legal Service Providers. We represent clients primarily before the two local immigration courts in our regions the Arlington, Virginia and the Baltimore, Maryland immigration courts, but also have a number of clients who are detained or live in other parts of the country.

4. CAIR Coalition is the only organization solely dedicated to providing legal services to immigrant men, women, and children who are detained by ICE or the ORR in Virginia and Maryland. CAIR Coalition strives to ensure equal justice for all migrant men, women, and children at risk of detention and deportation in the Washington, D.C. metropolitan area and beyond.

5. CAIR Coalition is comprised of three main programs: the Detained Adult Program, the Detained Children's Program, and the Immigration Impact Lab. The Detained Adult and Children's programs are the backbone of the organization and are focused on providing direct services; the Lab program is focused on impact and federal court work.

6. The Detained Adult Program has four main work components: (1) providing educational services in the form of "know your rights" presentations, conducting individual consultations (intakes), and conducting pro se workshops with unrepresented detained noncitizens in the custody of ICE at facilities located in Virginia and Maryland; (2) connecting unrepresented detained migrants who cannot afford a lawyer with pro bono attorneys from CAIR Coalition's various pro bono partners; (3) representing detained immigrants found legally incompetent while appearing pro se before an immigration judge as part of the National Qualified Representative Program ("NQRP"); and the newest component, (4) providing in-house direct representation to indigent immigrants from various local regions throughout the course of their removal proceedings applying a universal representation model.

7. The Detained Children's Program has three main work components: (1) providing educational services in the form of "know your rights" presentations and conducting individual consultations (intakes) with unrepresented detained noncitizens in the custody of ORR at facilities located in Virginia and Maryland; (2) connecting unrepresented detained immigrants who cannot afford a lawyer with pro bono attorneys from CAIR Coalition's various pro bono partners; and, (3) providing in-house direct legal representation to immigrant children throughout the course of their removal proceedings.

8. Asylum applications represent a vital component of CAIR Coalition's organizational mission and account for much of the legal services it provides. While a majority of CAIR Coalition's work focuses on assistance and representation of people before the two local immigration courts in the region, the organization also represents unaccompanied immigrant children ("UACs") in interviews before U.S. Citizenship and Immigration Services ("USCIS") Asylum Offices.

9. CAIR Coalition works with the thousands of adults and children detained by ICE in the Washington, D.C. and Virginia areas to provide information, support, and representation during Immigration Court proceedings. In 2019, CAIR Coalition helped represent 477 individuals

(eleven percent of CAIR Coalition's total intake) in such proceedings, and provided *pro se* assistance to an additional 241 people. Also in 2019, CAIR Coalition conducted 4,090 individual consultations with children and adults in detention, and provided pro bono representation or significant *pro se* assistance to eighteen percent of people we met in detention.

10. The Rule challenged in the Complaint, *see Procedures for Asylum and Bars to Asylum Eligibility*, 85 Fed. Reg. 67202 (October 21, 2020) ("Rule"), would irreparably harm CAIR Coalition in multiple ways absent enjoinder of the Rule, including by frustrating CAIR Coalition's mission to serve as many detained immigrants lawfully seeking asylum as possible.

11. The Rule would significantly limit the overall number of clients CAIR Coalition is able to service. In 2019, CAIR Coalition provided direct representation to, and/or obtained pro bono representation for, approximately 477 immigrants, and as of the date of this declaration, for the year 2020, has connected 310 people to in-house or pro bono attorneys. For 2019, approximately seventy-five percent of the adults and five percent of the children CAIR Coalition connected with a lawyer had some type of a criminal conviction or other involvement with the criminal justice system. These percentages have not significantly changed based on a review of CAIR Coalition's current 2020 placement data.

12. There are two key factors that contribute to these percentages described above: (1) Unlike legal service providers at the border, who mainly provide asylum assistance to newly arrived asylum seekers, many who do not have criminal histories, CAIR Coalition's clients tend to have deeper ties to the United States, as CAIR Coalition provides services to a large population of detained immigrants who have been the subject of internal arrests by ICE; and (2) CAIR Coalition's children's program provides services to the only secure detention center for immigrant children in the nation.

13. It is generally the case that matters involving individuals with criminal histories typically require significantly more resources than matters without a criminal justice component (e.g. representation of a recent arriving immigrant seeking asylum). For instance, CAIR Coalition staff aims to complete initial intake in eight minutes, but these may increase by two to five minutes,

depending on the length of the person's criminal history. After intake, CAIR Coalition staff spend on average two to three minutes entering intake information in their database and verifying certain basic information such as when the individual's next court date is and what their current status is. If an individual has a criminal history, this process can take an additional ten minutes, as CAIR Staff must search various local case search systems to confirm any arrests self-reported during the intake process. At the trial representation stage, a typical case may take approximately forty to fifty hours to complete, an amount that can easily increase by ten to twenty hours if the individual has *any* criminal history. If the individual's criminal history is lengthy or serious in nature, a case may exceed one hundred hours of work, as CAIR Coalition staff must engage in significant analysis to determine arguments against bars to asylum or withholding of removal. The above are average work times for the representation of clients with criminal histories based on the asylum criminal bar framework in place *prior* to the Rule.

14. By dramatically increasing the number of individuals potentially subject to criminal bars to asylum eligibility, the Rule would undoubtably increase the proportion of cases requiring resource-intensive assistance by CAIR Coalition staff. The Rule would thus put the organization in an impossible position: CAIR Coalition would either need to raise more funds simply to be able to continue serving the same number of clients, or reduce the number of clients it serves to fit within its current budget.

15. Additionally, CAIR Coalition would be forced to divert significant staff resources to analyzing and interpreting the Rule, overhauling its client information database, and preparing new informational and advocacy materials.

16. For example, even updating CAIR Coalition's client database to include information relevant to the new Rule's asylum eligibility bars would take a single staff member between three to five days to complete, as this information would need to be retrieved for each active client. CAIR Coalition uses Salesforce to keep track of client and case information. Currently, CAIR Coalition staff are only required to input an individual's criminal offense history as part of their client database profile if the offense could be categorized as a removability ground, as the current

bars to relief are based on those grounds (*e.g.*, aggravated felonies, crimes involving moral turpitude, crimes related to controlled substances or firearms offenses). Because the Rule bars people from asylum for non-removability offenses, as well as for conduct that is generally not provided in online case search records, CAIR Coalition staff expect to spend significantly more time entering an individual's complete criminal history, in addition to having to spend more time pulling criminal records from local state courts.

17. Additionally, the base framework of the database and CAIR Coalition's intake process would need to be retooled to add questions and responses relevant to the new bars. It takes approximately five to ten hours to customize, test, and implement small changes to CAIR Coalition's database and an additional three to five hours to train staff on the changes. Given the number of criminal bars newly imposed by this Rule, CAIR Coalition estimates that the changes required to fully customize and update its database to track the new bars and train its staff will exceed twenty hours.

18. Although CAIR Coalition has contracted with a Salesforce systems consultant to assist with such changes, this assistance is subject to a monthly time cap due to cost restrictions. Given the substantial changes required by the Rule, the necessary changes to the Salesforce database could easily take the consultant far longer than their monthly cap permits, requiring CAIR Coalition to expend additional time and money simply to update their database. The opportunity cost of these updates cannot be ignored, especially as CAIR Coalition was already in the midst of several other technological updates, including streamlining volunteer applications, programmatic technical updates identified in the middle of 2020, and transitioning CAIR Coalition staff onto Salesforce's Lightening Platform, many or all of which may need to be deferred in order to prioritize changes to account for the asylum eligibility bars implemented by the Rule, which are set to go into effect in less than a month's time.

19. Additionally, under the Rule, CAIR Coalition's staff would spend substantial resources identifying and sorting asylum-seekers impacted by the Rule from other asylum seekers (i.e., those who would not be subject to the categorical bars or other changes contemplated by the

Rule). Many of CAIR Coalition's adult clients came to CAIR Coalition following arrests or convictions within the U.S. criminal legal system, so, as stated earlier, the Rule will necessarily significantly impact a large portion of CAIR Coalition's client base.

20. Consequently, CAIR Coalition would need to expend more time and resources to assess clients during intakes and/or to prepare clients—both adults and children—for their asylum interviews, including to elicit and prepare more facts to determine eligibility based on the Rule's vaguely defined categorical bars and proposed multi-factor test for assessing prior criminal convictions.

21. In 2019, CAIR Coalition provided 4,090 individual consultations with adults and children to ascertain their asylum options, spending 4,000 hours conducting jail visits. The additional time required to account for the sweeping impact of the new Rule would likely cut by a third the number of adults CAIR Coalition could prepare during each jail visit. Although CAIR Coalition has paused in-person jail visits in light of the COVID-19 pandemic, CAIR Coalition staff are still conducting intakes by phone. However, phone intakes require more time than in-person intakes for several reasons: (a) facility staff do not always provide private phone call spaces for such calls; (b) phone use is in high demand inside housing units due to COVID-19; and (c) it takes significantly longer to gain someone's trust and get them to share personal information over the phone, especially when they are inconsistently afforded privacy for such calls. There is no way for CAIR Coalition to compensate for this loss; it has finite resources and only has permission to make jail visits a few times a month, so, together with the limited phone access, time is at a premium.

22. CAIR Coalition's staff also would spend added time and resources on each asylum-seeker's case, including the time and resources required to analyze and brief eligibility issues and obtain any records of arrests and/or convictions that may be needed. Whereas in 2019, CAIR Coalition was able to represent 365 detained adults and children in court, bring 312 full merits hearings, including asylum proceedings, and bring 42 appeals to the Board of Immigration Appeals and the Fourth Circuit Court of Appeals, the Rule would significantly reduce the amount of cases

in which CAIR Coalition could support and represent asylum-seekers going forward.

23. Given the increased complexity resulting from the new Rule (including, *inter alia*, the need to assess the applicability of a number of new bars to asylum eligibility and the impact of any prior convictions an asylum-seeker may have), CAIR Coalition also anticipates that it would not be able to staff client intake interviews with legal assistant or law student volunteers, as it has sometimes been able to do in the past.

24. The inability to rely on legal assistant or law student volunteers for intake interviews will cause a ripple effect felt throughout the organization. For example, CAIR Coalition staff members and volunteer lawyers will be required to redirect their time and energy to intake and preliminary interviews and will thus be unable to assist as many clients in other aspects of the asylum process. Because CAIR Coalition's organizational model relies on volunteer lawyers to represent clients in trial-stage proceedings, a reduction in overall volunteer capacity will necessarily reduce CAIR Coalition's capacity to represent as many clients as possible. Additionally, CAIR Coalition staff members and lawyers, who are trained in immigration work, may not have the criminal expertise required to navigate the complexities of the Rule's *new* bars to asylum, although many have developed some level of expertise as to the *existing* criminal bars. As a result, these new bars will likely require CAIR Coalition's staff members and lawyers to undergo substantial additional training, resulting in further reductions in CAIR Coalition's capacity to represent as many clients as possible.

25. Reduced volunteer capacity would also result in the diversion of resources from other CAIR Coalition initiatives, such as providing translation services, conducting country conditions research. While significant majorities of CAIR Coalition's funds come from federal and local state contracts and foundation grants, the organization still depends on large and small-scale donors, whose contributions primarily go towards non-earmarked operational funds. Maintaining an engaged volunteer workforce not only helps CAIR Coalition with cases, but is also a significant factor in the organization's ability to attract small and large donors, as volunteers often also donate or connect the organization with donors. Fewer volunteer opportunities directly translates into

reduced volunteer engagement and, often, a decrease in the organization's ability to recruit and maintain donors.

26. In addition to providing direct representation to adults and children, CAIR Coalition also hosts workshops for underrepresented individuals and assists detained adults with their *pro se* asylum applications by gathering country conditions, helping them prepare testimony, and serving as a resource for specific questions. In 2019, CAIR Coalition hosted 182 such workshops and assisted 241 adults with their *pro se* applications. The added complexities posed by the new Rule—sections of which purport to allow immigration adjudicators to conduct their own subjective inquiries into conduct that may never have resulted in a conviction—will require the CAIR Coalition staff to revise all current training materials and to spend significantly more time assisting and advising each *pro se* applicant instead of hosting group workshops, thus reducing the total number of applicants it is able to serve.

27. The Rule also will jeopardize CAIR Coalition's already tight budget. If the organization places fewer asylum cases with volunteers at law firms, it is likely to receive fewer of the much-needed firm donations upon which it depends for close to five percent of its annual budget. Much of CAIR Coalition's funding from law firm donations comes from CAIR Coalition giving them opportunities to provide direct assistance with and staffing of with asylum matters; to the extent many clients are no longer eligible for asylum, CAIR Coalition expects that such donations could decrease.

28. Moreover, some of CAIR Coalition's funding is tied to the number of adult clients that the organization serves each year. CAIR Coalition currently has four contracts with local government entities to represent immigrant residents who are in detention. As part of each of these funding contracts, CAIR Coalition agreed to represent a certain number of immigrants per year, a representation goal which was based on the average number of hours and representation capacity for one staff attorney. The increased hours that each asylum-seeker would require if the Rule were permitted to take effect would reduce the overall number of people served, placing this future funding in jeopardy. Indeed, because the Rule would reduce the number of clients CAIR Coalition

could serve in court proceedings per staff member, it is unclear whether CAIR Coalition would be able to comply with existing funding conditions tied to the number of individuals it represents in such proceedings.

29. In sum, the Rule would irreparably harm CAIR Coalition, including by frustrating its fundamental organizational mission to serve as many detained noncitizens as possible. CAIR Coalition would be unable to represent the same number of clients that it has traditionally, both because fewer clients would be eligible for asylum relief and because the organization would have to spend more of its limited resources on each individual case. The Rule also would force CAIR Coalition to divert scarce resources away from other important programs to compensate for the additional time and staffing resources required to continue serving clients under the Rule.

30. The relief requested in the Plaintiffs' Complaint would properly address the injuries to CAIR Coalition described above and in the public comment CAIR Coalition submitted in opposition to the Rule. If Plaintiffs prevail in this action, CAIR Coalition would be able to devote its staff time and resources to more clients than it would be able to if the Rule were permitted to take effect.

31. CAIR Coalition is unaware of any way they can recover the increased costs that the Rule will impose on them as an organization, and would suffer immediate and irreparable injury under the Rule if the rule were permitted to take effect.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: November 2, 2020

Washington, D.C.

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO

PANGEA LEGAL SERVICES; DOLORES STREET COMMUNITY SERVICES, INC.; CATHOLIC LEGAL IMMIGRATION NETWORK, INC.; and CAPITAL AREA IMMIGRANTS' RIGHTS COALITION,

Plaintiffs,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY;
CHAD F. WOLF, *under the title of Acting Secretary of Homeland Security*;
KENNETH T. CUCCINELLI, *under the title of Senior Official Performing the Duties of the Deputy Secretary for the Department of Homeland Security;*
U.S. CITIZENSHIP AND IMMIGRATION SERVICES;
U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT;

Case No. 3:20-cv-07721

DECLARATION OF NAOMI A. IGRA

TONY H. PHAM, *under the title of Senior Official Performing the Duties of the Director of U.S. Immigration and Customs Enforcement*;
U.S. CUSTOMS AND BORDER PROTECTION;
MARK A. MORGAN, *under the title of Senior Official Performing the Duties of the Commissioner of U.S. Customs and Border Protection*;
U.S. DEPARTMENT OF JUSTICE;
WILLIAM P. BARR, *under the title of U.S. Attorney General*;
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW; and
JAMES MCHENRY, *under the title of Director of the Executive Office for Immigration Review*,

Defendants.

I, Naomi A. Igra, declare as follows:

1. I am an attorney licensed to practice law in all the courts of the State of California. I am an associate at the law firm of Sidley Austin LLP, counsel of record for Plaintiffs Pangea Legal Services ("Pangea"), Dolores Street Community Services, Inc. ("DSCS"), Catholic Legal Immigration Network, Inc. ("CLINIC"), and Capital Area Immigrants' Rights Coalition ("CAIR Coalition") in this case. This declaration is submitted in support of Plaintiffs' Motion for Temporary Restraining Order, Preliminary Injunction, and Stay. The facts set forth in this declaration are within my personal knowledge. If called as a witness, I could and would competently testify as follows.

2. Attached hereto as **Exhibit E** is a true and correct copy of a January 21, 2020 comment letter submitted to the Department of Justice ("DOJ"), Executive Office for Immigration Review ("EOIR"), Department of Homeland Security ("DHS"), and U.S. Citizenship and Immigration Services by the City of New York in response to the December 19, 2019 proposed rule, EOIR ID No. EOIR-2019-0005-0534, and available at https://www.regulations.gov/document?D=EOIR-2019-0005-0534 ("N.Y.C. Comment Letter").

3. Attached hereto as **Exhibit F** is a true and correct copy of the proposed rule, *Procedures for Asylum and Bars to Asylum Eligibility*, 84 Fed. Reg. 69640, dated December 19, 2019.

4. Attached hereto as **Exhibit G** is a true and correct copy of the final rule, *Procedures for Asylum and Bars to Asylum Eligibility*, 85 Fed. Reg. 67202, dated October 21, 2020.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed on this 3rd day of November, 2020, at San Francisco, California.

/s/ Naomi A. Igra
Naomi A. Igra

EXHIBIT E

THE CITY OF NEW YORK
OFFICE OF THE MAYOR

January 21, 2020

Department of Justice, Executive Office for Immigration Review,
Department of Homeland Security, U.S. Citizenship and Immigration Services
Via electronic submission

Re: Procedures for Asylum and Bars to Asylum Eligibility
EOIR Docket No. 18-0002; A.G. Order No. 4592-2019

The City of New York ("the City") submits this comment to oppose the Department of Homeland Security's ("DHS") proposed rule entitled "Procedures for Asylum and Bars to Asylum Eligibility," which was published in the Federal Register on December 19, 2019 ("Proposed Rule").

The Proposed Rule joins a slew of attacks on the asylum application process, such as the Migrant Protection Protocol ("MPP") and the Third Country Transit Bar, as well as other recently published proposed rules related to employment authorization for asylum-seekers.[1] This latest Proposed Rule would do further damage to an already vulnerable population by impeding those fleeing persecution from receiving due process in the asylum adjudication process. The Proposed Rule is organized into three sections. The first proposes to add seven unprecedented categorical bars to asylum eligibility altogether. The second proposes a multi-factor test for adjudicators to determine whether the applicant's criminal conviction or sentence is relevant for purposes of determining asylum eligibility. The third seeks to rescind a critical provision in current rules regarding the reconsideration of discretionary asylum. Cumulatively, these proposed changes seek to further dismantle the existing asylum protections rooted in United States and international law, and to create unjustified, punitive bars to asylum for the most vulnerable. This Proposed Rule would harm immigrant New Yorkers who are seeking asylum as well as their families—including U.S. citizens—and their local communities. In turn, the Proposed Rule would harm the social and economic well-being of New York City. For these

[1] *See c*omment in opposition to Asylum Eligibility and Procedural Modifications (8/15/2019); 83 FR 55934 (Nov. 9, 2019); 84 FR 62280 (Nov. 14, 2019), 84 FR 67243 (Dec. 9, 2019); *Policy Guidance for Implementation of the Migrant Protection Protocols,* (January 25, 2019) *available at* https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf; See comment in opposition to Asylum Application, Interview, and Employment Authorization for Applicants CIS No. 2648-19; DHS Docket No. USCIS-2019-0011 (January 13, 2019) *available at* https://www.regulations.gov/document?D=USCIS-2019-0011-0656 *also available at* https://www1.nyc.gov/assets/immigrants/downloads/pdf/comments/DHS-Docket-No-USCIS-2019-0011-NYC-Comment.pdf.

reasons, the City strongly opposes the Proposed Rule, and calls upon DHS to withdraw it in its entirety.

I. The Proposed Rule Harms the Most Vulnerable in New York City and Stands in Stark Contrast to Local Policy and International Treaty Obligations.

The United States asylum system, which was codified in statute through the Refugee Act of 1980, sought to ensure that the United States legal code would comply with the 1967 Protocol Relating to the Status of Refugees[2] which binds parties to the United Nations Convention Relating to the Status of Refugees.[3] Asylum protections are critical to ensure that those fleeing persecution have due process safeguards in place as they seek safety and stability for themselves and their families. As is, the process of seeking asylum is complex and challenging because the evidentiary burden rests on the asylum-seeker to navigate a complex system with no right to counsel. This new Proposed Rule joins the many other changes that have and will continue to impede asylum seekers from achieving stability.

New York City is the ultimate city of immigrants, with immigrants making up almost 40% of its population, or over 3.2 million people. This immigrant population is deeply tied to the City as a whole, with nearly 60% of New Yorkers living in households that have at least one immigrant.[4] Asylum seekers are a particularly vulnerable population in the City, having often made the perilous journey to the United States to flee persecution in their home countries or who have a well-founded fear of future persecution. The Proposed Rule would have grave consequences to those immigrant New Yorkers who are asylum seekers by creating unprecedented barriers to eligibility for asylum that fly in the face of due process and long-standing policy. It also runs contrary to the country's moral obligation to protect those fleeing from persecution.

The City has long recognized that policies that welcome immigrants lead to a stronger and more prosperous community. As such, the City has taken great strides to welcome those fleeing persecution and provide them with a safe home.[5] In addition, the City has invested in immigration legal services, so that immigrants—including those fleeing persecution—are provided with much needed support as they rebuild their lives here. Additional barriers for asylum seekers undermine the City's commitment to immigrants and are inconsistent with the City's and the country's core values.

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

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

[4] *New York City Mayor's Office of Immigrant Affairs, State of Our Immigrant City: MOIA Annual Report for Calendar Year 2018, 11, available at* https://www1.nyc.gov/assets/immigrants/downloads/pdf/moia_annual_report%202019_final.pdf.

[5] *See e.g.,* https://www.nbcnewyork.com/news/local/syria-refugee-new-york-mayor-bill-de-blasio-immigrant/1274304/; https://www.nytimes.com/2016/09/20/opinion/our-immigrants-our-strength.html.

As it stands now, the U.S. asylum system already applies asylum bars in a manner that is overly broad in the context of our obligations under the Refugee Convention.[6] The drafters of the Refugee Convention intended the particularly serious crime exception to non-refoulement to apply only to refugees who constitute a serious threat to the host country's national security.[7] While many countries around the world have adopted the United Nation's High Commissioner for Refugees' interpretations of the original intent of Article 33(2),[8] the United States has deviated substantially from this norm. In the United States, refugees can be barred from relief from removal by statute for relatively minor, nonviolent offenses like theft, filing a false tax return or failing to appear in court, with no individualized assessment of the circumstances surrounding those offenses and whether such individuals currently pose a credible threat to national security.[9] Given that the current bars are already extremely overbroad, the City opposes the federal administration's efforts to further expand the bars to asylum.

II. The Proposed Rule Undermines the City's Investments in Ensuring Due Process for Immigrants and Public Safety.

Were the Proposed Rule to go into effect, it could threaten public safety in the City by imposing a chilling effect on victims, witnesses, and defendants. For example, adding "any accusation of conduct for acts of battery involving a domestic relationship" as a bar to asylum could have the unintended consequence of disincentivizing victims of domestic violence from reporting their abuse to law enforcement.[10] All survivors of domestic violence face difficult and complex choices when deciding to report to the police, as reporting abuse can result in loss of housing, financial resources, and child custody for the victim. For undocumented survivors, the decision involves even greater risk, including the possibility of deportation for the victim. For example, abusers often cross-claim allegations of violence or mutual combat against survivors who are subsequently charged with acts constituting domestic violence, which could result in the denial of the survivor's asylum claim. These additional risks are reflected in the already lower reporting rates of domestic violence among that population.[11] Given these complex dynamics,

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[6] *See* Philip L. Torrey, Clarissa Lehne, Collin Poirot, Manuel D. Vargas, Jared Friedberg, *United States Failure to Comply with the Refugee Convention: Misapplication of the Particularly Serious Crime Bar to Deny Refugees Protection from Removal to Countries Where Their Life or Freedom is Threatened*, (2018) *available at* https://www.immigrantdefenseproject.org/wp-content/uploads/IDP_Harvard_Report_FINAL.pdf.

[7] Id.

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

[9] *See United States Failure to Comply with the Refugee Convention: Misapplication of the Particularly Serious Crime Bar to Deny Refugees Protection from Removal to Countries Where Their Life or Freedom is Threatened*, (2018) *available at* https://www.immigrantdefenseproject.org/wp-content/uploads/IDP_Harvard_Report_FINAL.pdf.

[10] Given that domestic violence is already underreported, the Proposed Rule could further limit law enforcement's ability to track and respond to complaints in domestic violence cases, of which there were more than 86,000 filed in 2018 alone. See NYPD's annual report on Domestic Violence Complaints: https://www1.nyc.gov/assets/nypd/downloads/pdf/analysis_and_planning/domestic-violence/dv-local-law-38-annual-2018.pdf (last accessed January 14, 2020).

[11] N,Y. Times, *Fewer Immigrants Are Reporting Domestic Abuse. Police Blame Fear of Deportation* https://www.nytimes.com/2018/06/03/us/immigrants-houston-domestic-violence.html (last accessed January 13, 2020).

barring asylum to anyone who is merely *accused* of domestic violence without conviction would further discourage a reluctant, vulnerable population from seeking necessary services and support, jeopardizing the safety of all New Yorkers. Moreover, this rule would in effect further remove protections for domestic violence survivors who have already escaped violence and are seeking to adjust their status.

Similarly, the addition of criminal offenses "involving criminal street gangs" broadly as a bar to asylum could discourage at-risk persons from participating in programs that seek to curb violence and reduce recidivism. Without definition or parameters, designating offenses "involving criminal street gangs" as a bar to asylum would undermine the ability of any programs that might seek to recruit and engage at-risk individuals, youth especially, as involvement with the programs could be viewed as creating a record of gang contact or affiliation. This chilling effect could undermine efforts to reduce violence and recidivism and prevent crime through holistic, long-term solutions.

Further, the Proposed Rule's addition of very broad and undefined categories of offenses would undermine the City's investments in ensuring that immigrant defendants receive adequate counsel. In 2010, the Supreme Court held that criminal defendants must be informed of the possible immigration consequences of their criminal convictions.[12] New York State has long afforded similar protections to immigrant defendants.[13] Consistent with these standards, the City spends millions of dollars per year to fund access to immigration-related advisals and training and education for practitioners representing criminal defendants. The Proposed Rule would impose added burdens on City-funded legal service providers to fulfill constitutionally mandated immigration-related responsibilities to criminal defendants.

In addition, the Proposed Rule would burden and clog the City's courts because increased uncertainty as to the consequences of criminal convictions would delay reasonable dispositions. As the Supreme Court has recognized, immigration consequences are often more important than any possible term of imprisonment to a non-citizen.[14] It reasonably follows that uncertainty as to the consequences accompanying a plea or allocution would unnecessarily prolong the life of a criminal case, prevent the parties from entering into a reasonable plea negotiation, and force costly and resource-draining trials.[15] In sum, the proposed sweeping change to asylum law would prove costly and threaten the courts' ability to serve all New Yorkers—citizens and non-citizens—with the timely adjudication and process justice and the Constitution demands.

Lastly, the Proposed Rule unreasonably cuts against the City's authority to evaluate the impact and consequences certain conduct should have on its residents by adding broad misdemeanor offenses as a bar to asylum relief. In 2017, the City Council enacted

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[12] *Padilla v. Kentucky*, 559 U.S. 356, 374 (2010) (holding that Constitutional right to effective assistance of counsel requires that counsel inform their clients whether a criminal plea carries a risk of deportation).
[13] *People v. McDonald*, 1 NY3d 109, 115 (N.Y. 2003) (finding that petitioner's criminal defense attorney failed to meet an "objective standard of reasonableness" when he misinformed petitioner as to the possible immigration consequences of his plea).
[14] *See Padilla*, 559 U.S. at 368 (acknowledging that a defendant's right to remain in the United States could be more important to the defendant than any potential jail sentence).
[15] *See Padilla*, 559 U.S. at 373 (noting that an understanding of the immigration consequences of criminal convictions is closely linked to "satisfying the interests" of both the prosecution and the defendant and ensuring the efficient use of court resources).

Administrative Code 10-179,[16] which created the civil offense of Disorderly Behavior. After engaging stakeholders in the City's criminal justice system, the Council enacted this law to reduce the number of arrests associated with Disorderly Conduct, Penal Law Section 240.20, thereby reducing unnecessary criminalization and unfair collateral exposure for non-citizen New Yorkers.[17] The law was drafted taking into consideration established principles of immigration-related consequences of arrests. The Proposed Rule would upend those principles. In so doing, it would undermine the City's sovereign prerogative to shape its law enforcement policies to best account for its complex social and political realities.

III. The Proposed Rule Criminalizes Vulnerable Populations Fleeing Persecution, Including Parents and Caregivers.

The Proposed Rule would expand the criminal bars to asylum to include offenses related to the harboring and smuggling of noncitizens by parents and family members and those previously removed. In particular, this would impact parents and 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 change would serve to further criminalize vulnerable populations fleeing persecution[18] and further punish those trying to help children while being in danger themselves. Furthermore, this proposed bar comes at a time that now-public documents have revealed this administration's efforts to utilize smuggling prosecutions against parents and caregivers as part of its strategy of deterring families from seeking asylum in the United States.[19] This expansion of criminal bars to asylum would expand on this reprehensible strategy by barring parents who have already been prosecuted from obtaining asylum protections for themselves and their children. This cruelly targets parents and caregivers and continues the separation of families.

The Proposed Rule would also expand the asylum bar to those who have fled persecution and returned to the United States after a previous deportation, many of whom have been convicted of illegal reentry as a result.[20] As justification for this change, the agency offers only

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[16] For the full text of Disorderly Behavior, see NYC Administrative Code 10-179: https://nycadministrativecode.readthedocs.io/en/latest/c09/#chapter-1-public-safety (last accessed January 14, 2020).

[17] See City Council Committee Report dated October 16, 2017: https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3028942&GUID=1058179C-1264-44A8-A9D0-D3B4A3C66B59&Options=&Search=, (last accessed January 13, 2020).

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

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

[20] *See* John Gramlich, *Far more immigration cases are being prosecuted criminally under Trump administration*, (Sept. 27, 2019) *available at* https://www.pewresearch.org/fact-tank/2019/09/27/far-more-immigration-cases-are-being-prosecuted-criminally-under-trump-administration/ (demonstrating

conclusory statements regarding the dangerousness of recidivist offenders. However, this discussion entirely lacks consideration of the seriousness of prior convictions.[21] All immigration violations are characterized as similar in seriousness to those previously warranting inclusion in the particularly serious crime bar, without any independent evidence to justify the expansion. Such an approach renders meaningless the limiting language of "particularly serious" in the statute and does nothing to further the safety of our country.

The agency further conflates multiple entries by noncitizens who have 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 were not aware of the complex statutory regime that governs asylum claims and did not knowingly abandoned their right to apply for asylum. Additionally, immigrants can be wrongly assessed in prior credible-fear interviews, and others may have previously entered or attempted to enter the United States before the onset of circumstances giving rise to their fear. Preserving discretion to grant asylum in these circumstances allows meritorious asylum seekers to be heard and corrects errors that might have previously occurred.

IV. Conclusion

In creating more barriers for asylum seekers, the Proposed Rule continues this federal administration's trend of making the United States a hostile place for immigrants to the detriment of everyone in our communities. It is well documented that hostile climates for immigrants make the City less safe[22] and less prosperous.[23] As the City's Comptroller stated, "when immigrants are threatened, when their ability to live, work, and raise their families is compromised—our entire City pays a costly price."[24] For these reasons, and those articulated above, we call upon DHS to withdraw the Proposed Rule.

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large increases in number of people arrested and criminally prosecuted for immigration offenses such as entering and reentering the United states illegally).

[21] Proposed Rules at 69648.

[22] Mike Males, *White Residents of Urban Sanctuary Counties are Safer From Deadly Violence Than White Residents in Non-Sanctuary Counties*, http://www.cjcj.org/uploads/cjcj/documents/white_residents_of_urban_sanctuary_counties.pdf?utm_content=%7BURIENCODE%5bFIRST_NAME%5d%7D&utm_source=VerticalResponse&utm_medium=Email&utm_term=CJCJ%27s%20report&utm_campaign=New%20Report%3A%20Sanctuary%20Counties%20Safer%20for%20White%20Residents (2017); *see* TCR Staff, *You're Safer in a 'Sanctuary City,' says New Study*, https://thecrimereport.org/2017/12/13/youre-safer-in-a-sanctuary-city-says-new-study/ (2017); Tom K. Wong, *The Effects of Sanctuary Policies on Crime and the Economy*, https://www.americanprogress.org/issues/immigration/reports/2017/01/26/297366/the-effects-of-sanctuary-policies-on-crime-and-the-economy/ (2017).

[23] *See* https://immigrationforum.org/article/immigrants-as-economic-contributors-immigrant-tax-contributions-and-spending-power/; https://research.newamericaneconomy.org/report/from-struggle-to-resilience-the-economic-impact-of-refugees-in-america/.

[24] Scott Stringer, *Immigrant Population Helps Power NYC Economy*, (Jan. 11, 2017) *available at* https://comptroller.nyc.gov/newsroom/press-releases/comptroller-stringer-analysis-immigrant-population-helps-power-nyc-economy/.

EXHIBIT F

Proposed Rules

Federal Register
Vol. 84, No. 244
Thursday, December 19, 2019

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

8 CFR Part 208

RIN 1615–AC41

DEPARTMENT OF JUSTICE

Executive Office for Immigration Review

8 CFR Part 1208

[EOIR Docket No. 18–0002; A.G. Order No. 4592–2019]

RIN 1125–AA87

Procedures for Asylum and Bars to Asylum Eligibility

AGENCY: Executive Office for Immigration Review, Department of Justice; U.S. Citizenship and Immigration Services, Department of Homeland Security.

ACTION: Joint notice of proposed rulemaking.

SUMMARY: The Department of Justice and the Department of Homeland Security (collectively, ''the Departments'') propose to amend their respective regulations governing the bars to asylum eligibility. The Departments also propose to clarify the effect of criminal convictions and to remove their respective regulations governing the automatic reconsideration of discretionary denials of asylum applications.

DATES: Written or electronic comments must be submitted on or before January 21, 2020. Written comments postmarked on or before that date will be considered timely. The electronic Federal Docket Management System will accept comments prior to midnight eastern time at the end of that day.

ADDRESSES: You may submit comments, identified by EOIR Docket No. 18–0002, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Lauren Alder Reid, Assistant Director, Office of Policy, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2616, Falls Church, VA 22041. To ensure proper handling, please reference EOIR Docket No. 18–0002 on your correspondence. This mailing address may be used for paper, disk, or CD–ROM submissions.
- *Hand Delivery/Courier:* Lauren Alder Reid, Assistant Director, Office of Policy, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2616, Falls Church, VA 22041. Contact Telephone Number (703) 305–0289 (not a toll-free call).

FOR FURTHER INFORMATION CONTACT: Lauren Alder Reid, Assistant Director, Office of Policy, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2616, Falls Church, VA 22041, Contact Telephone Number (703) 305–0289 (not a toll-free call).

Maureen Dunn, Chief, Division of Humanitarian Affairs, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, U.S. Citizenship and Immigration Services (USCIS), DHS, 20 Massachusetts NW, Washington, DC 20529–2140; Contact Telephone Number (202) 272–8377 (not a toll-free call).

SUPPLEMENTARY INFORMATION:

I. Public Participation

Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments on all aspects of this rule. The Departments also invite comments that relate to the economic, environmental, or federalism effects that might result from this rule. Comments must be submitted in English, or an English translation must be provided. To provide the most assistance to the Departments, comments should reference a specific portion of the rule; explain the reason for any recommended change; and include data, information, or authority that support the recommended change.

All comments submitted for this rulemaking should include the agency name and EOIR Docket No. 18–0002. Please note that all comments received are considered part of the public record and made available for public inspection at *www.regulations.gov.* Such information includes personally identifiable information (such as a person's name, address, or any other data that might personally identify that individual) that the commenter voluntarily submits. You may wish to consider limiting the amount of personal information that you provide in any voluntary public comment submission you make to the Departments. The Departments may withhold information provided in comments from public viewing that they determine may impact the privacy of an individual or is offensive. For additional information, please read the Privacy Act notice that is available via the link in the footer of *http://www.regulations.gov.*

If you want to submit personally identifiable information as part of your comment, but do not want it to be posted online, you must include the phrase ''PERSONALLY IDENTIFIABLE INFORMATION'' in the first paragraph of your comment and precisely and prominently identify the information for which you seek redaction.

If you want to submit confidential business information as part of your comment, but do not want it to be posted online, you must include the phrase ''CONFIDENTIAL BUSINESS INFORMATION'' in the first paragraph of your comment and precisely and prominently identify the confidential business information for which you seek redaction. If a comment has so much confidential business information that it cannot be effectively redacted, all or part of that comment may not be posted on *www.regulations.gov.* Personally identifiable information and confidential business information provided as set forth above will be placed in EOIR's public docket file, but not posted online. To inspect the public docket file in person, you must make an appointment with EOIR. Please see the **FOR FURTHER INFORMATION CONTACT** paragraph above for the contact information specific to this rule.

II. Background

Asylum is a discretionary immigration benefit that generally can be sought by eligible aliens who are physically present or arriving in the United States, irrespective of their status, as provided in section 208 of the Immigration and Nationality Act (''INA''), 8 U.S.C. 1158. Congress, however, has provided that certain

categories of aliens cannot receive asylum and has further delegated to the Attorney General and the Secretary of Homeland Security (''Secretary'') the authority to promulgate regulations establishing additional bars on eligibility to the extent consistent with the asylum statute, as well as the authority to establish ''any other conditions or limitations on the consideration of an application for asylum'' that are consistent with the INA. *See* INA 208(b)(2)(C), (d)(5)(B), 8 U.S.C. 1158(b)(2)(C), (d)(5)(B). This proposed rule will limit aliens' eligibility for this discretionary benefit if they fall within certain categories related to criminal behavior. The proposed rule will also eliminate a regulation concerning the automatic reconsideration of discretionary denials of asylum applications.

A. Joint Notice of Proposed Rulemaking

The Attorney General and the Acting Secretary of Homeland Security publish this joint notice of proposed rulemaking in the exercise of their respective authorities concerning asylum determinations.

The Homeland Security Act of 2002, Public Law 107–296, as amended (''the Act'' or ''the HSA''), transferred many functions related to the execution of federal immigration law to the newly created Department of Homeland Security (''DHS''). The Act charges the Secretary ''with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens,'' 8 U.S.C. 1103(a)(1), and grants the Secretary the power to take all actions ''necessary for carrying out'' the provisions of the immigration and nationality laws, *id.* 1103(a)(3). The Act also transferred to U.S. Citizenship and Immigration Services (''USCIS'') responsibility for affirmative asylum applications, *i.e.,* applications for asylum made outside the removal context. *See* 6 U.S.C. 271(b)(3). If an alien is not in removal proceedings or is an unaccompanied alien child, DHS asylum officers determine in the first instance whether an alien's asylum application should be granted. *See* 8 CFR 208.9.

At the same time, the Act retained for the Attorney General authority over certain individual immigration adjudications, including those related to asylum. These proceedings are conducted by the Department of Justice through the Executive Office for Immigration Review (''EOIR''), subject to the direction and regulation of the Attorney General. *See* 6 U.S.C. 521; 8 U.S.C. 1103(g). Accordingly, immigration judges within the Department of Justice continue to adjudicate all defensive asylum applications made by aliens during the removal process and review affirmative asylum applications referred by USCIS to the immigration courts. *See* 8 U.S.C. 1101(b)(4); 8 CFR 1208.2. *See generally Dhakal* v. *Sessions,* 895 F.3d 532, 536–37 (7th Cir. 2018) (describing affirmative and defensive asylum processes). The Board of Immigration Appeals within the Department of Justice, in turn, hears appeals from immigration judges' decisions. 8 CFR 1003.1. In addition, the HSA amended the INA to mandate ''[t]hat determination and ruling by the Attorney General with respect to all questions of law shall be controlling.'' 8 U.S.C. 1103(a)(1). This broad division of functions and authorities informs the background of this proposed rule.

B. Domestic Legal Framework for Asylum

Asylum is a form of discretionary relief under section 208 of the INA, 8 U.S.C. 1158, that precludes an alien from being subject to removal, creates a path to lawful permanent resident status and citizenship, and affords a variety of other ancillary benefits, such as allowing certain alien family members to obtain lawful immigration status derivatively. *See R–S–C* v. *Sessions,* 869 F.3d 1176, 1180 (10th Cir. 2017); *see also, e.g.,* INA 208(c)(1)(A), (C), 8 U.S.C. 1158(c)(1)(A), (C) (asylees cannot be removed and can travel abroad without prior consent); INA 208(b)(3), 8 U.S.C. 1158(b)(3) (allowing derivative asylum for asylee's spouse and unmarried children); INA 209(b), 8 U.S.C. 1159(b) (allowing the Attorney General or Secretary to adjust the status of an asylee to that of a lawful permanent resident); INA 316(a), 8 U.S.C. 1427(a) (describing requirements for naturalization of lawful permanent residents). Aliens who are granted asylum are authorized to work in the United States and to receive certain financial assistance from the Federal Government. *See* INA 208(c)(1)(B), (d)(2), 8 U.S.C. 1158(c)(1)(B), (d)(2); 8 U.S.C. 1612(a)(2)(A), (b)(2)(A); 8 U.S.C. 1613(b)(1); 8 CFR 274a.12(a)(5); *see also* 8 CFR 274a.12(c)(8) (providing that asylum applicants may seek employment authorization 150 days after filing a complete application for asylum).

In 1980, the Attorney General, in his discretion, established several mandatory bars to asylum eligibility. *See* 8 CFR 208.8(f) (1980); Aliens and Nationality; Refugee and Asylum Procedures, 45 FR 37392, 37392 (June 2, 1980). In 1990, the Attorney General substantially amended the asylum regulations, but exercised his discretion to retain the mandatory bars to asylum eligibility related to persecution of others on account of a protected ground, conviction of a particularly serious crime in the United States, firm resettlement in another country, and the existence of reasonable grounds to regard the alien as a danger to the security of the United States. *See* Aliens and Nationality; Asylum and Withholding of Deportation Procedures, 55 FR 30674–01, 30678, 30683 (July 27, 1990); *see also Yang* v. *INS,* 79 F.3d 932, 936–39 (9th Cir. 1996) (upholding firm resettlement bar); *Komarenko* v. *INS,* 35 F.3d 432, 436 (9th Cir. 1994) (upholding particularly serious crime bar), *abrogated on other grounds by Abebe* v. *Mukasey,* 554 F.3d 1203 (9th Cir. 2009) (en banc). In 1990, Congress added another mandatory bar for those with aggravated felony convictions. Immigration Act of 1990, Public Law 101–649, sec. 515, 104 Stat. 4987.

With the passage of the Illegal Immigration Reform and Immigrant Responsibility Act (''IIRIRA'') in 1996, Congress added three more categorical bars on the ability to apply for asylum, for: (1) Aliens who can be removed to a safe third country pursuant to a bilateral or multilateral agreement; (2) aliens who failed to apply for asylum within one year of arriving in the United States; and (3) aliens who have previously applied for asylum and had the application denied. Public Law 104–208, div. C, sec. 604. Congress also adopted six mandatory bars to asylum eligibility that largely reflected the pre-existing, discretionary bars set forth in the Attorney General's existing asylum regulations. These bars cover (1) aliens who ''ordered, incited, or otherwise participated'' in the persecution of others; (2) aliens convicted of a ''particularly serious crime'' in the United States; (3) aliens who committed a ''serious nonpolitical crime outside the United States'' before arriving in the United States; (4) aliens who are a ''danger to the security of the United States;'' (5) aliens who are inadmissible or removable under a set of specified grounds relating to terrorist activity; and (6) aliens who were ''firmly resettled'' in another country prior to arriving in the United States. *Id.* (codified at 8 U.S.C. 1158(b)(2) (1997)). Congress further added that aggravated felonies, defined in 8 U.S.C. 1101(a)(43), would be considered ''particularly serious crime[s].'' *Id.* (codified at 8 U.S.C. 1158(b)(2)(B)(i) (1997)).

Although Congress has enacted specific asylum eligibility bars, that statutory list is not exhaustive. Congress, in IIRIRA, further provided

the Attorney General with the authority to establish by regulation ''any other conditions or limitations on the consideration of an application for asylum,'' so long as those limitations are ''not inconsistent with this chapter.'' INA 208(d)(5)(B), 8 U.S.C. 1158(d)(5)(B); *see also* INA 208(b)(2)(C), 8 U.S.C. 1158(b)(2)(C). Aliens who apply for asylum must satisfy two criteria. They must establish that they (1) are statutorily eligible for asylum; and (2) merit a favorable exercise of discretion. INA 208(b)(1)(A), 240(c)(4)(A), 8 U.S.C. 1158(b)(1)(A), 1229a(c)(4)(A); *Matter of A–B–,* 27 I&N Dec. 316, 345 n.12 (A.G. 2018), *abrogated on other grounds by Grace* v. *Whitaker,* 344 F. Supp. 3d 96, 140 (D.D.C. 2018); *see also, e.g., Fisenko* v. *Lynch,* 826 F.3d 287, 291 (6th Cir. 2016); *Kouljinski* v. *Keisler,* 505 F.3d 534, 541–42 (6th Cir. 2007); *Gulla* v. *Gonzales,* 498 F.3d 911, 915 (9th Cir. 2007); *Dankam* v. *Gonzales,* 495 F.3d 113, 120 (4th Cir. 2007); *Krastev* v. *INS,* 292 F.3d 1268, 1270 (10th Cir. 2002). As the Attorney General recently observed, ''[a]sylum is a discretionary form of relief from removal, and an applicant bears the burden of proving not only statutory eligibility for asylum but that he also merits asylum as a matter of discretion.'' *Matter of A–B–,* 27 I&N Dec. at 345 n.12; *see also Moncrieffe* v. *Holder,* 569 U.S. 184, 187 (2013) (describing asylum as a form of ''discretionary relief from removal''); *Delgado* v. *Mukasey,* 508 F.3d 702, 705 (2d Cir. 2007) (''Asylum is a discretionary form of relief . . . . Once an applicant has established eligibility . . . , it remains within the Attorney General's discretion to deny asylum.'').

With respect to eligibility for asylum, section 208 of the INA provides that an applicant must (1) be ''physically present'' or ''arrive[ ]'' in the United States, INA 208(a)(1), 8 U.S.C. 1158(a)(1); (2) meet the statutory definition of a ''refugee,'' INA 208(b)(1)(A), 8 U.S.C. 1158(b)(1)(A); and (3) otherwise be eligible for asylum, INA 208(b)(2), 8 U.S.C. 1158(b)(2); 8 CFR 1240.8(d).

In general, a refugee is someone who is outside of his country of nationality and who is unable or unwilling to return to that country ''because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.'' INA 101(a)(42)(A), 8 U.S.C. 1101(a)(42)(A). The alien bears the burden of proof to establish that he meets eligibility criteria, including that he qualifies as a refugee. INA 208(b)(1)(B)(i), 8 U.S.C. 1158(b)(1)(B)(i).

Aliens must also establish that they are otherwise eligible for asylum, meaning that they are not subject to one of the statutory bars to asylum or any ''additional limitations and conditions . . . under which an alien shall be ineligible for asylum'' established by regulation. *See* INA 208(b)(2)(C), 8 U.S.C. 1158(b)(2)(C). The INA currently bars from asylum eligibility any alien who (1) ''ordered, incited, assisted, or otherwise participated in the persecution of any person on account of'' a protected ground; (2) ''having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States;'' (3) ''has committed a serious nonpolitical crime outside the United States'' prior to arrival in the United States; (4) constitutes ''a danger to the security of the United States;'' (5) is described in the terrorism-related inadmissibility grounds, with limited exception; or (6) ''was firmly resettled in another country prior to arriving in the United States.'' INA 208(b)(2)(A)(i)–(vi), 8 U.S.C. 1158(b)(2)(A)(i)–(vi).

Aliens who fall within one of these bars are subject to mandatory denial of asylum. Where there is evidence that ''one or more of the grounds for mandatory denial of the application for relief may apply,'' the applicant in immigration court proceedings bears the burden of establishing that the bar at issue does not apply. 8 CFR 1240.8(d); *see also, e.g., Rendon* v. *Mukasey,* 520 F.3d 967, 973 (9th Cir. 2008) (applying 8 CFR 1240.8(d) in the context of the aggravated felony bar to asylum); *Su Qing Chen* v. *U.S. Att'y Gen.,* 513 F.3d 1255, 1257 (11th Cir. 2008) (applying 8 CFR 1240.8 in the context of the persecutor bar); *Xu Sheng Gao* v. *U.S. Att'y Gen.,* 500 F.3d 93, 98 (2d Cir. 2007) (same).

Because asylum is a discretionary benefit, aliens who are eligible for asylum are not automatically entitled to it. Rather, after demonstrating eligibility, aliens must further meet their burden of showing that the Attorney General or Secretary should exercise his or her discretion to grant asylum. *See* INA 208(b)(1)(A), 8 U.S.C. 1158(b)(1)(A) (the ''Secretary of Homeland Security or the Attorney General *may* grant asylum to an alien'' who applies in accordance with the required procedures and meets the definition of a refugee (emphasis added)); *Matter of A–B–,* 27 I&N Dec. at 345 n.12; *Matter of Pula,* 19 I&N Dec. 467, 474 (BIA 1987).

Additionally, aliens whose asylum applications are denied may nonetheless be able to obtain protection from removal under other provisions of the immigration laws. A defensive application for asylum that is submitted by an alien in removal proceedings is also automatically deemed an application for statutory withholding of removal under section 241(b)(3) of the INA, 8 U.S.C. 1231(b)(3). *See* 8 CFR 1208.3(b). An immigration judge may also consider an alien's eligibility for withholding and deferral of removal under regulations implementing U.S. obligations under Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (''CAT''), which were issued pursuant to section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998, Public Law 105–277 (8 U.S.C. 1231 note). *See* 8 CFR 1208.13(c)(1); *see also* 8 CFR 1208.16(c) through 1208.18.

These forms of protection prohibit removal to any country where the alien would more likely than not be persecuted on account of a protected ground or tortured. Applying the relevant standard, if an alien proves that it is more likely than not that the alien's life or freedom would be threatened on account of a protected ground, but is denied asylum for some other reason—for instance, because of an eligibility bar or a discretionary denial of asylum—the alien may be entitled to statutory withholding of removal if not otherwise statutorily barred. INA 241(b)(3)(A), 8 U.S.C. 1231(b)(3)(A); 8 CFR 208.16, 1208.16; *see also Garcia* v. *Sessions,* 856 F.3d 27, 40 (1st Cir. 2017) (''[W]ithholding of removal has long been understood to be a mandatory protection that must be given to certain qualifying aliens, while asylum has never been so understood.''). Likewise, an alien who establishes that it is more likely than not that he or she would be tortured if removed to the proposed country of removal will qualify for CAT protection. *See* 8 CFR 1208.16(c) through 1208.18. But, unlike asylum, statutory withholding and CAT protection do not (1) prohibit the Government from removing the alien to a third country where the alien does not face persecution or torture, regardless of whether the country is a party to a bilateral or multilateral agreement specifically authorizing such removal, *contra* 8 U.S.C. 1158(a)(2)(A) (denying eligibility to apply for asylum ''if the Attorney General determines that the alien may be removed, pursuant to a bilateral or multilateral agreement, to a [third] country''); (2) create a path to lawful permanent resident status and citizenship; or (3) afford the same ancillary benefits (such as derivative protection for family members). *See R–S–C,* 869 F.3d at 1180.

C. Bars to Eligibility for Asylum

Eligibility for asylum has long been qualified both by statutory bars and by the discretion of the Attorney General and the Secretary to create additional bars. Those bars have developed over time in a back-and-forth process between Congress and the Attorney General. The original asylum provisions, as set out in the Refugee Act of 1980, Public Law 96–212, simply directed the Attorney General to ''establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum,'' and provided that ''the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee'' within the meaning of the title. 8 U.S.C. 1158(a) (1994); *see also INS* v. *Cardoza-Fonseca,* 480 U.S. 421, 427–29 (1987) (describing the 1980 provisions).

In the 1980 implementing regulations, the Attorney General, in his discretion, established several mandatory bars to asylum eligibility that were modeled on the mandatory bars to eligibility for withholding of deportation under the existing section 243(h) of the INA. *See* 8 CFR 208.8(f) (1980); 45 FR at 37392 (''The application will be denied if the alien does not come within the definition of refugee under the Act, is firmly resettled in a third country, or is within one of the undesirable groups described in section 243(h) of the Act, *e.g.,* having been convicted of a serious crime, constitutes a danger to the United States.''). Those regulations required denial of an asylum application if it was determined that (1) the alien was not a refugee within the meaning of section 101(a)(42) of the INA; (2) the alien was firmly resettled in a foreign country before arriving in the United States; (3) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular group, or political opinion; (4) the alien had been convicted by a final judgment of a particularly serious crime and therefore constituted a danger to the community of the United States; (5) there were serious reasons for considering that the alien has committed a serious non-political crime outside the United States prior to the arrival of the alien in the United States; or (6) there were reasonable grounds for regarding the alien as a danger to the security of the United States. 45 FR at 37394–95.

In 1990, the Attorney General substantially amended the asylum regulations, but exercised his discretion to retain the mandatory bars to asylum eligibility for persecution of others on account of a protected ground, conviction of a particularly serious crime in the United States, firm resettlement in another country, and reasonable grounds to regard the alien as a danger to the security of the United States. *See* 55 FR at 30683; *see also Yang,* 79 F.3d at 936–39 (upholding firm resettlement bar); *Komarenko,* 35 F.3d at 436 (upholding particularly serious crime bar). In the Immigration Act of 1990, Congress added an additional mandatory bar to eligibility to apply for or be granted asylum for ''an[y] alien who has been convicted of an aggravated felony.'' Public Law 101–649, sec. 515, 104 Stat. 4987.

In 1996, with the passage of IIRIRA and the Antiterrorism and Effective Death Penalty Act of 1996, Public Law 104–132, Congress amended the asylum provisions in section 208 of the INA, 8 U.S.C. 1158. Among other amendments, Congress created three categories of aliens who are barred from applying for asylum: (1) Aliens who can be removed to a safe third country pursuant to bilateral or multilateral agreement; (2) aliens who failed to apply for asylum within one year of arriving in the United States; and (3) aliens who have previously applied for asylum and had the application denied. Public Law 104–208, div. C, sec. 604.

Congress also adopted six mandatory bars to asylum eligibility that largely reflected the pre-existing, discretionary bars set forth in the Attorney General's existing asylum regulations. These bars cover (1) aliens who ''ordered, incited, or otherwise participated'' in the persecution of others; (2) aliens convicted of a ''particularly serious crime'' in the United States; (3) aliens who committed a ''serious nonpolitical crime outside the United States'' before arriving in the United States; (4) aliens who are a ''danger to the security of the United States;'' (5) aliens who are inadmissible or removable under a set of specified grounds relating to terrorist activity; and (6) aliens who were ''firmly resettled'' in another country prior to arriving in the United States. *Id.* (codified at 8 U.S.C. 1158(b)(2) (1997)). Congress further added that aggravated felonies, defined in 8 U.S.C. 1101(a)(43), would be considered ''particularly serious crime[s].'' *Id.* (codified at 8 U.S.C. 1158(b)(2)(B)(i) (1997)).

Although Congress has enacted specific asylum eligibility bars, that statutory list is not exhaustive. Congress, in IIRIRA, expressly authorized the Attorney General to expand upon two bars to asylum eligibility—the bars for ''particularly serious crimes'' and ''serious nonpolitical offenses.'' *See id.* Although Congress prescribed that all aggravated felonies constitute particularly serious crimes, Congress further provided that the Attorney General may ''designate by regulation offenses that will be considered'' a ''particularly serious crime,'' by reason of which the offender ''constitutes a danger to the community of the United States.'' INA 208(b)(2)(A)(ii), (B)(ii), 8 U.S.C. 1158(b)(2)(A)(iii), (B)(ii). Courts and the Board of Immigration Appeals (''Board'') have long held that this grant of authority also authorizes the Board to identify additional particularly serious crimes (beyond aggravated felonies) through case-by-case adjudication. *See, e.g., Delgado* v. *Holder,* 648 F.3d 1095, 1106 (9th Cir. 2011) (en banc); *Ali* v. *Achim,* 468 F.3d 462, 468–69 (7th Cir. 2006). Congress likewise authorized the Attorney General to designate by regulation offenses that constitute ''a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States.'' INA 208(b)(2)(A)(iii), (B)(ii), 8 U.S.C. 1158(b)(2)(A)(iii), (B)(ii).[1]

In addition to authorizing the discretionary expansion of crimes that would constitute particularly serious crimes or serious nonpolitical offenses, Congress further provided the Attorney General with the authority to establish by regulation ''any other conditions or limitations on the consideration of an application for asylum,'' so long as those limitations are ''not inconsistent with this chapter.'' INA 208(d)(5)(B), 8 U.S.C. 1158(d)(5)(B); *see also* INA 208(b)(2)(C), 8 U.S.C. 1158(b)(2)(C) (allowing for the establishment by regulation of ''additional limitations and conditions, consistent with this section, under which an alien shall be ineligible for asylum''). As the Tenth Circuit has recognized, ''[t]his delegation of authority means that Congress was prepared to accept administrative dilution of the asylum guarantee in § 1158(a)(1),'' given that ''the statute clearly empowers'' the Attorney General and the Secretary to ''adopt[ ] further limitations'' on asylum eligibility. *R–S–C,* 869 F.3d at 1187 & n.9. In providing for ''additional limitations and conditions,'' the statute gives the Attorney General and the Secretary broad authority in determining what the ''limitations and conditions'' should be—*e.g.,* based on non-criminal or procedural grounds like the existing

[1] Although these provisions continue to refer only to the Attorney General, those authorities also lie with the Secretary by operation of the HSA.

exceptions for firm resettlement, INA 208(b)(2)(A)(vi), 8 U.S.C. 1158(b)(2)(A)(vi), or based on filing time limits, INA 208(a)(2)(B), 8 U.S.C. 1158(a)(2)(B), or based on certain criminal activity, INA 208(b)(2)(A)(ii), 8 U.S.C. 1158(b)(2)(A)(ii). The additional limitations on eligibility must simply be established ''by regulation,'' and must be ''consistent with'' the rest of 8 U.S.C. 1158.

Thus, the Attorney General in the past has invoked section 208(b)(2)(C) of the INA to limit eligibility for asylum based on a ''fundamental change in circumstances'' and on the ability of an applicant to safely relocate internally within a country. *See* Asylum Procedures, 65 FR 76121, 76127 (Dec. 6, 2000) (codified at 8 CFR 208.13(b)(1)(i)(A) and (B)). The courts have also viewed this provision as a broad authority, and have suggested that ineligibility based on fraud would be authorized under it. *See Nijjar* v. *Holder,* 689 F.3d 1077, 1082 (9th Cir. 2012) (noting that fraud can be ''one of the 'additional limitations . . . under which an alien shall be ineligible for asylum' that the Attorney General is authorized to establish by regulation'').

The current statutory framework accordingly leaves the Attorney General (and, after the HSA, the Secretary) significant discretion to adopt additional bars to asylum eligibility. Congress has expressly identified one class of particularly serious crimes—aggravated felonies—so that aliens who commit such offenses are categorically ineligible for asylum and there is no discretion to grant such aliens asylum under any circumstances. Congress has left the task of further defining particularly serious crimes or serious nonpolitical offenses to the discretion of the Attorney General and the Secretary.[2] And Congress has provided the Attorney General and Secretary with additional discretion to establish by regulation additional limitations or conditions on eligibility for asylum. Those limitations may involve other types of crimes or non-criminal conduct, so long as the limitations are consistent with other aspects of the asylum statute.

[2] ''[A]n alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime. The previous sentence shall not preclude the Attorney General from determining that, notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime.'' H.R. Rep No. 104–863, at 616 (1996).

D. United States Laws Implementing International Treaty Obligations

The proposed rule is consistent with U.S. obligations under the 1967 Protocol relating to the Status of Refugees (''Refugee Protocol'') (incorporating Articles 2 through 34 of the 1951 Convention relating to the Status of Refugees (''Refugee Convention'')) and the CAT. Neither the 1967 Refugee Protocol nor the CAT is self-executing. *See Khan* v. *Holder,* 584 F.3d 773, 783 (9th Cir. 2009) ('[T]he [1967 Refugee] Protocol is not self-executing.''); *Auguste* v. *Ridge,* 395 F.3d 123, 132 (3d Cir. 2005) (the CAT ''was not self-executing''). Therefore, these treaties are not directly enforceable in U.S. law, but some of the obligations they contain have been implemented by domestic legislation. For example, the United States has implemented the non-refoulement provisions of these treaties—*i.e.,* provisions prohibiting the return of an individual to a country where he or she would face persecution or torture—through the withholding of removal provisions at section 241(b)(3) of the INA and the CAT regulations, not through the asylum provisions at section 208 of the INA. *See Cardoza-Fonseca,* 480 U.S. at 440–41. The proposed rule is consistent with those obligations because it affects only eligibility for asylum. It does not affect grants of the statutory withholding of removal or protection under the CAT regulations. *See R–S–C,* 869 F.3d at 1188 n. 11; *Cazun* v. *Att'y Gen.,* 856 F.3d 249, 257 (3d Cir. 2017); *Ramirez-Mejia* v. *Lynch,* 813 F.3d 240, 241 (5th Cir. 2016).

Limitations on eligibility for asylum are also consistent with Article 34 of the 1951 Refugee Convention, concerning assimilation of refugees, as implemented by 8 U.S.C. 1158. Section 1158 reflects that Article 34 is precatory and not mandatory, and accordingly does not provide that all refugees shall receive asylum. *See Cardoza-Fonseca,* 480 U.S. at 441; *R–S–C,* 869 F.3d at 1188; *Mejia* v. *Sessions,* 866 F.3d 573, 588 (4th Cir. 2017); *Garcia,* 856 F.3d at 42; *Cazun,* 856 F.3d at 257 & n.16; *Ramirez-Mejia,* 813 F.3d at 241. Moreover, the state parties to the Refugee Convention sought to ''deny admission to their territories of criminals who would present a danger to security and public order.'' United Nations High Comm'r 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 ¶ 148 (1979) (edited Jan. 1992). Accordingly, the Refugee Convention incorporated exclusion clauses, including a bar to refugee status for those who committed serious nonpolitical crimes outside the country of refuge prior to their entry into the country of refuge that sought ''to protect the community of a receiving country from the danger of admitting a refugee who has committed a serious common crime.'' *Id.* ¶ 151. As noted above, Congress has long recognized this principle in U.S. law by imposing various statutory bars to eligibility for asylum and by authorizing the creation of new bars to eligibility through regulation.[3]

III. Regulatory Changes

The Departments now propose to (1) establish additional bars to eligibility for asylum for aliens with certain criminal convictions; (2) clarify the effect of criminal convictions; and (3) remove the regulations regarding reconsideration of discretionary denials of asylum.

The Attorney General possesses general authority under section 103(g)(2) of the INA, 8 U.S.C. 1103(g)(2), to ''establish such regulations . . . as the Attorney General determines to be necessary for carrying out this section.'' *See Tamenut* v. *Mukasey,* 521 F.3d 1000, 1004 (8th Cir. 2008) (en banc) (per curiam) (describing section 1103(g)(2) as ''a general grant of regulatory authority''). Similarly, Congress has conferred upon the Secretary the authority to ''establish such regulations . . . as he deems necessary for carrying out his authority under the provisions of [the INA].'' INA 103(a)(1), (3), 8 U.S.C. 1103(a)(1), (3).

Additionally, the Attorney General and the Secretary have authority to promulgate this proposed rule under sections 208(b)(2)(B)(ii) and (C) of the INA, 8 U.S.C. 1158(b)(2)(B)(ii) and (C). Under section 208(b)(2)(B)(ii), ''[t]he Attorney General may designate by regulation offenses that will be considered to be a ''particularly serious crime'' under INA 208(b)(2)(A)(ii), 8 U.S.C. 1158(b)(2)(A)(ii), or a ''serious nonpolitical crime'' under INA 208(b)(2)(A)(iii), 8 U.S.C.

[3] Courts have likewise rejected arguments that other provisions of the Refugee Convention require every refugee to receive asylum. Courts have held, in the context of upholding the bar on eligibility for asylum in reinstatement proceedings under section 241(a)(5) of the INA, 8 U.S.C. 1231(a)(5), that limiting the ability to apply for asylum does not constitute a prohibited ''penalty'' under Article 31(1) of the Refugee Convention. *Mejia,* 866 F.3d at 588; *Cazun,* 856 F.3d at 257 n.16. Courts have also rejected the argument that Article 28 of the Refugee Convention, governing issuance of international travel documents for refugees ''lawfully staying'' in a country's territory, mandates that every person who might qualify for withholding must also be granted asylum. *R–S–C,* 869 F.3d at 1188; *Garcia,* 856 F.3d at 42.

1158(b)(2)(A)(iii). Under INA 208(b)(2)(C), 8 U.S.C. 1158(b)(2)(C), the Attorney General may ''by regulation establish additional limitations and conditions, consistent with [8 U.S.C. 1158], under which an alien shall be ineligible for asylum under'' INA 208(b)(1).

A. Additional Limitations on Eligibility for Asylum

The Departments propose to revise 8 CFR 208.13 and 1208.13 by adding paragraphs (c)(6) through (8) to add bars on eligibility for asylum for certain aliens. First, the regulations would add bars on eligibility for asylum for aliens who commit certain offenses in the United States after entering the country. Those bars would apply to aliens who are convicted of (1) a felony under federal or state law; (2) an offense under 8 U.S.C. 1324(a)(1)(A) or 1324(a)(1)(2) (Alien Smuggling or Harboring); (3) an offense under 8 U.S.C. 1326 (Illegal Reentry); (4) a federal, state, tribal, or local crime involving criminal street gang activity; (5) certain federal, state, tribal, or local offenses concerning the operation of a motor vehicle while under the influence of an intoxicant; (6) a federal, state, tribal, or local domestic violence offense, or who are found by an adjudicator to have engaged in acts of battery or extreme cruelty in a domestic context, even if no conviction resulted; and (7) certain misdemeanors under federal or state law for offenses related to false identification; the unlawful receipt of public benefits from a federal, state, tribal, or local entity; or the possession or trafficking of a controlled substance or controlled-substance paraphernalia. The Departments intend that the criminal ineligibility bars would be limited only to aliens with convictions and—with a narrow exception in the domestic violence context [4]—not based only on criminal conduct for which the alien has not been convicted. In addition, although 8 U.S.C. 1101(a)(43) provides for the application of the aggravated felony definition to offenses in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years, this proposal is not intended to cover such foreign convictions.

[4] A conviction would not be required in certain situations involving battery or extreme cruelty. That conduct-specific inquiry is essentially identical to the inquiry already undertaken in situations in which an alien seeks to obtain immigration benefits based on domestic violence that does not necessarily result in a conviction. *See, e.g.,* INA 240A(b)(2)(A), 8 U.S.C. 1229b(b)(2)(A); 8 CFR 204.2(c)(1)(i)(E), (c)(1)(vi), (c)(2)(iv), (e)(1)(i)(E), (e)(1)(vi), and (e)(2)(iv).

1. Aliens Convicted of a Felony Under Federal, State, Tribal, or Local Law

The Departments are proposing to implement a new bar on eligibility for asylum for felony convictions. *See* 8 U.S.C. 1158(b)(2)(B)(ii) and (C). Felonies are defined in the proposed rule as crimes designated as felonies by the relevant jurisdiction or crimes punishable by more than one year's imprisonment.

In the first instance, the Attorney General and the Secretary could reasonably exercise their discretion to classify felony offenses as particularly serious crimes for purposes of 8 U.S.C. 1158(b)(2)(B)(ii). Congress defined ''particularly serious crimes'' in the asylum statute to expressly encompass all aggravated felonies. *See* INA 208(b)(2)(B)(i), 8 U.S.C. 1158(b)(2)(B)(i). At present, the INA defines an aggravated felony by reference to an enumerated list of 21 types of convictions. INA 101(a)(43), 8 U.S.C. 1101(a)(43). But Congress did not limit the definition of particularly serious crimes to aggravated felonies. Rather, Congress expressly authorized the Attorney General to designate additional particularly serious crimes through regulation or by case-by-case adjudication. INA 208(b)(2)(B)(ii), 8 U.S.C. 1158(b)(2)(B)(ii); *Delgado,* 648 F.3d at 1106 (''[t]here is little question that [the asylum] provision permits the Attorney General, by regulation, to make particular crimes categorically particularly serious'' (emphasis omitted)); *Gao* v. *Holder,* 595 F.3d 549, 556 (4th Cir. 2010) (''we think that [s]ection 1158(b)(2)(B)(ii) . . . empowers the Attorney General to designate offenses which, like aggravated felonies, will be considered per se particularly serious''). By defining ''particularly serious crimes'' to include all ''aggravated felonies,'' but then giving the Attorney General the discretion to ''designate by regulation offenses that will be considered'' a ''particularly serious crime,'' Congress made clear that the bar on asylum eligibility for particularly serious crimes necessarily includes, but is not limited to, aggravated felonies. *See* INA 208(b)(2)(A)(ii), (B)(ii), 8 U.S.C. 1158(b)(2)(A)(ii), (B)(ii); *Delgado,* 648 F.3d at 1105–06 (explaining that the asylum statute specifies two categories of crimes that are per se particularly serious—aggravated felonies, and those that the Attorney General designates by regulation).

To date, the Attorney General has not used the above-described authority to promulgate regulations identifying additional categories of particularly serious crimes. The Board has engaged in case-by-case adjudication to identify some particularly serious crimes, but this approach imposes significant interpretive difficulties and costs, while producing unpredictable results. The Supreme Court has employed the so-called ''categorical'' approach, established in *Taylor* v. *United States,* 495 U.S. 575 (1990), and its progeny such as *Mathis* v. *United States,* 136 S. Ct. 2243 (2016), and *Descamps* v. *United States,* 133 S. Ct. 2276 (2013), to determine when an offense constitutes an aggravated felony. Under that approach, courts must compare the elements of the statutory crime for which an alien was convicted with the generic elements of the specified federal aggravated felony. As a general matter, any mismatch between the elements means that the crime of conviction is not an aggravated felony (unless the statute of conviction is divisible and the alien was convicted of a particular offense within the statute that would satisfy the generic definition of the relevant aggravated felony).

Courts, however, have repeatedly expressed frustration with the complexity of applying this approach. *See, e.g., United States* v. *Aguila-Montes de Oca,* 655 F.3d 915, 917 (9th Cir. 2011), *overruled by Descamps,* 570 U.S. 254 (''In the twenty years since *Taylor,* we have struggled to understand the contours of the Supreme Court's framework. Indeed, over the past decade, perhaps no other area of the law has demanded more of our resources.''); *see also Quarles* v. *United States,* 139 S. Ct. 1872, 1880 (2019) (Thomas, J., concurring); *Williams* v. *United States,* 927 F.3d 427, 446 (6th Cir. 2019) (Merritt, J., concurring); *Lowe* v. *United States,* 920 F.3d 414, 420 (6th Cir. 2019) (Thapar, J., concurring) (''in the categorical-approach world, we cannot call rape what it is . . . . [I]t is time for Congress to revisit the categorical approach so we do not have to live in a fictional world where we call a violent rape non-violent''); *United States* v. *Evans,* 924 F.3d 21, 31 (2d Cir. 2019) (observing that, although the court may resolve only an actual case or controversy, ''the categorical approach paradoxically instructs courts resolving such cases to embark on an intellectual enterprise grounded in the facts of *other* cases not before them, or even *imagined* scenarios'' (emphases in original)); *United States* v. *Chapman,* 866 F.3d 129, 136–39 (3d Cir. 2017) (Jordan, J., concurring); *United States* v. *Faust,* 853 F.3d 39, 60–61 (1st Cir. 2017) (Lynch, J., concurring).

Application of the categorical approach has resulted in anomalous

decisions in which aliens convicted of a serious criminal offense have been found not to have been convicted of an aggravated felony. *See, e.g., Harbin* v. *Sessions,* 860 F.3d 58 (2d Cir. 2017) (holding that a New York controlled substance law was not written in a way that allowed it to be used as the basis for establishing that a convicted alien was removable under the INA for drug trafficking); *Larios-Reyes* v. *Lynch,* 843 F.3d 146, 149–50 (4th Cir. 2016) (alien's conviction under Maryland law for sexual abuse of a victim under the age of 14 did not amount to the aggravated felony of ''sexual abuse of a minor''). The Board has rectified some anomalies by determining that certain crimes, though not aggravated felonies, are of a sufficiently pernicious nature that they should facially constitute particularly serious crimes that would disqualify aliens from eligibility for asylum or withholding of removal. *See Sopo* v. *U.S. Att'y Gen.,* 739 F. App'x 554, 558 (11th Cir. 2018) (the Board and immigration judges ''may focus solely on the elements of the offense'' to determine whether an offense is a ''particularly serious crime''); *In re N–A–M–,* 24 I&N Dec. 336, 343 (BIA 2007) (explaining that ''the proper focus for determining whether a crime is particularly serious is on the nature of the crime,'' and that its elements alone may be dispositive); *see also, e.g., Ahmetovic* v. *INS,* 62 F.3d 48, 52 (2d Cir. 1995) (upholding the Board's determination that first-degree manslaughter, while not an aggravated felony, is per se ''particularly serious'' for asylum purposes). Furthermore, the Board has looked at the individual circumstances of a crime to conclude that an even wider range of offenses can be considered particularly serious crimes on an as-applied basis. *See, e.g., Vaskovska* v. *Lynch,* 655 F. App'x 880, 884 (2d Cir. 2016) (the Board did not err in its individualized determination that an alien's conviction for drug possession was a particularly serious crime); *Arbid* v. *Holder,* 700 F.3d 379, 381 (9th Cir. 2012) (the Board did not err in determining that an alien's mail fraud conviction was particularly serious even if not an aggravated felony). Even in the withholding context—where an alien is deemed to have committed a particularly serious crime if he has been convicted of an aggravated felony (or felonies) for which the sentence was an aggregate term of imprisonment of at least 5 years, *see* 8 U.S.C. 1231(b)(3)(B)—courts have routinely concluded that crimes that are not aggravated felonies may be particularly serious. *See, e.g., Valerio-Ramirez* v. *Sessions,* 882 F.3d 289, 291, 296 (1st Cir. 2018) (the Board did not err in determining that an alien's identity theft conviction was particularly serious even though it was not an aggravated felony); *Hamama* v. *INS,* 78 F.3d 233, 240 (6th Cir. 1996) (the Board had power to declare certain firearm possession crimes ''facially'' particularly serious without an individualized evaluation of the alien's case, even if such crimes are not always aggravated felonies); *In re N–A–M–,* 24 I&N Dec. at 338–39 (felony menacing is a particularly serious crime based on its elements, though not an aggravated felony).

Nonetheless, this mix of case-by-case adjudication and per se rules is an inefficient means of identifying categories of offenses that should constitute particularly serious crimes. The Board has only rarely exercised its authority to designate categories of offenses as facially or per se particularly serious, and instead typically looks to a wide and variable range of evidence in making an individualized determination of a crime's seriousness. *See In re N–A–M–,* 24 I&N Dec. at 343–44; *Matter of L–S–,* 22 I&N Dec. 645, 651 (BIA 1999). This case-by-case adjudication means that aliens convicted of the exact same offense can receive different asylum treatment. For certain crimes—*i.e.,* those described in this notice of proposed rulemaking—the Attorney General and the Secretary have determined that the possibility of such inconsistency is not desirable and that a rule-based approach is instead warranted in this specific context.

The proposed rule would eliminate the inefficiencies described above by providing that all felonies would constitute particularly serious crimes. The determination of whether a crime would be a felony for purposes of asylum eligibility would depend on whether the relevant jurisdiction defines the crime as a felony or whether the statute of conviction allows for a sentence of more than one year. Convictions for which sentences are longer tend to be associated with crimes of a more consequential nature. For example, an offender's ''criminal history category'' for the purposes of sentencing for federal crimes ''serves as [a] proxy for the need to protect the public from further crimes of the defendant.'' *United States* v. *Hayes,* 762 F.3d 1300, 1314 n.8 (11th Cir. 2014); *see also id.* (''In other words, it is a proxy for recidivism.''). And the criminal history category, in turn, is ''based on the maximum term imposed in previous sentences rather than on other measures, such as whether the conviction was designated a felony or misdemeanor.'' U.S. Sentencing Guidelines Manual § 4A1.2 cmt. background (U.S. Sentencing Comm'n 2018). This calculation thus reflects a recognition that crimes with the potential for longer sentences tend to indicate that the offenders who commit such crimes are greater dangers to the community.

In addition, defining a felony to include such offenses would also be consistent with the definition of felonies in other federal statutes. For instance, convictions for crimes that states designated as felonies may serve as predicate ''prior felony conviction[s]'' under the federal career offender statute. *See United States* v. *Beasley,* 12 F.3d 280, 282–84 (1st Cir. 1993); *United States* v. *Rivera,* 996 F.2d 993, 994–97 (9th Cir. 1993).

Furthermore, defining felonies to include crimes that involve a possible sentence of more than one year in prison would be generally consistent with the way that federal law defines felonies. *See, e.g.,* 5 U.S.C. 7313(b) (''For the purposes of this section, 'felony' means any offense for which imprisonment is authorized for a term exceeding one year''); *cf.* U.S.S.G. 2L1.2 cmt. n.2 (''' 'Felony' means any federal, state, or local offense punishable by imprisonment for a term exceeding one year.''). The Model Penal Code and most states likewise define a felony as a crime with a possible sentence in ''excess of one year.'' Model Penal Code § 1.04(2); *see* 1 Wharton's Criminal Law § 19 & n.23 (15th ed.) (surveying state laws). Finally, relying on the possibility of a sentence in excess of one year—rather than on the actual sentence imposed—would be consistent with Board precedents adjudicating whether a crime qualifies as ''particularly serious'' for purposes of asylum or withholding eligibility. In that context, ''the sentence imposed is not a dominant factor in determining whether a conviction is for a particularly serious crime'' because the sentence actually imposed often depends on factors such as offender characteristics that ''may operate to reduce a sentence but do not diminish the gravity of [the] crime.'' *In re N–A–M–,* 24 I&N Dec. at 343.

Relying on the possibility of a sentence of over one year to define a felony would capture crimes of a particularly serious nature because the offenders who commit such crimes are—as a general matter—more likely to be dangerous to the community than those offenders whose crimes are punishable by shorter sentences. *See* 8 U.S.C. 1158(b)(2)(A)(ii) (tying the ''particularly serious crime'' determination to ''danger[ousness] to

the community''). In addition, by encompassing all crimes with a sentence of more than one year, regardless of whether the crimes are defined felonies by the relevant jurisdiction, the definition would create greater uniformity by accounting for possible variations in how different jurisdictions may label the same offense. Such a definition would also avoid anomalies in the asylum context that arise from the definition of ''aggravated felonies'' under 8 U.S.C. 1101(a)(43), which defines some qualifying offenses with reference to the length of the actual sentence ordered. *See United States* v. *Pacheco,* 225 F.3d 148, 153–54 (2d Cir. 2000) (agreeing that ordinarily the touchstone in the aggravated felony definition's reference to sentences is the actual term of imprisonment imposed). The proposed definition of a felony would also obviate the need for immigration adjudicators and courts to apply the categorical approach with respect to aggravated felonies. This proposal thus would offer a more streamlined and predictable approach to be applied in the asylum context.[5]

In addition to their authority under section 208(b)(2)(B)(ii) of the INA, 8 U.S.C. 1158(b)(2)(B)(ii), the Attorney General and the Secretary further propose relying on their respective authorities under section 208(b)(2)(C) of the INA, 8 U.S.C. 1158(b)(2)(C), to make all felony convictions disqualifying for purposes of asylum eligibility. Federal, state, tribal, or local felony convictions already carry a number of serious repercussions over and above the sentence imposed. Felons, including those who are U.S. citizens, may lose certain privileges, including the ability to apply for Government grants and live in public housing. *See Estep* v. *United States,* 327 U.S. 114, 122 & n.13 (1946) (explaining that ''[a] felon customarily suffers the loss of substantial rights''); *see also, e.g., Dist. of Columbia* v. *Heller,* 554 U.S. 570, 626–27 (2008) (the Second Amendment does not prohibit laws disallowing the possession of firearms by felons). Treating a felony conviction as disqualifying for purposes of obtaining the discretionary benefit of asylum would be consistent with the disabilities arising from felony convictions in these other contexts and would reflect the serious social cost of such crimes.

The Departments also seek public comment on whether (and, if so, how) to differentiate among crimes designated as felonies and among crimes punishable by more than one year of imprisonment. For example, are there crimes that are currently designated as felonies in one or more relevant jurisdictions in the United States that should not be categorical bars to asylum eligibility? Are there crimes that are currently punishable by more than one year's imprisonment in one or more relevant jurisdictions in the United States that should not be categorical bars to asylum? Should the definition of a felony depend instead on the term of imprisonment that was ordered by the court of jurisdiction? In addition to seeking public comment on whether the definition of felony in the proposed rule might be over-inclusive, the Departments also seek comment on whether it might be under-inclusive—*i.e.,* are there crimes that would not fall under the definition of felony in the proposed rule, and that do not otherwise constitute categorical bars to asylum eligibility, that should be made categorical bars? In sum, the Departments seek input on how the proposed definition of a felony might be modified. Further, the Departments seek comment on what measures, if any, are necessary to ensure that aliens who are victims of human trafficking, but also have convictions caused by or incident to victimization, are not subject to this bar. For instance, victims of severe forms of human trafficking may nevertheless receive a waiver of criminal grounds for inadmissibility in order to qualify for T nonimmigrant status pursuant to 8 CFR 212.16. *See* INA 101(a)(15)(T), 212(d)(13)(B), 8 U.S.C. 1101(a)(15)(T), 1182(d)(13)(B).

Regardless of whether the rule encompasses all felony convictions or some subset of such convictions, the Departments have identified specific types of offenses below that are proposed in this rule as grounds for ineligibility for asylum.

2. Federal Convictions for Harboring Aliens

The Attorney General and the Secretary propose to designate all offenses involving the federal crimes of bringing in or harboring certain aliens pursuant to sections 274(a)(1)(A) and (2) of the INA, 8 U.S.C. 1324(a)(1)(A), (2), as particularly serious crimes and, in all events, as discrete bases for ineligibility. *See* INA 208(b)(2)(B)(ii), (C), 8 U.S.C. 1158(b)(2)(B)(ii), (C). To convict a person of harboring an alien under sections 274(a)(1)(A) or (2) of the INA, the Government must establish that the defendant concealed, harbored, shielded from detection, or transported an alien, or attempted to do so. INA 274(a)(1)(A), (2), 8 U.S.C. 1324(a)(1)(A), (2). Penalties differ depending on whether the act was for commercial advantage or financial gain and on whether serious bodily injury or death occurred. INA 274(a)(1)(B), (2)(B), 8 U.S.C. 1324(a)(1)(B), (2)(B). Most of the prohibited acts carry a penalty of possible imprisonment of at least five years, INA 274(a)(1)(B)(i)–(iii), 8 U.S.C. 1324(a)(1)(B)(i)–(iii), and committing those acts in circumstances resulting in the death of another person can be punished by a sentence of death or life imprisonment, INA 274(a)(1)(B)(iv), 8 U.S.C. 1324(a)(1)(B)(iv). The only exception is for certain instances of the offense of bringing or attempting to bring in an alien who lacks official authorization to enter under section 274(a)(2) of the INA, 8 U.S.C. 1324(a)(2), which carries a possible penalty of imprisonment up to one year, INA 274(a)(2)(A), 8 U.S.C. 274(a)(2)(A).

Convictions under section 1324 are often aggravated felonies under section 101(a)(43)(N) of the INA, 8 U.S.C. 1101(a)(43)(N), which defines an aggravated felony as including ''an offense described in [INA 274(a)(1)(A) or (2)], except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent.'' *See Matter of Ruiz-Romero,* 22 I&N Dec. 486, 488, 492–93 (BIA 1999) (holding that an alien convicted of transporting an illegal alien committed an aggravated felony under section 101(a)(43)(N) of the INA and was thus deportable); *see also Patel* v. *Ashcroft,* 294 F.3d 465 (3d Cir. 2002) (holding that harboring an alien constitutes an aggravated felony); *Gavilan-Cuate* v. *Yetter,* 276 F.3d 418, 419–20 (8th Cir. 2002) (dismissing an appeal for lack of jurisdiction because the court had already determined on the petitioner's direct appeal that he had been convicted of the aggravated felony of transporting and harboring aliens); *United States* v. *Galindo-Gallegos,* 244 F.3d 728, 733–34 (9th Cir. 2001) (holding that transporting aliens under 8 U.S.C. 1324(a)(1)(A)(ii) is an aggravated felony for purposes of section 101(a)(43)(N) of the INA). Aliens convicted of such aggravated felonies would already be ineligible for asylum under section 208(b)(2)(B)(i) of the INA.

The proposed rule would broaden this bar so that first-time offenders who engage in illegal smuggling or harboring

[5] The Departments intend that this proposed provision would be limited to aliens with convictions and would not apply to criminal conduct for which the alien has not been convicted. Further, this provision would expand ineligibility for asylum based on offenses committed in the United States, not offenses committed abroad. This provision would thus leave unchanged the provision in 8 U.S.C. 1101(a)(43) that provides for application of the aggravated felony definition to offenses in violation of the law of a foreign country.

to aid certain family members, in violation of section 1324(a)(1)(A) or (2), are deemed to have committed particularly serious crimes. The *mens rea* required for a section 1324 conviction under subsection (a)(1)(A) is ''knowing,'' and under (a)(2) is ''knowing or in reckless disregard,'' meaning such a conviction displays a serious disregard for U.S. immigration law. In all events, conviction of a smuggling offense under section 1324(a)(1)(A) or (2) should also be disqualifying under section 1158(b)(2)(C), which gives the Attorney General and the Secretary additional discretion to identify grounds for ineligibility. Even first-time alien smuggling offenses involving immediate family members display a serious disregard for U.S. immigration law and pose a potential hazard to smuggled family members, which often include a vulnerable child or spouse. *See Arizona* v. *United States,* 567 U.S. 387, 396 (noting the ''danger'' posed by ''alien smugglers or aliens who commit a serious crime''); *United States* v. *Miguel,* 368 F.3d 1150, 1157 (9th Cir. 2004), *overruled on other grounds by United States* v. *Gasca-Ruiz,* 852 F.3d 1167 (9th Cir. 2017) (noting that ''young children [are] more susceptible to the criminal conduct because they [do] not fully appreciate the danger involved in illegal smuggling'').

3. Federal Convictions for Illegal Reentry

The Attorney General and the Secretary further propose to exercise their authority under sections 208(b)(2)(B)(ii) and 208(b)(2)(C) of the INA, 8 U.S.C. 1158(b)(2)(B)(ii) and (C), to designate a conviction for the federal crime of illegal reentry pursuant to section 276 of the INA, 8 U.S.C. 1326, as precluding asylum eligibility.

Under section 1326(a), aliens who were previously removed and reenter the United States are subject to fines and to a term of imprisonment of two years or less. 8 U.S.C. 1326(a). Section 1326(b) prescribes significantly higher penalties for certain removed aliens who reenter, such as aliens who were removed after being convicted for aggravated felonies and then reenter. 8 U.S.C. 1326(b) (authorizing sentences of imprisonment up to 20 years as possible penalties).

Some convictions under section 1326 already qualify as aggravated felonies under section 101(a)(43)(O) of the INA, 8 U.S.C. 1101(a)(43)(O), which defines an aggravated felony as including ''an offense described in section . . . 1326 . . . committed by an alien who was previously deported on the basis of a conviction for an [aggravated felony].'' Aliens who commit such offenses are thus already ineligible for asylum under section 208(b)(2)(B)(i) of the INA, 8 U.S.C. 1158(b)(2)(B)(i).

The proposed rule would broaden this bar so that all aliens convicted of illegal reentry under section 1326 would be considered to have committed an offense that disqualifies them from asylum eligibility. It would also harmonize the treatment of most aliens who have illegally reentered the United States after being removed, as such aliens who have a prior order of removal reinstated are already precluded from asylum eligibility. Section 1326 makes clear that all offenses relating to illegal reentry are quite serious; even the most basic illegal reentry offense is punishable by fine and by up to two years' imprisonment. 8 U.S.C. 1326(a). Illegal reentry also reflects a willingness to repeatedly disregard the immigration laws despite alternative means of presenting a claim of persecution. An alien seeking protection, even one who has previously been removed from the United States, may present himself or herself at a port of entry without illegally reentering the United States. An alien who chooses instead to again enter illegally has repeatedly chosen to flout immigration laws, and such recidivism suggests that the offense should be treated more severely. The fact that the alien has *repeatedly* engaged in criminal conduct suggests a tendency to engage in such conduct in the future, thus warranting a conclusion that the alien poses a danger to the community that makes the alien's crime particularly serious. *See* Mariel Alper et al., 2018 Update on Prisoner Recidivism: A 9-Year Follow-up Period (2005–2014) 17 (2018) (''Overall, excluding probation and parole violations, 82.4% of prisoners released in 30 states in 2005 were arrested within 9 years.''); U.S. Sentencing Comm'n, The Past Predicts the Future: Criminal History and Recidivism of Federal Offenders 14 (2017) (''Overall, an offender's total criminal history score is a strong predictor of recidivism. Rearrest rates range from a low of 30.2 percent of offenders with zero criminal history points to a high of 85.7 percent for offenders with 15 or more criminal history points. Each additional criminal history point is generally associated with a greater likelihood of recidivism.''); Nick Tilley, Analyzing and Responding to Repeat Offending 11 (2013) (''Once criminal careers are established and offenders are processed by the criminal justice system, recidivism rates become very high: Up to two-thirds of those who are incarcerated will reoffend within a few years.'').

Moreover, Congress, as noted above, has already designated certain crimes related to illegal reentry as aggravated felonies. *See* 8 U.S.C. 1101(a)(43)(O). This designation reflects a congressional decision that aliens who commit these crimes are dangers to the community, *see* 8 U.S.C. 1158(b)(2)(A)(ii) (tying the ''particularly serious crime'' determination to ''danger[ousness] to the community''), so aliens who commit similar crimes related to reentry are also likely be dangers to the community. Further, 63% of those convicted of illegal reentry had a prior criminal history, again suggesting that the offenders who commit these crimes pose an ongoing danger to others. *See* U.S. Sentencing Comm'n, Quick Facts: Illegal Reentry Offenses 1 (2019), *https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Illegal_Reentry_FY18.pdf.*

As a separate basis for this aspect of the proposed rule, the Attorney General and the Secretary propose making illegal reentry a ground for ineligibility under section 208(b)(2)(C) of the INA, 8 U.S.C. 1158(b)(2)(C). A regulation providing for the mandatory ineligibility for asylum based on convictions for illegal reentry of removed aliens, *see* INA 276, 8 U.S.C. 1326, would bear a close relationship to the statutory bar on applying for asylum when a previous order of removal is reinstated, *see* INA 241(a)(5), 8 U.S.C. 1231(a)(5). An alien subject to reinstatement of a prior removal order is not eligible to apply for any relief from removal, but may seek protection such as statutory withholding of removal and protection pursuant to the CAT regulations. *See, e.g., Cazun,* 856 F.3d at 254. The statutory bar on applying for asylum and other forms of relief when an order of removal is reinstated has been upheld by every circuit to consider the question. *See Garcia* v. *Sessions,* 873 F.3d 553, 557 (7th Cir. 2017), *cert. denied,* 138 S. Ct. 2648 (2018); *R–S–C,* 869 F.3d at 1189; *Mejia,* 866 F.3d at 587; *Garcia,* 856 F.3d at 30; *Cazun,* 856 F.3d at 260; *Perez-Guzman* v. *Lynch,* 835 F.3d 1066, 1082 (9th Cir. 2016); *Jimenez-Morales* v. *U.S. Att'y Gen.,* 821 F.3d 1307, 1310 (11th Cir. 2016); *Ramirez-Mejia* v. *Lynch,* 794 F.3d 485, 489–90 (5th Cir. 2015); *Herrera-Molina* v. *Holder,* 597 F.3d 128, 137–38 (2d Cir. 2010). That bar reflects legislators' apparent concerns that aliens who re-cross the border illegally after having been removed once should not be rewarded with benefits that the United States is not obliged to offer them. *See R–S–C,* 869 F.3d at 1179 &

n.2; H.R. Rep. No. 104–469, pt. 1, at 155 (1996) (''[T]he ability to cross into the United States over and over with no consequences undermines the credibility of our efforts to secure the border.''); H.R. Rep. No. 104–469, pt. 1, 113 (''One seemingly intractable problem is repeat border-crossings.'').

The existing statutory bar for reinstated removal orders and the proposed bar for aliens convicted of illegal reentry after being previously removed are not coterminous because not all persons with a conviction under section 276 of the INA, 8 U.S.C. 1326, have orders of removal reinstated. *See Lara-Aguilar* v. *Sessions,* 889 F.3d 134, 144 (4th Cir. 2018) (reinstatement of a prior removal order is neither automatic nor obligatory). Furthermore, not all persons with reinstated removal orders have been convicted under section 276 of the INA, 8 U.S.C 1326. However, the Departments believe that similar policy considerations support the barring of aliens convicted of illegal reentry under section 276 of the INA, 8 U.S.C. 1326, from eligibility for asylum.

Furthermore, although this proposed bar would render ineligible for asylum an alien whose threat of persecution arose after the initial removal and illegal reentry, such an alien could still seek other forms of protection, such as statutory withholding of removal and withholding or deferral of removal under the regulations implementing the CAT. The proposed rule is consistent, therefore, with U.S. treaty obligations under the Refugee Protocol (which incorporates Articles 2 through 34 of the Refugee Convention) and the CAT. U.S. asylum law implements Article 34 of the Refugee Convention, concerning assimilation of refugees, which is precatory and not mandatory. *See Cardoza-Fonseca,* 480 U.S. at 441. In accordance with the non-mandatory nature of Article 34, the asylum statute, INA 208, 8 U.S.C. 1158, was drawn to be discretionary; it does not require asylum to be granted to all refugees. *Id.* For the reasons outlined above, limitations like the ones proposed here do not violate Article 34. *See Garcia,* 856 F.3d at 42; *R–S–C,* 869 F.3d at 1188; *Mejia,* 866 F.3d at 588; *Cazun* , 856 F.3d at 257 & n.16; *Ramirez-Mejia,* 813 F.3d at 241. In contrast, the United States' non-refoulement obligations under Article 33(1) of the Refugee Convention and Article 3 of the CAT are mandatory to the extent provided by domestic law. They are implemented by statutory withholding of removal, a mandatory provision, and withholding or deferral of removal under the CAT regulations. Because the new limitations adopted here do not affect the availability of statutory withholding of removal, INA 241(b)(3)(A), 8 U.S.C. 1231(b)(3)(A), or protection under the regulations implementing the CAT, 8 CFR 1208.16(c) through 1208.18, the rule does not affect U.S. compliance with its obligations under Article 33(1) of the Refugee Convention or Article 3 of the CAT. *See R–S–C,* 869 F.3d at 1188 n.11; *Cazun,* 856 F.3d at 257; *Ramirez-Mejia,* 813 F.3d at 241.

Moreover, in rejecting any argument that the Refugee Convention and Refugee Protocol require that the U.S. must grant asylum to anyone who qualifies as a ''refugee,'' the Departments note that the Refugee Convention and Refugee Protocol are not self-executing. Rather, Congress implemented relevant U.S. obligations under the Refugee Protocol through the Refugee Act. *Matter of D–J–,* 23 I&N Dec. 572, 584 n.8 (A.G. 2003). The Refugee Act made asylum discretionary, meaning that Congress did not consider it obligatory to grant asylum to every refugee who qualifies. Public Law 96–212, sec. 208(a), 94 Stat. 102. Moreover, as noted earlier in footnote 3, courts have rejected arguments that other provisions of the Refugee Convention require every refugee to receive asylum. Courts have held, in the context of upholding the bar on eligibility for asylum in reinstatement proceedings under section 241(a)(5) of the INA, 8 U.S.C. 1231(a)(5), that limiting the ability to apply for asylum does not constitute a prohibited ''penalty'' under Article 31(1) of the Refugee Convention. *Mejia,* 866 F.3d at 588; *Cazun,* 856 F.3d at 257 n.16. Courts have also rejected the argument that Article 28 of the Refugee Convention, governing issuance of international travel documents for refugees ''lawfully staying'' in a country's territory, mandates that every person who might qualify for withholding must also be granted asylum. *Garcia,* 856 F.3d at 42; *R–S–C,* 869 F.3d at 1188. Thus, the Attorney General may render aliens ineligible for asylum if they enter illegally and are then convicted of unlawfully entering the country, and still remain faithful to U.S. obligations under the Refugee Protocol.

4. Federal, State, Tribal, or Local Convictions for Offenses Involving Criminal Street Gangs

The Departments are proposing to bar from asylum all those who are convicted of a crime involving criminal street gangs, regardless of whether that crime qualifies as a felony or as a misdemeanor. One approach the Attorney General and the Secretary are considering is to exercise their discretionary authority under sections 208(b)(2)(B)(ii) and (C) of the INA, 8 U.S.C. 1158(b)(2)(B)(ii) and (C), to exclude individuals convicted of federal, state, tribal, or local crimes committed in support, promotion, or furtherance of a criminal street gang as that term is defined in the convicting jurisdiction or under 18 U.S.C. 521(a). Specifically, the proposed rule would cover individuals convicted of federal, state, tribal, or local crimes in cases in which the adjudicator knows or has reason to believe the crime was committed in furtherance of criminal street gang activity.[6] The ''reason to believe'' standard is used elsewhere in the INA, *see* 8 U.S.C. 1182(a)(2)(C), and would allow for consideration of all reliable evidence, including any penalty enhancements, to determine whether the crime was committed for or related to criminal gang activities, *see Garces* v. *U.S. Att'y Gen.,* 611 F.3d 1337, 1350 (11th Cir. 2010); *Matter of Rico,* 16 I&N Dec. 181, 185–86 (BIA 1977). In addition, the Departments have concluded that it is appropriate to allow the adjudicator to determine whether a crime was in fact committed ''in furtherance'' of gang-related activity. The states, as noted above, have enacted numerous laws that address gang-related crimes, but they have not enacted a uniform definition of what constitutes activity taken ''in furtherance'' of a gang-related crime. It thus appropriately falls to immigration judges in the first instance to determine whether a person committed the type of crime that warrants withholding of the benefit of legal presence in our communities. Moreover, to the extent that allowing the adjudicator to undertake such an inquiry might raise concerns about inconsistent application of the proposed bar, the Departments note that the Board is capable of

[6] California enacted the first major anti-gang legislation in the country in 1988. *See* Cal. Penal. Code 186.22(a) (establishing a substantive criminal offense for ''[a]ny person who actively participates in any criminal street gang with knowledge that its members engage in, or have engaged in, a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang''). In the years since, 49 states, the District of Columbia, and the Federal Government have enacted legislation that provides for penalties (including sentence enhancements, fines, or damages) for gang-related criminal activity. National Gang Center, Highlights of Gang-Related Legislation (Dec. 31, 2018), *https://www.nationalgangcenter.gov/Legislation/Highlights* (last visited June 3, 2019); *see also, e.g.,* 18 U.S.C. 521 (providing a 10-year sentence enhancement for certain convictions regarding criminal street gang activity); Idaho Code Ann. 18–8503; Iowa Code Ann. 723A.2; Kan. Stat. Ann. 21–6314; La. Rev. Stat. 1403; Minn. Stat. Ann. 609.229; Mo. Rev. Stat. 578.423; Mont. Code Ann. 45–8–405; N.C. Gen. Stat. 14–50.17; Ohio Rev. Code Ann. 2923.42; Tenn. Code Ann. 40–35–121; Utah Code Ann. 76–9–903.

ensuring a uniform approach to the gang-related crimes inquiry. *See, e.g.,* 8 CFR 1003.1(e)(6)(i) (allowing for referral of cases to a three-member panel of the Board ''to settle inconsistencies among the rulings of different immigration judges'').

Some of the relevant criminal street gang-related offenses may already constitute aggravated felonies, such that aliens convicted of such offenses would already be ineligible for asylum. The most common criminal street gang crimes ''are street-level drug trafficking, assault, threats and intimidation, robbery, and large-scale drug trafficking.'' National Gang Intelligence Center, 2015 National Gang Report 12 (2015). Many convictions for such offenses could qualify as aggravated felonies. *See, e.g.,* 8 U.S.C. 1101(a)(43)(B) (defining drug trafficking crimes as aggravated felonies); *id.* 1101(a)(43)(F) (defining crimes of violence punishable by at least one year in prison as aggravated felonies).

Regardless, criminal street gang-related offenses—whether felonies or misdemeanors—could reasonably be designated as ''particularly serious crimes'' pursuant to 8 U.S.C. 1158(b)(2)(B)(ii). All criminal street gang-related offenses appear to be particularly serious because they are strong indicators of recidivism and ongoing, organized criminality within a community, thus implying that aliens who commit such crimes are likely to pose an ongoing danger to that community. For example, research suggests that criminal street gang members are responsible for 48 percent of violent crime in most U.S. jurisdictions. *See* National Gang Intelligence Center, National Gang Threat Assessment 15 (2011). Criminal street gang members are also more likely than nonmembers to be involved in selling drugs. *See* Dana Peterson, et al., *Gang Membership and Violent Victimization* 21 Just. Q. 793, 798 (2004). And the Federal Bureau of Investigation reports that more than 96 criminal street gangs conduct cross-border crimes such as cross-border drug trafficking. National Gang Intelligence Center, 2015 National Gang Report 9–10 (2015); *see also* J.C. Barnes et al., *Estimating the Effect of Gang Membership on Nonviolent and Violent Delinquency: A Counterfactual Analysis,* 36 Aggressive Behav. 437, 438 (2010) (studying the link between gang membership and crime, and reporting that gang members account for 86 percent of all ''serious delinquent acts''). In light of this well-documented link between gang membership and a range of crimes, the Departments believe that aliens who enter the United States and proceed to be convicted of crimes involving criminal street gang-related activity should be deemed to have committed particularly serious crimes that render them ineligible for asylum.

Further, some of the crimes in which gangs frequently engage—such as drug trafficking—are similar to the kinds of crimes that Congress has already classified as aggravated felonies. *See, e.g.,* 8 U.S.C. 1101(a)(43)(B) (defining aggravated felonies to include ''illicit trafficking in a controlled substance''). This classification reflects a congressional determination that such crimes pose a danger to the community, *see* 8 U.S.C. 1158(b)(2)(A)(ii), (b)(2)(B)(i), such that aliens involved in similar, gang-related crimes are also likely to pose a danger to the community. Indeed, the perpetrators of crimes that further gang activity are, by the very nature of the acts they commit, displaying a disregard for basic societal structures in preference of criminal activities that place other members of the community—even other gang members—in danger. Existing law in some cases thus already treats gang-related offenders more harshly than other offenders, *see, e.g.,* U.S. Sentencing Guidelines Manual § 5K2.18 (U.S. Sentencing Comm'n 2018) (allowing for upward departures ''to enhance the sentences of defendants who participate in groups, clubs, organizations, or associations that use violence to further their ends''), thereby confirming that these offenders are more likely to be dangerous to the community.

Moreover, even if 8 U.S.C. 1158(b)(2)(B)(ii) did not authorize the proposed bar, the Attorney General and the Secretary would propose designating criminal gang-related offenses as disqualifying under 8 U.S.C. 1158(b)(2)(C). Criminal gangs of all types—including local, regional, or national street gangs; outlaw motorcycle gangs; and prison gangs—are a significant threat to the security and safety of the American public. *See, e.g.,* National Gang Intelligence Center, 2015 National Gang Report 8 (2015) (explaining that ''each gang type poses a unique threat to the nation''). Transnational organized crime has also expanded in size, scope, and impact over the past several years.[7] In Executive Order 13773, Enforcing Federal Law With Respect to Transnational Criminal Organizations and Preventing International Trafficking, 82 FR 10691 (Feb. 9, 2017), the President emphasized the scourge of transnational criminal organizations and directed federal agencies to ''pursue and support additional efforts to prevent the operational success of transnational criminal organizations and subsidiary organizations within and beyond the United States.'' Aliens involved in gang-related criminal activity accordingly represent a threat to the safety and security of the United States, and barring aliens convicted of such activity from receiving the discretionary benefit of asylum is ''consistent with'' the asylum statute's current provisions specifying that aliens posing such a threat are not eligible for asylum. *See* 8 U.S.C. 1158(b)(2)(A)(ii), (iv).

Finally, the Departments solicit public comments on:

(1) What should be considered a sufficient link between an alien's underlying conviction and the gang-related activity in order to trigger the application of the proposed bar; and

(2) any other regulatory approaches to defining the type of gang-related activities that should render aliens ineligible for asylum.

5. Convictions for Offenses Involving Driving While Intoxicated or Impaired

The Attorney General and Secretary further propose that, pursuant to their authorities under 8 U.S.C. 1158(b)(2)(B)(ii) and (C), aliens convicted under federal, state, tribal, or local law of certain offenses involving driving while intoxicated or impaired (also known as driving under the influence (''DUI'')) should be ineligible for asylum. Specifically, aliens should be ineligible for asylum if they are convicted under federal, state, tribal, or local law of a second or subsequent offense of driving while intoxicated or impaired, or for a single such offense resulting in death or serious bodily injury. Whether a conviction involves driving while intoxicated or impaired would depend on the definition that the jurisdiction of conviction gives those terms. Such convictions would be disqualifying regardless of whether they constituted felonies or misdemeanors in the jurisdiction of conviction.

An alien convicted of DUI may remain eligible for asylum under current law, even when it is an alien's second or subsequent such conviction or when the DUI offense results in death or serious injury. Not all DUI offenses constitute aggravated felonies within the meaning of section 101(a)(43) of the INA, 8 U.S.C. 1101(a)(43), and thus these offenses may not automatically constitute ''particularly serious crimes'' for purposes of 8 U.S.C. 1158(b)(2)(B)(i).

[7] Office of the Dir. Of Nat'l Intelligence, Transnational Organized Crime, *https://www.dni.gov/files/documents/NIC_toc_foldout.pdf.*

Cf. Leocal v. *Ashcroft,* 543 U.S. 1, 13 (2004) (noting that DUI offenses in states whose relevant statutes ''do not require any mental state'' are not aggravated felony crimes of violence). However, the Board in the withholding of removal context has concluded that a number of DUI-related offenses involving death or serious injury constitute particularly serious crimes, and courts have upheld those determinations. *See, e.g., Avendano-Hernandez* v. *Lynch,* 800 F.3d 1072, 1076, 1076–78 (9th Cir. 2015) (affirming the Board's determination that a felony DUI conviction involving injury to another was a particularly serious crime for purposes of withholding of removal given the inherently dangerous nature of the offense, even though the alien was sentenced to less than one year's imprisonment); *Anaya-Ortiz* v. *Holder,* 594 F.3d 673, 675, 679–80 (9th Cir. 2010) (the Board applied the correct standard to conclude that an alien's actions in crashing ''into a house while driving drunk . . . [and] caus[ing] part of the house's sheetrock wall to collapse on an elderly woman who lived inside'' constituted a particularly serious crime); *Ursu* v. *INS,* 20 F. App'x 702, 705 (9th Cir. 2001) (upholding the Board's conclusion that a specific DUI offense was a particularly serious crime for withholding purposes because the alien ''caused the death of another human being'' while severely impaired). These holdings indicate that DUI offenses often have grave consequences, thus supporting a conclusion that they can reasonably be considered ''particularly serious'' for purposes of asylum eligibility. DUI laws exist, in part, to protect unknowing persons who are transiting through their communities from the dangerous persons who choose to willingly disregard common knowledge that their criminal acts endanger others.

As noted above, however, existing law does not clearly or categorically limit asylum eligibility for aliens convicted of serious DUI offenses, including those resulting in death or serious bodily injury. Establishing such a bar would be consistent with the Attorney General and the Secretary's statutory authority to designate by regulation ''particularly serious crimes'' that constitute a danger to the community and, thus, render aliens ineligible for asylum. INA 208(b)(2)(A)(ii), (B)(ii), 8 U.S.C. 1158(b)(2)(A)(ii), (B)(ii); *Delgado,* 648 F.3d at 1105–06; *Gao,* 595 F.3d at 555–56; *see also Matter of Carballe,* 19 I&N Dec. 357, 360 (BIA 1986) (an alien convicted of a particularly serious crime constitutes a danger to the community of the United States). The Fifth Circuit has noted that ''the very nature of the crime of [driving while intoxicated] presents a 'serious risk of physical injury' to others.'' *United States* v. *DeSantiago-Gonzalez,* 207 F.3d 261, 264 (5th Cir. 2000). These decisions in the withholding context underscore that DUI offenses involving serious bodily harm or death are routinely deemed ''particularly serious crimes'' in that context, and section 101(h)(3) of the INA, 8 U.S.C. 1101(h)(3), classifies driving under the influence as a ''serious criminal offense'' for purposes of the ground of inadmissibility at section 1182(a)(2)(E). Classifying DUI offenses that involve serious bodily harm or death as particularly serious crimes as a categorical matter would be reasonable given that all such offenses by definition involve a serious danger to the community. Likewise, categorically classifying repeat DUI offenses as particularly serious crimes would be a reasonable exercise of the Attorney General and the Secretary's discretion to designate particularly serious crimes because repeat offenders have already exhibited disregard for the safety of others as well as a likelihood of continuing to engage in extremely dangerous conduct.

Even if some of the proposed DUI-related bars could not be characterized as ''particularly serious crimes'' for purposes of section 1158(b)(2)(B)(ii), such bars would be within the Attorney General and the Secretary's authority to establish under 8 U.S.C. 1158(b)(2)(C). As the Supreme Court has recognized, ''[d]runk driving is an extremely dangerous crime'' as a general matter. *Begay* v. *United States,* 553 U.S. 137, 141 (2008), *abrogated on other grounds by Johnson* v. *United States,* 135 S. Ct. 2551 (2015). It takes ''a grisly toll on the Nation's roads, claiming thousands of lives, injuring many more victims, and inflicting billions of dollars in property damage every year.'' *Birchfield* v. *North Dakota,* 136 S. Ct. 2160, 2166 (2016); *see also Marmolejo-Campos* v. *Holder,* 558 F.3d 903, 913 (9th Cir. 2009) (noting that ''the dangers of drunk driving are well established''). Furthermore, federal courts have upheld the Board's determination that even if a particular DUI-related offense does not qualify as a ''particularly serious crime,'' such a conviction warrants a discretionary denial of asylum. *See, e.g., Kouljinski* v. *Keisler,* 505 F.3d 534, 543 (6th Cir. 2007) (holding that, regardless of whether driving under the influence of alcohol is a ''particularly serious crime,'' the immigration judge ''did not abuse his discretion in this case by basing his discretionary denial of asylum on [the petitioner's] three drunk-driving convictions''). These cases are consistent with the notion that the Attorney General and Secretary could, in their discretion, identify a subset of DUI convictions reflecting particularly dangerous conduct as grounds to deny eligibility for asylum.

6. Domestic Assault or Battery, Stalking, or Child Abuse

Relying on the authority under section 208(b)(2)(B)(ii) of the INA, the proposed regulation would also render aliens convicted of federal, state, tribal, or local offenses involving conduct amounting to domestic assault or battery, stalking, or child abuse in the domestic context ineligible for asylum, irrespective of whether those offenses qualify as felonies or misdemeanors. Relying solely on the Attorney General and the Secretary's authority under section 208(b)(2)(C) of the INA, the regulation would also render ineligible aliens who engaged in acts of battery and extreme cruelty in a domestic context in the United States, regardless of whether such conduct resulted in a criminal conviction. Notably, the asylum statute already contemplates that individuals who engage in certain harmful behavior will be ineligible, regardless of whether that behavior resulted in a conviction. 8 U.S.C. 1158(b)(2)(A)(i), (iii)–(v). Finally, the proposed regulation would except from the ineligibility bar aliens who have been battered or subjected to extreme cruelty and who were not the primary perpetrators of violence in their relationships.

Some of the offenses described above may already render an alien ineligible for asylum, to the extent that a particular conviction qualifies as an aggravated felony. For instance, aggravated felonies encompass ''murder, rape, or sexual abuse of a minor,'' 8 U.S.C. 1101(a)(43)(A), as well as any ''crime of violence . . . for which the term of imprisonment [is] at least one year,'' *id.* 1101(a)(43)(F). Convictions for such offenses automatically constitute ''particularly serious crimes'' for purposes of 8 U.S.C. 1158(b)(2)(A)(ii). *See* 8 U.S.C. 1158(b)(2)(B)(i). But, as noted, due to the application of the categorical approach, many state convictions that involve sexual abuse or domestic violence-related offenses may not qualify as aggravated felonies. *E.g., Larios-Reyes,* 843 F.3d at 149–50 (alien's conviction under Maryland law for sexual abuse of a victim under the age of 14 did not amount to the aggravated felony of ''sexual abuse of a minor''); *Ortega-Mendez* v. *Gonzales,* 450 F.3d

1010, 1021 (9th Cir. 2006) (holding that a conviction for battery under California Penal Code section 242 is not a ''crime of violence'' within the meaning of 18 U.S.C. 16(a) and thus is not a ''crime of domestic violence'' within the meaning of 8 U.S.C. 1227(a)(2)(E)(i)); *Tokatly* v. *Ashcroft,* 371 F.3d 613, 624 (9th Cir. 2004) (''Applying *Taylor,* a court may not look beyond the record of conviction to determine whether an alien's crime was one of 'violence,' or whether the violence was 'domestic' within the meaning of the provision.'').

The Board has routinely deemed some of the identified domestic violence offenses as particularly serious crimes, and many of those decisions have been upheld on appeal. *See Pervez* v. *Holder,* 546 F. App'x 157, 159 (4th Cir. 2013) (attempted indecent liberties with a child constituted a particularly serious crime even where ''no child was actually harmed''); *Lara-Perez* v. *Holder,* 517 F. App'x 255 (5th Cir. 2013) (lewd and lascivious acts with a child constituted particularly serious crime); *Uzoka* v. *Att'y Gen.,* 489 F. App'x 595 (3d Cir. 2012) (endangering welfare of a child constituted a particularly serious crime); *Sosa* v. *Holder,* 457 F. App'x 691 (9th Cir. 2011) (willful infliction of corporal injury on a spouse or cohabitant constituted a particularly serious crime); *Hernandez-Vasquez* v. *Holder,* 430 F. App'x 448 (6th Cir. 2011) (child endangerment constituted a particularly serious crime); *Matter of Singh,* 25 I&N Dec. 670, 670 (BIA 2012) (stalking offense constituted a crime of violence). But the Board's case-by-case assessment of each domestic violence conviction does not cover all of the offenses identified above, and it would not cover domestic violence that does not result in a conviction, as the proposed rule would.

The Attorney General and the Secretary propose classifying domestic violence convictions as particularly serious crimes under section 208(b)(2)(B)(ii) of the INA, 8 U.S.C. 1158(b)(2)(B)(ii), because violent conduct, or conduct creating a substantial risk of violence against the person, generally constitutes a particularly serious offense rendering an alien ineligible for asylum or withholding of removal. *Matter of E–A–,* 26 I&N Dec. 1, 9 n.3 (BIA 2012) (a ''serious'' crime involves ''a substantial risk of violence and harm to persons''); *Matter of Frentescu,* 18 I&N Dec. 244, 247 (BIA 1982) (''Crimes against persons are more likely to be categorized as 'particularly serious crimes.' '').

Even if all of the proposed domestic violence offenses would not qualify as particularly serious crimes, convictions for such offenses—as well as engaging in conduct involving domestic violence that does not result in a conviction—should be a basis for ineligibility for asylum under section 208(b)(2)(C) of the INA. Domestic violence is particularly reprehensible because the perpetrator takes advantage of an ''especially vulnerable'' victim. *Carrillo* v. *Holder,* 781 F.3d 1155, 1159 (9th Cir. 2015). Congress enacted grounds for removability for domestic violence offenses because ''[w]hen someone is an alien and has already shown a predisposition toward violence against women and children, we should get rid of them the first time.'' *See* 142 Cong. Rec. S4058–02, S4059 (daily ed. Apr. 24, 1996) (statement of Senator Dole on his amendment adding grounds for removability under subsection (E) to 8 U.S.C. 1227(a)(2)). Congress included stalking within the same statutory provision as domestic violence offenses that make an alien subject to removal because it is a ''vicious act:'' ''Of all the women killed in the United States by husbands or boyfriends, 90 percent were stalked before being murdered.'' *Id.* In addition, ''[s]talking behavior often leads to violence which may result in the serious injury or death of stalking victims.'' *Id.* Congress also included child abuse within the same statutory provision as domestic violence offenses, noting that child abuse includes a range of serious maltreatment, such as negligence, physical abuse, sexual abuse, emotional abuse, and medical negligence. *See id.* (statement of Senator Coverdale). ''[American] society will not tolerate crimes against women and children.'' *Id.* (statement of Senator Dole on his amendment to add subsection (E) to 8 U.S.C. 1227(a)(2)). The same rationale should render aliens who commit domestic violence in the United States ineligible for the discretionary benefit of asylum. Denying asylum eligibility to an alien who has engaged in domestic violence accords with the aim of ''send[ing] a message that we will protect our citizens against [domestic] assaults'' committed by aliens. *Id.*

The portions of the proposed regulation that require a conviction would permit the adjudicator to assess all reliable evidence in order to determine whether that conviction amounts to a domestic violence offense. In limited circumstances, a similar type of analysis already occurs in the removal context. Although the ground of removability at 8 U.S.C. 1227(a)(2)(E)(ii)—which applies to individuals who violate certain portions of a protective order—does not require a criminal conviction, it does require a judicial order. *See Garcia-Hernandez* v. *Boente,* 847 F.3d 869, 872 (7th Cir. 2017) (''The text of [8 U.S.C. 1227(a)(2)](E)(ii) does not depend on a criminal conviction but on what a court 'determines' about the alien's conduct.''). That ground of removability requires the immigration judge to consider ''the probative and reliable evidence regarding what a State court has determined about the alien's violation [of a protective order].'' *Matter of Medina-Jimenez,* 27 I&N Dec. 399, 401 (BIA 2018). And, under 8 U.S.C. 1227(a)(2)(E)(i), which requires a conviction, the immigration judge may still apply a circumstance-specific approach to determine whether the ''domestic relationship component'' of that removability ground is met. *Hernandez-Zavala* v. *Lynch,* 806 F.3d 259, 266–67 (4th Cir. 2015); *Matter of Estrada,* 26 I&N Dec. 749, 752–53 (BIA 2016) (''[T]he circumstance-specific approach is properly applied in analyzing the domestic nature of a conviction to determine if it is for a crime of domestic violence.''). Because some states may not have separate offenses for the different types of conduct recognized in federal law as domestic violence offenses, relying on such a factual inquiry would ''clos[e] the . . . loopholes'' where aliens might otherwise escape the immigration consequences due to the vagaries of states' laws. 142 Cong. Rec. S4058–02, S4059 (statement of Senator Dole).

For similar reasons, the portions of the proposed rule at 8 CFR 208.13(c)(6)(vii) and 1208.13(c)(6)(vii), which would not require a conviction to trigger ineligibility, allow the adjudicator to consider what conduct the alien engaged in to determine if the conduct amounts to a covered act of battery or extreme cruelty. There is precedent for such a conduct-specific inquiry in the asylum statute, *see* INA 208(b)(2)(A)(i), 8 U.S.C. 1158(b)(2)(A)(i), as well as in the removability context, *see* INA 237(a)(1)(E), 8 U.S.C. 1227(a)(1)(E); *see also Meng* v. *Holder,* 770 F.3d 1071, 1076 (2d Cir. 2014) (reviewing the record evidence to determine whether it supported the agency's finding that the applicant's conduct triggered section 1158(b)(2)(A)(i)'s persecutor bar); *Santiago-Rodriguez* v. *Holder,* 657 F.3d 820, 829 (9th Cir. 2011) (explaining that a factual admission may be sufficient to satisfy the Government's burden of demonstrating removability under section 1227(a)(1)(E)(i)). Moreover, this conduct-specific inquiry is materially similar to the inquiry already undertaken in situations in which an

alien seeks to obtain immigration benefits based on domestic violence actions that do not necessarily result in a conviction. *See, e.g.,* 8 U.S.C. 1229b(b)(2)(A); 8 CFR 204.2(c)(1)(i)(E), (c)(1)(vi), (c)(2)(iv), (e)(1)(i)(E), (e)(1)(vi), and (e)(2)(iv).

Finally, the proposed regulation would exempt from the ineligibility bar aliens who have been battered or subjected to extreme cruelty and who were not the primary perpetrators of violence in their relationships. These aliens are generally described in section 237(a)(7)(A) of the INA, 8 U.S.C. 1227(a)(7)(A), which provides a waiver of the domestic violence and stalking removability ground when it is determined that the alien (1) was acting in self-defense; (2) was found to have violated a protection order intended to protect the alien; or (3) committed, was arrested for, was convicted of, or pled guilty to committing a crime that did not result in serious bodily injury and where there was a connection between the crime and the alien's having been battered or subjected to extreme cruelty. Although section 237(a)(7)(A) of the INA, 8 U.S.C. 1227(a)(7)(A), excepts such aliens from removability only if they are granted a discretionary waiver, the proposed rule would except all aliens who satisfy the above criteria from the proposed asylum bar. Asylum officers or immigration judges could thus make factual determinations regarding whether an alien fit into this category, making the exception more administrable and uniform in the asylum context. The Departments believe that this exception would provide important protections for domestic violence victims.

7. Convictions for Certain Misdemeanor Offenses

The proposed regulation would also make certain misdemeanor offenses bars to asylum based on the authority to create new grounds for ineligibility in section 208(b)(2)(C) of the INA, 8 U.S.C. 1158(b)(2)(C). Other provisions of the INA render aliens ineligible for other benefits based on convictions for certain misdemeanors. *See, e.g.,* INA 244(c)(2)(B)(i), 8 U.S.C. 1254a(c)(2)(B)(i) (barring aliens from eligibility for temporary protected status if they have been convicted of two or more misdemeanors in the United States). The proposed rule would designate offenses involving the use of fraudulent documents, the receipt of public benefits under false pretenses, or the possession or trafficking of drugs as disqualifying for purposes of asylum, even if such offenses are misdemeanors rather than felonies. The proposed regulation would define a misdemeanor in this context as a crime defined as a misdemeanor by the jurisdiction of conviction, or that involves a potential penalty of one year or less in prison. Convictions for such misdemeanor offenses should be disqualifying because these offenses inherently undermine public safety or Government integrity.

The Departments also seek public comment on whether (and, if so, how) to differentiate among misdemeanor convictions that should warrant designation as grounds for ineligibility for asylum. Are there any additional misdemeanor convictions that should be bars to asylum eligibility? Conversely, should any of the below proposed misdemeanor bars be eliminated?

a. Fraudulent Document Offenses

The Departments propose to make aliens ineligible for asylum when they are convicted of a federal, state, tribal, or local misdemeanor for the possession or use, without lawful authority, of an identification document, authentication feature, or false identification document as defined in 18 U.S.C. 1028(d). Aliens convicted of falsifying passports or other identity documents where the term of imprisonment is at least a year are already ineligible for asylum (unless the conduct was a first-time offense for purposes of aiding a specified family member) because such conduct constitutes an aggravated felony under 8 U.S.C. 1101(a)(43)(P). Other felonies relating to fraudulent document offenses would be encompassed within the proposed eligibility bar for felony convictions.

The Attorney General and the Secretary believe that fraudulent document offenses pose such a significant affront to government integrity that even misdemeanor fraudulent document offenses should disqualify aliens from eligibility for asylum. Proper identity documentation is critical in the immigration context. *See Noriega-Perez* v. *United States,* 179 F.3d 1166, 1173–74 (9th Cir. 1999). Furthermore, as Congress acknowledged when it passed the REAL ID Act of 2005, Public Law 109–13, preserving the integrity of identity documents is critical for general national security and public safety reasons. The United States has taken concrete steps to protect all Government-issued identification documents by making the process to obtain identification documents more rigorous. *See, e.g.,* H.R. Rep. No. 109–72, at 179 (2005) (Conf. Rep.) (explaining that the REAL ID Act was passed in part to ''correct the chronic weakness among many of the states in the verification of identity'' for the purpose of issuing Government identification documents).

The use of fraudulent documents, especially involving the appropriation of someone else's identity, so strongly undermines government integrity that it would be inappropriate to allow an individual convicted of such an offense to obtain the discretionary benefit of asylum.

Despite the concerns articulated above, the proposed rule would provide an exception for the bar to asylum based on convictions for use or misuse of identification documents if the alien can show that the document was presented before boarding a common carrier for the purpose of coming to the United States, that the document relates to the alien's eligibility to enter the United States, that the alien used the document to depart a country in which the alien has claimed a fear of persecution, and that the alien claimed a fear of persecution without delay upon presenting himself or herself to an immigration officer upon arrival at a United States port of entry. This exception is consistent with distinctions regarding certain document-related offenses made in *Matter of Pula,* 19 I&N Dec. at 474–75, existing statutes, *see* INA 274C(a)(6) and (d)(7), 8 U.S.C. 1324c(a)(6) and (d)(7), and existing regulations, *see* 8 CFR 270.2(j) and 1270.2(j); *see also Matter of Kasinga,* 21 I&N Dec. 357, 368 (BIA 1996) (use of fraudulent passport to come to the United States was not a significant adverse factor where, upon arrival, applicant told the immigration inspector the truth). Other than this exception, aliens seeking to enter, remain, obtain employment, or obtain benefits and services who are convicted of using false or fraudulent documents should not be eligible for asylum.

b. Public Benefits Offenses

Many aliens are legally entitled to receive certain categories of federal public benefits. 8 U.S.C. 1611, 1641. The unlawful receipt of public benefits, however, burdens taxpayers and drains a system intended to assist lawful beneficiaries. The inherently pernicious nature of such conduct has previously led the Government to prioritize enforcement of the immigration laws against such offenders, *see* Enhancing Public Safety in the Interior of the United States, Exec. Order No. 13768, 82 FR 8799 (Jan. 25, 2017), and this pernicious conduct warrants the use of the Attorney General and the Secretary's authority to bar convicted individuals

from receiving the discretionary benefit of asylum.[8]

c. Controlled Substances Offenses

Relying on the authority in section 208(b)(2)(C) of the INA, 8 U.S.C. 1158(b)(2)(C), the Departments propose to make aliens ineligible for asylum when they are convicted of a federal, state, tribal, or local misdemeanor involving controlled-substances offenses. Specifically, the Departments propose that a conviction for possession or trafficking of a controlled substance or controlled-substance paraphernalia, other than a single offense involving possession for one's own use of 30 grams or less of marijuana, should disqualify an alien from eligibility for asylum.

Aliens who violate controlled substance laws may be removable, *see* INA 212(a)(2)(A)(i)(II), 237(a)(2)(B)(i), 8 U.S.C. 1182(a)(2)(A)(i)(II), 1227(a)(2)(B)(i), and they would already be barred from receiving asylum to the extent a controlled-substance offense constitutes an aggravated felony, *see* INA 208(b)(2)(B)(i), 8 U.S.C. 1158(b)(2)(B)(i); *see also* INA 101(a)(43)(B), 8 U.S.C. 1101(a)(43)(B); *United States* v. *Valdivia-Flores,* 876 F.3d 1201, 1206–07 (9th Cir. 2017) (controlled-substances offenses are aggravated felonies under the INA if they meet the definition of trafficking or involve state analogues to federal trafficking offenses). Furthermore, in cases that the courts of appeals have often upheld, the Board has concluded that various controlled-substances offenses can constitute particularly serious crimes even if they do not rise to the level of aggravated felonies. *See, e.g., Herrera-Davila* v. *Sessions,* 725 F. App'x 589, 590 (9th Cir. 2018) (the Board and immigration judge did not err in determining that an immigrant's conviction for drug possession constituted a particularly serious crime for both asylum and withholding of removal); *Vaskovska* v. *Lynch,* 655 F. App'x 880, 884 (2d Cir. 2016) (the Board did not err in determining that an alien's conviction for drug possession was ''a particularly serious crime rendering her ineligible for asylum and withholding of removal''); *Bertrand* v. *Holder,* 448 F. App'x 744, 745 (9th Cir. 2011) (the Board did not err in determining that an alien's conviction for selling cannabis constituted a particularly serious crime for purposes of both asylum and withholding of removal). Additionally, drug paraphernalia possession can include certain equipment associated with the use, manufacture, packaging, or sale of illegal drugs. *See, e.g.,* 21 U.S.C. 863(d). Under the proposed eligibility bar for felonies, all felony convictions relating to controlled substances would become a basis for ineligibility for asylum.

The Departments further propose to implement a new bar for asylum to include convictions for misdemeanors involving the trafficking or possession of controlled substances. Both possessors and traffickers of controlled substances pose a direct threat to the public health and safety interests of the United States, and they should not be entitled to the benefit of asylum. The harmful effects of controlled substance offenses have been recognized consistently by policymakers and courts. ''[F]ar more people die from the misuse of opioids in the United States each year than from road traffic accidents or violence.'' United Nations Office on Drugs and Crime, World Drug Report: Executive Summary, Conclusions, and Policy Implications 10 (2017). As Attorney General Ashcroft previously recognized in an immigration opinion, ''[t]he harmful effect to society from drug offenses has consistently been recognized by Congress in the clear distinctions and disparate statutory treatment it has drawn between drug offenses and other crimes.'' *Matter of Y–L-,* 23 I&N Dec. 270, 275 (A.G. 2002). He concluded that the ''unfortunate situation'' of drug abuse and related crime ''has reached epidemic proportions and . . . tears the very fabric of American society.'' *Id.* The federal courts have agreed that drug offenses are serious, and have noted that ''immigration laws clearly reflect strong congressional policy against lenient treatment of drug offenders.'' *Ayala-Chavez* v. *U.S. INS,* 944 F.2d 638 (9th Cir. 1991) (quoting *Blackwood* v. *INS,* 803 F.2d 1165, 1167 (11th Cir. 1988)); *see also Hazzard* v. *INS,* 951 F.2d 435, 438 (1st Cir. 1991); *cf. Mason* v. *Brooks,* 862 F.2d 190, 194 (9th Cir. 1988) (''Congress has forcefully expressed our national policy against persons who possess controlled substances by enacting laws . . . to exclude them from the United States if they are aliens.'').

For these reasons, the proposed bar on asylum eligibility is consistent with the INA's current treatment of controlled-substance offenses. Nevertheless, the Departments also propose a limited exception to the proposed bar for convictions involving a single offense involving possession for one's own use of 30 grams or less of marijuana. That exception would be consistent with an existing exception in the removability context: One who is convicted of a single offense of simple possession of marijuana is not automatically removable under the INA. *See* INA 237(a)(2)(B)(i), 8 U.S.C. 1227(a)(2)(B)(i). An alien with the same conviction would be inadmissible, but has a statutory right to request a waiver, which the Attorney General or the Secretary may grant in his or her discretion. *See* INA 212(a)(2)(A)(i)(II), (h), 8 U.S.C. 1182(a)(2)(A)(i)(II), (h); 8 CFR 212.7(d) and 1212.7(d); *see also* INA 103(a), 8 U.S.C. 1103(a).

The Departments seek public comment on how to differentiate among controlled substance offenses. Are there offenses that are currently designated as a controlled substance offense in one or more relevant jurisdictions in the United States that should not be categorical bars to asylum eligibility? In addition to seeking public comment on whether this proposed definition is over-inclusive, the Departments seek comment on whether it might be under-inclusive: Are there crimes that would not fall under this definition that should be made categorical bars?

B. Clarifying the Effect of Criminal Convictions

The proposed regulations governing ineligibility for asylum would also set forth criteria for determining whether a vacated, expunged, or modified conviction or sentence should be recognized for purposes of determining whether an alien is eligible for asylum. The proposed rule would apply the same set of principles to federal, state, tribal, or local convictions that are relevant to the eligibility bars described above. The rule would not apply to convictions that exist prior to the effective date of the proposed regulation. For convictions or sentences imposed thereafter, the proposed rule would provide that (1) vacated or expunged convictions, or modified convictions or sentences, remain valid for purposes of ascertaining eligibility for asylum if courts took such action for rehabilitative or immigration purposes; (2) an immigration judge or other adjudicator may look to evidence other than the order itself to determine whether the order was issued for rehabilitative or immigration purposes; (3) the alien bears the burden of establishing that the vacatur, expungement, or sentence modification was not for rehabilitative or immigration purposes; (4) the alien must further establish that the court had jurisdiction and authority to alter the relevant order;

[8] In Fiscal Year (''FY'') 2017, approximately 20 percent of Government benefits fraud offenders at the federal level were not U.S. citizens. *See* U.S. Sentencing Comm'n, Quick Facts, *https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Government_Benefits_Fraud_FY17.pdf.*

and (5) there exists a rebuttable presumption against the effectiveness, for immigration purposes, of the order vacating, expunging, or modifying a conviction or sentence if either (i) the order was entered after the initiation of any removal proceeding; or (ii) the alien moved for the order more than one year after the date of the original order of conviction or sentencing. The rule would thus ensure that aliens do not have their convictions vacated or modified for purported rehabilitative purposes that are, in fact, for immigration purposes.

The authority of the Attorney General and the Secretary to promulgate this proposed rule derives from sections 208(b)(2)(B)(ii) and (C) of the INA, 8 U.S.C. 1158(b)(2)(B)(ii) and (C). Prescribing the effect to be given to vacated, expunged, or modified convictions or sentences is an ancillary aspect of prescribing which criminal convictions should constitute ''particularly serious crimes'' for purposes of asylum ineligibility, as well as prescribing additional limitations or conditions on asylum eligibility. Additionally, the Attorney General possesses general authority under section 103(g)(2) of the INA, 8 U.S.C. 1103(g)(2), to ''establish such regulations . . . as the Attorney General determines to be necessary for carrying out this section.'' *See Tamenut,* 521 F.3d at 1004 (describing section 1103(g)(2) as ''a general grant of regulatory authority'').[9] Similarly, Congress has conferred upon the Secretary the authority to ''establish such regulations . . . as he deems necessary for carrying out his authority under the provisions of [the INA].'' INA 103(a)(1), (3), 8 U.S.C. 1103(a)(1), (3).

First, regarding the immigration effect of expungements, vacaturs, or sentence modifications, the rule would codify the principle set forth in *Matter of Thomas and Thompson,* 27 I&N Dec. 674 (A.G. 2019), that, if the underlying reason for the vacatur, expungement, or modification was for ''rehabilitation or immigration hardship,'' the conviction remains effective for immigration purposes. *Id.* at 680; *see also id.* (distinguishing between convictions vacated on the basis of a procedural or substantive defect in the underlying proceeding and those vacated because of post-conviction events, such as rehabilitation or immigration hardships); *Matter of Pickering,* 23 I&N Dec. 621 (BIA 2003) (finding that a conviction remains valid for immigration purposes if the conviction is vacated for reasons unrelated to the merits of the underlying criminal proceedings), *rev'd on other grounds by Pickering* v. *Gonzales,* 465 F.3d 263, 267–70 (6th Cir. 2006).

Courts of appeals have repeatedly accepted this principle. The Second Circuit deemed it ''reasonable'' for the Board to conclude in *Pickering* that convictions vacated for rehabilitative reasons are still effective for purposes of immigration consequences. *Saleh* v. *Gonzales,* 495 F.3d 17, 24 (2d Cir. 2007). That interpretation is ''entirely consistent with Congress's intent in enacting the 1996 amendments to broaden the definition of conviction and advances the two purposes earlier identified by the Board: It focuses on the original attachment of guilt (which only a vacatur based on some procedural or substantive defect would call into question) and imposes uniformity on the enforcement of immigration laws.'' *Id.; see also Pinho* v. *Gonzales,* 432 F.3d 193, 215 (3d Cir. 2005) (applying *Pickering* to conclude that a conviction was vacated ''based on a defect in the underlying criminal proceedings,'' not for rehabilitative or immigration purposes); *cf. Dickerson* v. *New Banner Inst., Inc.,* 460 U.S. 103, 120 (1983) (accepting that Congress need not ''be bound by post-conviction state actions . . . that vary widely from State to State and that provide less than positive assurance that the person in question no longer poses an unacceptable risk of dangerousness'').

For similar reasons, the rule would provide that court orders *modifying* criminal sentences for rehabilitative purposes should also have no effect on the alien's eligibility for asylum. *See Matter of Thomas and Thompson,* 27 I&N Dec. at 680 (explaining that ''the *Pickering* test should apply to state-court orders that modify, clarify, or otherwise alter the term of imprisonment or sentence associated with a state-court conviction'').

Second, to avoid gamesmanship and manipulation in the drafting of orders vacating a conviction or modifying a criminal sentence, the proposed regulations would allow an adjudicator to look beyond the face of the order to determine whether it was issued for rehabilitative or immigration purposes and to determine whether the other requirements of proposed 8 CFR 208.13(c)(7)(v) and 1208.13(c)(7)(v) have been met, notwithstanding the putative basis of the order on its face. This rule is largely consistent with existing precedent. *See Rodriguez* v. *U.S. Att'y Gen.,* 844 F.3d 392, 396–97 (3d Cir. 2016) (applying this approach and looking to court records absent a clear explanation for the basis of the order in the order itself); *see also Cruz* v. *Att'y Gen.,* 452 F.3d 240, 244, 248 (3d Cir. 2006) (holding that the Board could reasonably determine that a conviction was vacated to avoid immigration consequences where a state prosecutor's letter stipulating the terms of a settlement agreement explicitly stated that the petitioner's scheduled deportation was a reason for the state's support for vacating the conviction).

Third, the proposed rule would clarify that the alien bears the burden of establishing that the vacatur, expungement, or sentence modification was not for rehabilitative or immigration purposes. Therefore, if the record is inconclusive based on a standard of preponderance of the evidence, the order should not be given effect for immigration purposes. The burden of proof is on the alien because the INA places the overall burden to establish asylum eligibility on the alien. *See* INA 208(b)(1)(B)(i), 8 U.S.C. 1158(b)(1)(B)(i); *Marikasi* v. *Lynch,* 840 F.3d 281, 287 (6th Cir. 2016). Where there is evidence that ''one or more of the grounds for mandatory denial of the application for relief may apply,'' the applicant bears the burden of establishing that the bar at issue does not apply. 8 CFR 1240.8(d). Consistent with this principle, in an analogous context, the Eighth Circuit has held that, because the INA places the burden of proof on the alien to establish eligibility for cancellation of removal, a form of discretionary relief, the alien bears the burden to prove that he has no disqualifying convictions, including the burden to show that the vacatur of any disqualifying conviction was not for rehabilitative purposes. *Andrade-Zamora* v. *Lynch,* 814 F.3d 945, 949 (8th Cir. 2016).[10] This allocation of the

[9] The Attorney General has previously exercised his authorities to address related questions regarding what immigration effect should be given to expunged convictions. For example, in 1959, Attorney General Rogers concluded that certain narcotics convictions would survive subsequent expungement for purposes of the immigration laws. *Matter of A–F-,* 8 I&N Dec. 429, 445–46 (A.G. 1959). More recently, Attorney General Ashcroft held that, in light of the INA's definition of ''conviction,'' an alien whose firearms conviction was expunged pursuant to section 1203.4 of the California Penal Code remained ''convicted'' for immigration purposes. *Matter of Luviano-Rodriguez,* 23 I&N Dec. 718, 718 (A.G. 2005).

[10] In contrast, when DHS uses a criminal conviction to prove deportability of an admitted alien, some courts have held that the Government bears the burden of establishing that a subsequent vacatur of that conviction should not be recognized because the vacatur was granted for immigration purposes. *See Nath* v. *Gonzales,* 467 F.3d 1185, 1188–89 (9th Cir. 2006); *Pickering,* 465 F.3d at 268–69 & n.4. Unlike applications for asylum and other forms of relief, where the alien has the burden of proving eligibility, the Government bears the burden of establishing that an admitted alien is

Continued

burden of proof makes sense because, as the Board and federal courts have noted, an alien is in the ''best position'' to present evidence on the issue. *Id.* at 950. The alien ''was a direct party to the criminal proceeding leading to the vacation of his conviction and is therefore in the best position to know why the conviction was vacated and to offer evidence related to the record of conviction.'' *Matter of Chavez-Martinez,* 24 I&N Dec. 272, 274 (BIA 2007); *see also Rumierz* v. *Gonzales,* 456 F.3d 31, 39 (1st Cir. 2006) (outlining several other reasons that placing the burden on the alien is rational, such as similar burden allocations in the context of criminal law and habeas petitions).

Fourth, the rule would provide that the alien must establish that the court issuing an order vacating or expunging a conviction or modifying a sentence had jurisdiction and authority to do so. This requirement would be consistent with Board precedent, which provides that facially valid orders can be disregarded based on a lack of jurisdiction. *See, e.g., Matter of F-,* 8 I&N Dec. 251 (BIA 1959) (''[T]he presumption of regularity and of jurisdiction [of a state court order] may be overcome by extrinsic evidence or by the record itself.''); *cf. Adam* v. *Saenger,* 303 U.S. 59, 62 (1938) (''If it appears on its face to be a record of a court of general jurisdiction, such jurisdiction over the cause and the parties is to be presumed unless disproved by extrinsic evidence, or by the record itself. . . . But in a suit upon the judgment of another state the jurisdiction of the court which rendered it is open to judicial inquiry . . . and when the matter of fact or law on which jurisdiction depends was not litigated in the original suit it is a matter to be adjudicated in the suit founded upon the judgment.'' (citations omitted)). In short, an order purporting to vacate, expunge, or otherwise modify a conviction or sentence is inoperative for purposes of immigration law if the state court lacked jurisdiction over the subject matter or the parties to the action.

Jurisdictional defects in court orders might arise in a number of ways. For example, in *United States* v. *Garza-Mendez,* 735 F.3d 1284 (11th Cir. 2013), a criminal sentencing case, the Eleventh Circuit refused to recognize a clarification order issued by a state judge after the sentencing judge had ordered the defendant to serve 12 months of confinement. The Eleventh Circuit rejected the ''subjective, interpretive clarification order,'' noting that it was obtained from a different judge, long after entry of the original sentence, for the purpose of preventing enhancement of the defendant's sentence for unlawful reentry in federal court. *Id.* at 1289; *cf. Herrera* v. *U.S. Att'y Gen.,* 811 F.3d 1298, 1299–1301 (11th Cir. 2016) (affirming a Board decision declining to give effect to orders clarifying that defendants were never sentenced to terms of confinement when the original sentencing orders clearly stated to the contrary). A jurisdictional defect could also arise where state law limits the court's authority to grant post-conviction relief in certain ways, such as by imposing a time limitation. *See Matter of Estrada,* 26 I&N Dec. at 756 (noting that section 17–10–1(f) of the Georgia Code Annotated imposes strict time limits with respect to a sentencing court's ability to change or ''modify'' a sentence).

Finally, the proposed rule creates a rebuttable presumption that the order vacating or expunging the conviction or modifying the sentence was issued for immigration purposes if either (1) the order was entered after the initiation of any proceeding to remove the alien from the United States; or (2) the alien moved for the order more than one year after the date of the original order of conviction or sentencing.

Precedents establish that the timing of such a process is relevant to whether the resulting order should be recognized for immigration purposes. The initiation of such a process after removal proceedings have commenced naturally raises an inference that the resulting order was issued for immigration or rehabilitative purposes. For instance, in *Andrade-Zamora,* the Eighth Circuit refused to credit a state court's vacatur of a conviction when the vacatur occurred two weeks after the Government commenced removal proceedings based on the conviction, and where the state court also modified the alien's sentence for a different conviction in an apparent attempt to fit the conviction within an exception to a criminal ground of removability. 814 F.3d at 949. The court affirmed the Board's refusal to recognize the vacatur and modification, reasoning: ''The timing and effect of the order . . . raise an inference the state court did not vacate the conviction on a substantive or procedural ground, but rather to avoid the immigration consequences of the conviction.'' *Id.* at 949–50.

Further, the rule would create a rebuttable presumption providing that if more than a year has passed between the original conviction and the alien's effort to seek a subsequent vacatur or expungement of a conviction, or the modification of sentence, the immigration adjudicator should weigh that fact against recognizing the vacatur or modification. It 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, and who might delay such a challenge until DHS commences immigration proceedings or attempts to remove the alien. *See Rumierz,* 456 F.3d at 38 (affirming the Board's refusal to recognize a vacatur and the Board's reasoning that ''Rumierz could easily have sought to vacate the January 1994 Vermont conviction and have presented the vacated conviction to the [Board] in the six years before the [Board's] 2000 order''). This rule promotes finality in immigration proceedings by encouraging an alien to act diligently if there is a legitimate basis to challenge a conviction or sentence.

C. Reconsiderations of Discretionary Denials of Asylum

The proposed rule would remove the automatic review of a discretionary denial of an alien's asylum application by removing and reserving paragraph (e) in 8 CFR 208.16 and 1208.16. The present regulation provides that the denial of asylum shall be reconsidered in the event that an applicant is denied asylum solely in the exercise of discretion, and the applicant is subsequently granted withholding of deportation or removal under this section, thereby effectively precluding admission of the applicant's spouse or minor children following to join him or her. Factors to be considered include the reasons for the denial and reasonable alternatives available to the applicant such as reunification with his or her spouse or minor children in a third country. This provision, however, has proved confusing, inefficient, and unnecessary.

The courts of appeals have expressed ongoing confusion related to this provision. For example, the regulation states that when an asylum application is denied in the exercise of discretion, but withholding of removal is granted, ''the denial of asylum shall be reconsidered,'' but the regulation does not say who shall reconsider the denial, when the reconsideration shall occur, or how the reconsideration is to be initiated. *See Shantu* v. *Lynch,* 654 F. App'x 608, 613–14 (4th Cir. 2016) (discussing these ambiguities); *see also*

deportable by clear and convincing evidence. INA 240(c)(3)(A), 8 U.S.C. 1229a(c)(3)(A).

Huang v. *INS,* 436 F.3d 89, 93 (2d Cir. 2006). These ambiguities have not been ''definitively resolved,'' *Shantu,* 654 F. App'x at 614, and continued litigation on these questions would be an ongoing burden for applicants, the immigration system, and courts.

Further, mandating that the decision maker reevaluate the very issue just decided is an inefficient practice that, in the view of the Departments, grants insufficient deference to the original fact finding and exercise of discretion. The regulation also appears unnecessary given that other regulations provide multiple avenues to challenge or otherwise seek to change a discretionary denial of asylum coupled with a grant of withholding of removal.[11] First, an immigration judge may reconsider that decision upon his or her own motion. 8 CFR 1003.23(b)(1). Second, the alien may file a motion to reconsider. *Id.* Third, the alien may also appeal the decision to the Board. 8 CFR 1003.38. The existence of at least three alternative processes for altering a discretionary denial of asylum obviates the need for a mandatory fourth. Moreover, the objective of facilitating family reunification, *see Huang,* 436 F.3d at 93 (describing 8 CFR 1208.16(e) as ''manifestly a law designed to further family reunification''), can be fulfilled even in the absence of the existing reconsideration provision because the immigration judge (or other decision maker) already considers these factors when making a discretionary decision in the first instance, *see Fisenko* v. *Lynch,* 826 F.3d 287, 292 (6th Cir. 2016) (stating that ''a 'crucial factor in weighing asylum as a discretionary matter' is family reunification'' (internal quotation marks and citation omitted)).

IV. Regulatory Requirements

A. Regulatory Flexibility Act

The Departments have reviewed this proposed rule in accordance with the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*)) and have determined that this rule will not have a significant economic impact on a substantial number of small entities. The rule would not regulate ''small entities'' as that term is defined in 5 U.S.C. 601(6). Only individuals, rather than entities, are eligible to apply for asylum, and only individuals are eligible to apply for asylum or are otherwise placed in immigration proceedings.

[11] With respect to the DHS regulation at 8 CFR 208.16(e), if USCIS denies an individual's asylum application on discretionary grounds, USCIS does not have jurisdiction to consider withholding of removal eligibility because withholding of removal determinations are made by immigration judges and the Board.

B. Unfunded Mandates Reform Act of 1995

This proposed rule will not result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995. *See* 2 U.S.C. 1532(a).

C. Congressional Review Act

The Office of Information and Regulatory Affairs has determined that this proposed rule is not a major rule as defined by section 804 of the Congressional Review Act. 5 U.S.C. 804(2). This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

D. Executive Order 12866 (Regulatory Planning and Review), Executive Order 13563 (Improving Regulation and Regulatory Review), and Executive Order 13771 (Reducing Regulation and Controlling Regulatory Costs)

The Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), has designated this rule a ''significant regulatory action'' under section 3(f)(4) of Executive Order 12866, but not an economically significant regulatory action. Accordingly, the rule has been submitted to OMB for review. The Departments certify that this rule has been drafted in accordance with the principles of Executive Order 12866, section 1(b), Executive Order 13563, and Executive Order 13771.

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health, and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of using the best available methods to quantify costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Similarly, Executive Order 13771 requires agencies to manage both the public and private costs of regulatory actions.

The proposed regulation would provide seven additional mandatory bars to eligibility for asylum pursuant to the Attorney General and the Secretary's authorities under sections 208(b)(2)(B)(ii), 208(b)(2)(C), and 208(d)(5) of the INA.[12] The proposed rule would add bars on eligibility for aliens who commit certain offenses in the United States after entering the country. Those bars would apply to aliens who are convicted of (1) a felony under federal or state law; (2) an offense under 8 U.S.C. 1324(a)(1)(A) or 1324(a)(1)(2) (Alien Smuggling or Harboring); (3) an offense under 8 U.S.C. 1326 (Illegal Reentry); (4) a federal, state, tribal, or local crime involving criminal street gang activity; (5) certain federal, state, tribal, or local offenses concerning the operation of a motor vehicle while under the influence of an intoxicant; (6) a federal, state, tribal, or local domestic violence offense, or who are found by an adjudicator to have engaged in acts of battery or extreme cruelty in a domestic context, even if no conviction resulted; and (7) certain misdemeanors under federal or state law for offenses related to false identification; the unlawful receipt of public benefits from a federal, state, tribal, or local entity; or the possession or trafficking of a controlled substance or controlled-substance paraphernalia.

The seven proposed bars would be in addition to the existing mandatory bars relating to the persecution of others, convictions for particularly serious crimes, commission of serious nonpolitical crimes, security threats, terrorist activity, and firm resettlement in another country that are currently contained in the INA and its implementing regulations. *See* INA 208(b)(2); 8 CFR 208.13 and 1208.13. Under the current statutory and regulatory framework, asylum officers and immigration judges consider the applicability of mandatory bars to the relief of asylum in every proceeding involving an alien who has submitted an I–589 application for asylum. Although the proposed regulation would expand the mandatory bars to asylum, the proposed regulation does not change the nature or scope of the role of an immigration judge or an asylum officer during proceedings for consideration of asylum applications. Immigration judges and asylum officers are already trained to consider both an alien's previous conduct and criminal

[12] As discussed further below, the proposed regulation would not otherwise impact the ability of an alien who is denied asylum to receive the protection of withholding of removal under the INA or withholding of removal or deferral of removal under the CAT.

record to determine whether any immigration consequences result, and the proposed rule does not propose any adjudications that are more challenging than those that are already conducted. For example, immigration judges already consider the documentation of an alien's criminal record that is filed by the alien, the alien's representative, or the DHS representative in order to determine whether one of the mandatory bars applies and whether the alien warrants asylum as a matter of discretion. Because the proposed bars all relate to an alien's criminal convictions or other criminal conduct, adjudicators will conduct the same analysis to determine the applicability of the bars proposed by the rule.[13] The Departments do not expect the proposed additional mandatory bars to increase the adjudication time for immigration court proceedings involving asylum applications.

The Departments note that the proposed expansion of the mandatory bars for asylum would likely result in fewer asylum grants annually; [14] however, because asylum applications are inherently fact-specific, and because there may be multiple bases for denying an asylum application, neither the Department of Justice (''DOJ'') nor DHS can quantify precisely the expected decrease. An alien who would be barred from asylum as a result of the proposed rule may still be eligible to apply for the protection of withholding of removal under section 241(b)(3) of the INA or withholding of removal or deferral of removal under regulations implementing U.S. obligations under Article 3 of the CAT. *See* INA 241(b)(3), 8 U.S.C. 1231(b)(3); 8 CFR 208.16, 208.17 through 18, 1208.16, and 1208.17 through 18. For those aliens barred from asylum under this rule who would otherwise be positively adjudicated for asylum, it is possible they would qualify for withholding (provided a bar to withholding did not apply separate and apart from this rule).[15] To the extent there are any impacts of this rule, they would almost exclusively fall on that population.[16]

The full extent of the impacts on this population is unclear and would depend on the specific circumstances and personal characteristics of each alien, and neither DHS nor DOJ collects such data at such a level of granularity. Both asylum applicants and those who receive withholding of removal may obtain work authorization in the United States. Although asylees may apply for lawful permanent resident status and later citizenship, they are not required to do so, and some do not. Further, although asylees may bring certain family members to the United States, not all asylees have family members or family members that wish to leave their home countries. Moreover, family members of aliens granted withholding of removal may have valid asylum claims in their own right, which would provide them with a potential path to the United States as well. The only clear impact is that aliens granted withholding of removal generally may not travel outside the United States without executing their underlying order of removal and, thus, may not be allowed to return to the United States; however, even in that situation—depending on the destination of their travel—they may have a prima facie case for another grant of withholding of removal should they attempt to reenter. In short, there is no precise quantification available for the impact, if any, of this rule beyond the general notion that it will likely result in fewer grants of asylum on the whole.

Applications for withholding of removal typically require a similar amount of in-court time to complete as an asylum application due to a similar nucleus of facts. 8 CFR 1208.3(b) (an asylum application is deemed to be an application for withholding of removal). In addition, this proposed rule would not affect the eligibility of applicants for the employment authorization documents available to recipients of those protections and during the pendency of the consideration of the application in accordance with the current regulations and agency procedures. *See* 8 CFR 274a.12(c)(8) and (18), 208.7, and 1208.7.

The proposed rule would also remove the provision at 8 CFR 208.16(e) and 1208.16(e) regarding reconsideration of discretionary denials of asylum. This change would have no impact on DHS adjudicative operations because DHS does not adjudicate withholding requests. DOJ estimates that immigration judges nationwide must apply 8 CFR 1208.16(e) in approximately 800 cases per year on average.[17] The removal of the requirement to reconsider a discretionary denial would increase immigration court efficiencies and reduce any cost from the increased adjudication time by no longer requiring a second review of the same application by the same immigration judge. This impact, however, would likely be minor because of the small number of affected cases. Accordingly, DOJ assesses that removal of paragraphs 8 CFR 208.16(e) and 1208.16(e) would not increase any EOIR costs or operations, and would, if anything, result in a small increase in efficiency. The Departments note that removal of 8 CFR 208.16(e) and 1208.16(e) may have a marginal cost for aliens in immigration court proceedings by removing one avenue for an alien who would otherwise be denied asylum as a matter of discretion to be granted that relief. DOJ notes, however, that of the average of 800 aliens situated as such each year during the last ten years, an average of fewer than 150, or 0.4%, of the average 38,000 total asylum completions [18] each year filed an appeal in their case, so the affected population is very small and the overall impact would be nominal at most.[19] Moreover, such aliens would retain the ability to file a motion to reconsider in such a situation and, thus, would not actually

[13] The Departments note that one of the newly proposed bars, regarding whether or not the alien has ''engaged'' in certain acts of battery or extreme cruelty, does not necessarily require a criminal conviction. The Departments believe that a criminal arrest or conviction is the most likely evidence to be filed with the immigration court related to this bar, but even in cases where no such evidence is available, the analysis by immigration judges related to this proposed bar is not an expansion from the current analysis immigration judges may conduct during the course of removal proceedings. *See, e.g.,* INA 212(a)(2)(C) (providing that an alien is inadmissible if ''the Attorney General knows or has reason to believe'' that the alien is an illicit trafficker of a controlled substance, regardless of whether the alien has a controlled substance-related conviction).

[14] In FY 2018, DOJ's immigration courts granted 13,169 applications for asylum.

[15] Because statutory withholding of removal has a higher burden of proof, an alien granted such protection would necessarily also meet the statutory burden of proof for asylum, but would not be otherwise eligible for asylum due to a statutory bar or as a matter of discretion. Because asylum applications may be denied for multiple reasons and because the proposed bars do not have analogues in existing immigration law, there is no precise data on how many otherwise grantable asylum applications would be denied using these bars and, thus, there is no way to calculate precisely how many aliens would be granted withholding. Further, because the immigration judge would have to adjudicate the application in either case, there is no cost to DOJ.

[16] In FY 2018, DOJ's immigration courts completed 45,923 cases with an application for asylum on file. For the first three quarters of FY 2018, 622 applicants were denied asylum but granted withholding.

[17] This approximation is based on the number of initial case completions with an asylum application on file that had a denial of asylum but a grant of withholding during FYs 2009 through the third quarter of 2018.

[18] Thirty-eight thousand is the average of completions of cases with an asylum application on file from years FY 2008 through FY 2018. Completions consist of both initial case completions and subsequent case completions.

[19] Because each case may have multiple bases for appeal and appeal bases are not tracked to specific levels of granularity, it is not possible to quantify precisely how many appeals were successful on this particular issue.

lose the opportunity for reconsideration of a discretionary denial.

For the reasons explained above, the expected costs of this proposed rule are likely to be *de minimis.* This proposed rule is accordingly exempt from Executive Order 13771. *See* Office of Mgmt. & Budget, Guidance Implementing Executive Order 13771, Titled ''Reducing Regulation and Controlling Regulatory Costs'' (2017).

E. Executive Order 13132 (Federalism)

This rule will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

F. Executive Order 12988 (Civil Justice Reform)

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

G. Paperwork Reduction Act

This rule does not propose new or revisions to existing ''collection[s] of information'' as that term is defined under the Paperwork Reduction Act of 1995, Public Law 104–13, 44 U.S.C. 3501 *et seq.,* and its implementing regulations, 5 CFR part 1320.

List of Subjects in 8 CFR Parts 208 and 1208

Administrative practice and procedure, Aliens, Immigration, Reporting and recordkeeping requirements.

Proposed Regulatory Amendments

DEPARTMENT OF HOMELAND SECURITY

Accordingly, for the reasons set forth in the preamble, the Acting Secretary of Homeland Security is proposing to amend 8 CFR part 208 as follows:

PART 208—PROCEDURES FOR ASYLUM AND WITHHOLDING OF REMOVAL

■ 1. The authority citation for part 208 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1158, 1226, 1252, 1282; Title VII of Public Law 110–229, 8 CFR part 2.

■ 2. Section 208.13 is amended by adding paragraphs (c)(6) through (9) to read as follows:

§ 208.13 Establishing asylum eligibility.

* * * * *

(c) * * *

(6) Additional limitations on eligibility for asylum. For applications filed on or after [the effective date of the final rule], an alien shall be found ineligible for asylum if:

(i) The alien has been convicted on or after such date of an offense arising under sections 274(a)(1)(A), 274(a)(2), or 276 of the Act;

(ii) The alien has been convicted on or after such date of a Federal, State, tribal, or local crime that the Secretary knows or has reason to believe was committed in support, promotion, or furtherance of the activity of a criminal street gang as that term is defined either under the jurisdiction where the conviction occurred or in section 521(a) of title 18;

(iii) The alien has been convicted on or after such date of an offense for driving while intoxicated or impaired as those terms are defined under the jurisdiction where the conviction occurred (including a conviction for driving while under the influence of or impaired by alcohol or drugs) without regard to whether the conviction is classified as a misdemeanor or felony under Federal, State, tribal, or local law, in which such impaired driving was a cause of serious bodily injury or death of another person;

(iv)(A) The alien has been convicted on or after such date of a second or subsequent offense for driving while intoxicated or impaired as those terms are defined under the jurisdiction where the conviction occurred (including a conviction for driving while under the influence of or impaired by alcohol or drugs) without regard to whether the conviction is classified as a misdemeanor or felony under Federal, State, tribal, or local law;

(B) A finding under paragraph (c)(6)(iv)(A) of this section does not require the asylum officer to find the first conviction for driving while intoxicated or impaired (including a conviction for driving while under the influence of or impaired by alcohol or drugs) as a predicate offense. The asylum officer need only make a factual determination that the alien was previously convicted for driving while intoxicated or impaired as those terms are defined under the jurisdiction where the convictions occurred (including a conviction for driving while under the influence of or impaired by alcohol or drugs);

(v)(A) The alien has been convicted on or after such date of a crime that involves conduct amounting to a crime of stalking; or a crime of child abuse, child neglect, or child abandonment; or that involves conduct amounting to a domestic assault or battery offense, including a misdemeanor crime of domestic violence, as described in section 922(g)(9) of title 18, a misdemeanor crime of domestic violence as described in section 921(a)(33) of title 18, a crime of domestic violence as described in section 12291(a)(8) of title 34, or any crime based on conduct in which the alien harassed, coerced, intimidated, voluntarily or recklessly used (or threatened to use) force or violence against, or inflicted physical injury or physical pain, however slight, upon a person, and committed by:

(1) A current or former spouse of the person;

(2) An alien with whom the person shares a child in common;

(3) An alien who is cohabiting with or has cohabited with the person as a spouse;

(4) An alien similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs; or

(5) Any other alien against a person who is protected from that alien's acts under the domestic or family violence laws of the United States or any State, tribal government, or unit of local government.

(B) In making a determination under paragraph (c)(6)(v)(A) of this section, including in determining the existence of a domestic relationship between the alien and the victim, the underlying conduct of the crime may be considered and the asylum officer is not limited to facts found by the criminal court or provided in the underlying record of conviction;

(C) An alien who was convicted of offenses described in paragraph (c)(6)(v)(A) of this section is not subject to ineligibility for asylum on that basis if the alien would be described in section 237(a)(7)(A) of the Act were the crimes or conduct considered grounds for deportability under section 237(a)(2)(E)(i) through (ii) of the Act.

(vi) The alien has been convicted on or after such date of—

(A) Any felony under Federal, State, tribal, or local law;

(B) Any misdemeanor offense under Federal, State, tribal, or local law involving:

(1) The possession or use of an identification document, authentication feature, or false identification document without lawful authority, unless the alien can establish that the conviction resulted from circumstances showing that the document was presented before boarding a common carrier, that the

document related to the alien's eligibility to enter the United States, that the alien used the document to depart a country in which the alien has claimed a fear of persecution, and that the alien claimed a fear of persecution without delay upon presenting himself or herself to an immigration officer upon arrival at a United States port of entry;

(2) The receipt of Federal public benefits, as defined in 8 U.S.C. 1611(c), from a Federal entity, or the receipt of similar public benefits from a State, tribal, or local entity, without lawful authority; or

(3) Possession or trafficking of a controlled substance or controlled-substance paraphernalia, other than a single offense involving possession for one's own use of 30 grams or less of marijuana;

(vii) There are serious reasons for believing the alien has engaged on or after such date in acts of battery or extreme cruelty as defined in 8 CFR 204.2(c)(1)(vi), upon a person, and committed by:

(A) A current or former spouse of the person;

(B) An alien with whom the person shares a child in common;

(C) An alien who is cohabiting with or has cohabited with the person as a spouse;

(D) An alien similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs; or

(E) Any other alien against a person who is protected from that alien's acts under the domestic or family violence laws of the United States or any State, tribal government, or unit of local government, even if the acts did not result in a criminal conviction;

(F) Except that an alien who was convicted of offenses or engaged in conduct described in paragraph (c)(6)(vii) of this section is not subject to ineligibility for asylum on that basis if the alien would be described in section 237(a)(7)(A) of the Act were the crimes or conduct considered grounds for deportability under section 237(a)(2)(E)(i)–(ii) of the Act.

(7) For purposes of paragraph (c)(6) of this section:

(i) The term ''felony'' means any crime defined as a felony by the relevant jurisdiction (Federal, State, tribal, or local) of conviction, or any crime punishable by more than one year of imprisonment.

(ii) The term ''misdemeanor'' means any crime defined as a misdemeanor by the relevant jurisdiction (Federal, State, tribal, or local) of conviction, or any crime not punishable by more than one year of imprisonment.

(iii) Whether any activity or conviction also may constitute a basis for removability under the Act is immaterial to a determination of asylum eligibility.

(iv) All references to a criminal offense or criminal conviction shall be deemed to include any attempt, conspiracy, or solicitation to commit the offense or any other inchoate form of the offense.

(v) No order vacating a conviction, modifying a sentence, clarifying a sentence, or otherwise altering a conviction or sentence, shall have any effect unless the asylum officer determines that—

(A) The court issuing the order had jurisdiction and authority to do so; and

(B) The order was not entered for rehabilitative purposes or for purposes of ameliorating the immigration consequences of the conviction or sentence.

(8) For purposes of paragraph (c)(7)(v)(B) of this section, the order shall be presumed to be for the purpose of ameliorating immigration consequences if:

(i) The order was entered after the initiation of any proceeding to remove the alien from the United States; or

(ii) The alien moved for the order more than one year after the date of the original order of conviction or sentencing.

(9) An asylum officer is authorized to look beyond the face of any order purporting to vacate a conviction, modify a sentence, or clarify a sentence to determine whether the requirements of paragraph (c)(7)(v) of this section have been met in order to determine whether such order should be given any effect under this section.

§ 208.16 [Amended]

■ 3. In § 208.16, remove and reserve paragraph (e).

DEPARTMENT OF JUSTICE

Accordingly, for the reasons set forth in the preamble, the Attorney General proposes to amend 8 CFR part 1208 as follows:

PART 1208—PROCEDURES FOR ASYLUM AND WITHHOLDING OF REMOVAL

■ 4. The authority citation for part 1208 continues to read as fol1ows:

Authority: 8 U.S.C. 1101, 1103, 1158, 1226, 1252, 1282; Title VII of Public Law 110–229.

■ 5. Section 1208.13 is amended by adding paragraphs (c)(6) through (9) to read as follows:

§ 1208.13 Establishing asylum eligibility.

* * * * *

(c) * * *

(6) Additional limitations on eligibility for asylum. For applications filed on or after [the effective date of the final rule], an alien shall be found ineligible for asylum if:

(i) The alien has been convicted on or after such date of an offense arising under sections 274(a)(1)(A), 274(a)(2), or 276 of the Act;

(ii) The alien has been convicted on or after such date of a Federal, State, tribal, or local crime that the Attorney General or Secretary knows or has reason to believe was committed in support, promotion, or furtherance of the activity of a criminal street gang as that term is defined under the jurisdiction where the conviction occurred or in section 521(a) of title 18;

(iii) The alien has been convicted on or after such date of an offense for driving while intoxicated or impaired as those terms are defined under the jurisdiction where the conviction occurred (including a conviction for driving while under the influence of or impaired by alcohol or drugs) without regard to whether the conviction is classified as a misdemeanor or felony under Federal, State, tribal, or local law, in which such impaired driving was a cause of serious bodily injury or death of another person;

(iv)(A) The alien has been convicted on or after such date of a second or subsequent offense for driving while intoxicated or impaired as those terms are defined under the jurisdiction where the conviction occurred (including a conviction for driving while under the influence of or impaired by alcohol or drugs) without regard to whether the conviction is classified as a misdemeanor or felony under Federal, State, tribal, or local law;

(B) A finding under paragraph (c)(6)(iv)(A) of this section does not require the immigration judge to find the first conviction for driving while intoxicated or impaired (including a conviction for driving while under the influence of or impaired by alcohol or drugs) as a predicate offense. The immigration judge need only make a factual determination that the alien was previously convicted for driving while intoxicated or impaired as those terms are defined under the jurisdiction where the convictions occurred (including a conviction for driving while under the influence of or impaired by alcohol or drugs).

(v)(A) The alien has been convicted on or after such date of a crime that involves conduct amounting to a crime of stalking; or a crime of child abuse,

child neglect, or child abandonment; or that involves conduct amounting to a domestic assault or battery offense, including a misdemeanor crime of domestic violence, as described in section 922(g)(9) of title 18, a misdemeanor crime of domestic violence as described in section 921(a)(33) of title 18, a crime of domestic violence as described in section 12291(a)(8) of title 34, or any crime based on conduct in which the alien harassed, coerced, intimidated, voluntarily or recklessly used (or threatened to use) force or violence against, or inflicted physical injury or physical pain, however slight, upon a person, and committed by:

(*1*) A current or former spouse of the person;

(*2*) An alien with whom the person shares a child in common;

(*3*) An alien who is cohabiting with or has cohabited with the person as a spouse;

(*4*) An alien similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs; or

(*5*) Any other alien against a person who is protected from that alien's acts under the domestic or family violence laws of the United States or any State, tribal government, or unit of local government.

(B) In making a determination under paragraph (c)(6)(v) of this section, including in determining the existence of a domestic relationship between the alien and the victim, the underlying conduct of the crime may be considered and the adjudicator is not limited to facts found by the criminal court or provided in the underlying record of conviction.

(C) An alien who was convicted of offenses or engaged in conduct described in paragraph (c)(6)(v)(A) of this section is not subject to ineligibility for asylum on that basis if the alien would be described in section 237(a)(7)(A) of the Act were the crimes or conduct considered grounds for deportability under section 237(a)(2)(E)(i) through (ii) of the Act.

(vi) The alien has been convicted on or after such date of—

(A) Any felony under Federal, State, tribal, or local law;

(B) Any misdemeanor offense under Federal, State, tribal, or local law involving

(*1*) The possession or use of an identification document, authentication feature, or false identification document without lawful authority, unless the alien can establish that the conviction resulted from circumstances showing that the document was presented before boarding a common carrier, that the document related to the alien's eligibility to enter the United States, that the alien used the document to depart a country in which the alien has claimed a fear of persecution, and that the alien claimed a fear of persecution without delay upon presenting himself or herself to an immigration officer upon arrival at a United States port of entry;

(*2*) The receipt of Federal public benefits, as defined in 8 U.S.C. 1611(c), from a Federal entity, or the receipt of similar public benefits from a State, tribal, or local entity, without lawful authority; or

(*3*) Possession or trafficking of a controlled substance or controlled-substance paraphernalia, other than a single offense involving possession for one's own use of 30 grams or less of marijuana.

(vii) There are serious reasons for believing the alien has engaged on or after such date in acts of battery or extreme cruelty as defined in 8 CFR 204.2(c)(1)(vi), upon a person, and committed by:

(A) A current or former spouse of the person;

(B) An alien with whom the person shares a child in common;

(C) An alien who is cohabiting with or has cohabited with the person as a spouse;

(D) An alien similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs; or

(E) Any other alien against a person who is protected from that alien's acts under the domestic or family violence laws of the United States or any State, tribal government, or unit of local government, even if the acts did not result in a criminal conviction;

(F) Except that an alien who was convicted of offenses or engaged in conduct described in paragraph (c)(6)(vii) of this section is not subject to ineligibility for asylum on that basis if the alien would be described in section 237(a)(7)(A) of the Act were the crimes or conduct considered grounds for deportability under section 237(a)(2)(E)(i)–(ii) of the Act.

(7) For purposes of paragraph (c)(6) of this section:

(i) The term ''felony'' means any crime defined as a felony by the relevant jurisdiction (Federal, State, tribal, or local) of conviction, or any crime punishable by more than one year imprisonment.

(ii) The term ''misdemeanor'' means any crime defined as a misdemeanor by the relevant jurisdiction (Federal, State, tribal, or local) of conviction, or any crime not punishable by more than one year of imprisonment.

(iii) Whether any activity or convictions also may constitute a basis for removability under the Act is immaterial to a determination of asylum eligibility.

(iv) All references to a criminal offense or criminal conviction shall be deemed to include any attempt, conspiracy, or solicitation to commit the offense or any other inchoate form of the offense.

(v) No order vacating a conviction, modifying a sentence, clarifying a sentence, or otherwise altering a conviction or sentence, shall have any effect unless the asylum officer determines that—

(A) The court issuing the order had jurisdiction and authority to do so; and

(B) The order was not entered for rehabilitative purposes or for purposes of ameliorating the immigration consequences of the conviction or sentence.

(8) For purposes of paragraph (c)(7)(v)(B) of this section, the order shall be presumed to be for the purpose of ameliorating immigration consequences if:

(i) The order was entered after the initiation of any proceeding to remove the alien from the United States; or

(ii) The alien moved for the order more than one year after the date of the original order of conviction or sentencing.

(9) An immigration judge or other adjudicator is authorized to look beyond the face of any order purporting to vacate a conviction, modify a sentence, or clarify a sentence to determine whether the requirements of paragraph (c)(7)(v) of this section have been met in order to determine whether such order should be given any effect under this section.

§ 1208.16 [Amended]

■ 6. In § 1208.16, remove and reserve paragraph (e).

Dated: December 9, 2019.

Chad F. Wolf,

Acting Secretary of Homeland Security.

Dated: December 10, 2019.

William P. Barr,

Attorney General.

[FR Doc. 2019–27055 Filed 12–18–19; 8:45 am]

BILLING CODE 9111–97–P 4410–30–P

EXHIBIT G

DEPARTMENT OF HOMELAND SECURITY

8 CFR Part 208

RIN 1615–AC41

DEPARTMENT OF JUSTICE

Executive Office for Immigration Review

8 CFR Part 1208

[EOIR Docket No. 18–0002; A.G. Order No. 4873–2020]

RIN 1125–AA87

Procedures for Asylum and Bars to Asylum Eligibility

AGENCY: Executive Office for Immigration Review, Department of Justice; U.S. Citizenship and Immigration Services, Department of Homeland Security.

ACTION: Final rule.

SUMMARY: On December 19, 2019, the Department of Justice (''DOJ'') and the Department of Homeland Security (''DHS'') (collectively, ''the Departments'') published a notice of proposed rulemaking (''NPRM'') that would amend their respective regulations governing the bars to asylum eligibility. The Departments also proposed to clarify the effect of criminal convictions and to remove their respective regulations governing the automatic reconsideration of discretionary denials of asylum applications. This final rule (''final rule'' or ''rule'') responds to comments received and adopts the provisions of the NPRM with technical corrections to ensure clarity and internal consistency.

DATES: This rule is effective on November 20, 2020.

FOR FURTHER INFORMATION CONTACT:

Lauren Alder Reid, Assistant Director, Office of Policy, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 1800, Falls Church, VA 22041, telephone (703) 305–0289 (not a toll-free call).

Maureen Dunn, Chief, Division of Humanitarian Affairs, Office of Policy and Strategy, U.S. Citizenship and Immigration Services (''USCIS''), DHS, 20 Massachusetts Avenue NW, Washington, DC 20529–2140; telephone (202) 272–8377 (not a toll-free call).

SUPPLEMENTARY INFORMATION:

I. Summary of the Proposed Rule

On December 19, 2019, the Departments published an NPRM that would amend their respective regulations governing the bars to asylum eligibility, clarify the effect of criminal convictions, and remove their respective regulations governing the automatic reconsideration of discretionary denials of asylum applications. Procedures for Asylum and Bars to Asylum Eligibility, 84 FR 69640 (Dec. 19, 2019).

A. Authority and Legal Framework

The Departments published the proposed rule pursuant to their respective authorities regarding the adjudication of asylum applications. 84 FR at 69641–42, 69644–45.

Regarding the DOJ, the Attorney General, through himself and the Executive Office for Immigration Review (''EOIR''), has authority over immigration adjudications. *See* 6 U.S.C. 521; section 103(g) of the Immigration and Nationality Act (''INA'' or ''the Act'') (8 U.S.C. 1103(g)). Immigration judges within DOJ adjudicate defensive asylum applications filed during removal proceedings [1] and affirmative asylum applications referred to the immigration courts by USCIS within DHS. INA 101(b)(4) (8 U.S.C. 1101(b)(4)); 8 CFR 1003.10(b), 1208.2. The Board of Immigration Appeals (''BIA'' or ''the Board'') hears appeals from immigration judges' decisions, including decisions related to the relief of asylum. 8 CFR 1003.1.

The immigration laws further provide the Attorney General with authority regarding immigration adjudications and determinations. For example, the Attorney General's determination with respect to all questions of law is ''controlling.'' INA 103(a)(1) (8 U.S.C. 1103(a)(1)). The Attorney General possesses a general authority to ''establish such regulations * * * as the Attorney General determines to be necessary for carrying out'' his authorities under the INA. INA 103(g)(2) (8 U.S.C. 1103(g)(2)). In addition, the INA authorizes the Attorney General to (1) ''by regulation establish additional limitations and conditions, consistent with [INA 208 (8 U.S.C. 1158)], under which an alien shall be ineligible for asylum under,'' INA 208(b)(1) (8 U.S.C. 1158(b)(1)); and (2) ''provide by regulation for * * * conditions or limitations on the consideration of an application for asylum not inconsistent with the Act.'' INA 208(b)(2)(C) and (d)(5)(B) (8 U.S.C. 1158(b)(2)(C) and (d)(5)(B)).

Regarding the Department of Homeland Security, the Homeland Security Act of 2002 (''HSA''), Public Law 107–296, 116 Stat. 2135, as amended, transferred many functions related to the execution of Federal immigration law to the newly created DHS. The HSA charges the Secretary of Homeland Security (''the Secretary'') ''with the administration and enforcement of [the INA] and all other laws relating to the immigration and naturalization of aliens,'' INA 103(a)(1) (8 U.S.C. 1103(a)(1)), and grants the Secretary the power to take all actions ''necessary for carrying out'' the provisions of the immigration and nationality laws, INA 103(a)(3) (8 U.S.C. 1103(a)(3)). The HSA also transferred to USCIS responsibility for affirmative asylum applications, *i.e.,* applications for asylum made outside the removal context. *See* 6 U.S.C. 271(b)(3). If an alien is not in removal proceedings, USCIS asylum officers determine in the first instance whether an alien's asylum application should be granted. *See* 8 CFR 208.2.

B. Provisions of the Proposed Rule

The NPRM proposed to amend 8 CFR 208.13 and 1208.13 by adding new paragraphs (c)(6)–(9) and amending 8 CFR 208.16 and 1208.16 by removing and reserving paragraphs (e) in each section.

1. Bars to Asylum Eligibility

Pursuant to the authorities outlined above, the Departments proposed to revise 8 CFR 208.13 and 1208.13 by adding paragraphs (c)(6) in each section to add the following bars on eligibility for asylum for the following aliens:

- Aliens who have been convicted of an offense arising under INA 274(a)(1)(A) or (a)(2) or INA 276 (8 U.S.C. 1324(a)(1)(A) or (a)(2) or 1326) (convictions related to alien harboring, alien smuggling, and illegal reentry). *See* 8 CFR 208.13(c)(6)(i) and 1208.13(c)(6)(i) (proposed); 84 FR at 69647–49.
- Aliens who have been convicted of a Federal, State, tribal, or local crime that the Attorney General or Secretary knows or has reason to believe was committed in support, promotion, or furtherance of the activity of a criminal street gang as that term is defined under the law of the jurisdiction where the conviction occurred or as in 18 U.S.C. 521(a). *See* 8 CFR 208.13(c)(6)(ii) and 1208.13(c)(6)(ii) (proposed); 84 FR at 69649–50.
- Aliens who have been convicted of an offense for driving while intoxicated or impaired as those terms are defined under the law of the jurisdiction where

[1] One exception is that asylum officers in DHS have initial jurisdiction to adjudicate asylum applications filed by unaccompanied alien children (''UAC'') in removal proceedings. INA 208(b)(3)(C) (8 U.S.C. 1158(b)(3)(C)); *see also* 6 U.S.C. 279(g)(2) (UAC defined).

the conviction occurred (including a conviction for driving while under the influence of or impaired by alcohol or drugs) without regard to whether the conviction is classified as a misdemeanor or felony under Federal, State, tribal, or local law, in which such impaired driving was a cause of serious bodily injury or death of another person. *See* 8 CFR 208.13(c)(6)(iii) and 1208.13(c)(6)(iii) (proposed); 84 FR at 69650–51.

- Aliens who have been convicted of a second or subsequent offense for driving while intoxicated or impaired as those terms are defined under the law of the jurisdiction where the conviction occurred (including a conviction for driving while under the influence of or impaired by alcohol or drugs) without regard to whether the conviction is classified as a misdemeanor or felony under Federal, State, tribal, or local law. *See* 8 CFR 208.13(c)(6)(iv)(A) and 1208.13(c)(6)(iv)(A) (proposed); 84 FR at 69650–51.[2]
- Aliens who have been convicted of a crime that involves conduct amounting to a crime of stalking; or a crime of child abuse, child neglect, or child abandonment; or that involves conduct amounting to a domestic assault or battery offense, including a misdemeanor crime of domestic violence, as described in section 922(g)(9) of title 18, a misdemeanor crime of domestic violence as described in section 921(a)(33) of title 18, a crime of domestic violence as described in section 12291(a)(8) of title 34, or any crime based on conduct in which the alien harassed, coerced, intimidated, voluntarily or recklessly used (or threatened to use) force or violence against, or inflicted physical injury or physical pain, however slight, upon a person, and committed by (a) the person's current or former spouse, (b) an alien with whom the person shares a child in common, (c) an alien who is cohabitating with or who has cohabitated with the person as a spouse, (d) an alien similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction, or (e) any other alien against a person who is protected from that alien's acts under the domestic or family violence laws of the United States or any State, tribal government, or unit of local government. *See* 8 CFR 208.13(c)(6)(v)(A), 1208.13(c)(6)(v)(A) (proposed); 84 FR at 69651–53. The NPRM also provided that an alien's conduct considered grounds for deportability under section 237(a)(2)(E)(i) through (ii) of the Act (8 U.S.C. 1227(a)(2)(E)(i)–(ii)) would not disqualify him or her from asylum under this provision if a determination was made that the alien satisfies the criteria in section 237(a)(7)(A) of the Act (8 U.S.C. 1227(a)(7)(A)). *See* 8 CFR 208.13(c)(6)(v)(C), 1208.13(c)(6)(v)(C) (proposed); 84 FR at 69651–53.
- Aliens who have been convicted of any felony under Federal, State, tribal, or local law. *See* 8 CFR 208.13(c)(6)(vi)(A), 1208.13(c)(6)(vi)(A) (proposed); 84 FR at 69645–47.
- Aliens who have been convicted of any misdemeanor offense under Federal, State, tribal, or local law that involves (1) possession or use of an identification document, authentication feature, or false identification document without lawful authority, unless the alien can establish that the conviction resulted from circumstances showing that the document was presented before boarding a common carrier, that the document related to the alien's eligibility to enter the United States, that the alien used the document to depart a country in which the alien has claimed a fear of persecution, and that the alien claimed a fear of persecution without delay upon presenting himself or herself to an immigration officer upon arrival at a United States port of entry; (2) the receipt of Federal public benefits, as defined in 8 U.S.C. 1611(c), from a Federal entity, or the receipt of similar public benefits from a State, tribal, or local entity, without lawful authority; or (3) possession or trafficking of a controlled substance or controlled substance paraphernalia, other than a single offense involving possession for one's own use of 30 grams or less of marijuana. *See* 8 CFR 208.13(c)(6)(vi)(B), 1208.13(c)(6)(vi)(B) (proposed); 84 FR at 69653–54.
- Aliens for whom there are serious reasons to believe have engaged in acts of battery or extreme cruelty, as defined in 8 CFR 204.2(c)(1)(vi), upon a person and committed by the same list of aliens as set forth above regarding domestic-violence convictions. *See* 8 CFR 208.13(c)(6)(vii)(A)–(E), 1208.13(c)(6)(vii)(A)–(E) (proposed); 84 FR at 69651–53. The NPRM further provided that an alien's offense would not disqualify him or her from asylum under this provision for crimes or conduct considered grounds for deportability under section 237(a)(2)(E)(i) and (ii) of the Act if a determination was made that the alien satisfies the criteria in section 237(a)(7)(A) of the Act (8 U.S.C. 1227(a)(7)(A)) (8 U.S.C. 1227(a)(2)(E)(i)–(ii)). *See* 8 CFR 208.13(c)(6)(vii)(F), 1208.13(c)(6)(vii)(F) (proposed); 84 FR at 69651–53.

2. Additional Instruction and Definitions for Analyzing the New Bars to Eligibility

The Departments proposed to revise 8 CFR 208.13 and 1208.13 by adding paragraphs (c)(7) through (9), which would have provided relevant definitions and other procedural instructions for the implementation of the proposed bars to eligibility discussed above.

First, this proposed revision would have defined the terms ''felony'' (''any crime defined as a felony by the relevant jurisdiction * * * of conviction, or any crime punishable by more than one year of imprisonment'') and ''misdemeanor'' (''any crime defined as a misdemeanor by the relevant jurisdiction * * * of conviction, or any crime not punishable by more than one year of imprisonment''). 8 CFR 208.13(c)(7)(i)–(ii), 1208.13(c)(7)(i)–(ii) (proposed); 84 FR at 69646, 69653.

The proposed rule further would have provided instructions that whether an activity would constitute a basis for removability is irrelevant to determining whether the activity would make an alien ineligible for asylum and that all criminal convictions referenced in the proposed bars to eligibility would include inchoate offenses. 8 CFR 208.13(c)(7)(iii)–(iv), 1208.13(c)(7)(iii)–(iv) (proposed).

Regarding convictions that have been modified, vacated, clarified, or otherwise altered, the proposed rule would have instructed that such modifications, vacaturs, clarifications, or alterations do not have any effect on the alien's eligibility for asylum unless the court issuing the order had jurisdiction and authority to do so, and the court did not do so for rehabilitative purposes or to alleviate possible immigration-related consequences of the conviction. 8 CFR 208.13(c)(7)(v), 1208.13(c)(7)(v) (proposed); 84 FR at 69654–56. The rule would have further provided that the modification, vacatur, clarification, or other alteration is presumed to be for the purpose of ameliorating the immigration

[2] When determining whether an alien's offense qualifies under this provision, the NPRM further provided that the adjudicator would not be required to find the initial conviction as a predicate offense. 8 CFR 208.13(c)(6)(iv)(B), 1208.13(c)(6)(iv)(B) (proposed). Further, the NPRM provided that the adjudicator would be permitted to consider the underlying conduct of the crime and would not be limited to those facts found by the criminal court or otherwise contained in the record of conviction. 8 CFR 208.13(c)(6)(iv)(B), 1208.13(c)(6)(iv)(B) (proposed). Instead, the adjudicator would be required only to make a factual determination that the alien was previously convicted for driving while intoxicated or impaired as those terms are defined under the law of the jurisdiction where the convictions occurred. 8 CFR 208.13(c)(6)(iv)(B), 1208.13(c)(6)(iv)(B).

consequences of a conviction if it was entered subsequent to the initiation of removal proceedings or if the alien moved for the order more than one year following the original order of conviction or sentencing. 8 CFR 208.13(c)(8), 1208.13(c)(8) (proposed); 84 FR at 69654–56. Finally, the proposed rule would have specifically allowed the asylum officer or immigration judge to ''look beyond the face of any order purporting to vacate a conviction, modify a sentence, or clarify a sentence'' to determine what effect such order should be given under proposed 8 CFR 208.13(c)(7)(v) and 1208.13(c)(7)(v). 8 CFR 208.13(c)(9),1208.13(c)(9) (proposed); 84 FR at 69654–56.

3. Reconsideration of Discretionary Denials

Lastly, the proposed rule would have removed and reserved 8 CFR 208.16(e) and 1208.16(e), which provide for the automatic review of a discretionary denial of an alien's asylum application if the alien is subsequently granted withholding of removal. 84 FR at 69656–57.

II. Public Comments on the Proposed Rule

A. Summary of Public Comments

The comment period for the NPRM closed on January 21, 2020, with 581 comments received.[3] Individual commenters submitted 503 comments, and 78 comments were submitted by organizations, including non-government organizations, legal advocacy groups, non-profit organizations, religious organizations, congressional committees, and groups of members of Congress. Most individual commenters opposed the NPRM. All organizations opposed the NPRM.

B. Comments Expressing Support for the Proposed Rule

Comment: One commenter supported the final rule to ensure that individuals who qualify for asylum are granted that status only when merited in the exercise of discretion and to provide a uniform and fair standard to prevent criminal aliens from ''gaining a foothold in the United States.''

One commenter stated that the NPRM was an appropriate exercise of discretionary authority. The commenter stated that asylum is an extraordinary benefit that offers a path to lawful permanent residence and United States citizenship and, thus, should be discretionary. The commenter stated that asylees are protected from removal, authorized to work in the United States, and may travel under certain circumstances, and that asylees' spouses and children are eligible for derivative status in the United States. The commenter stated that the United States asylum system is generous, asserting that, in fiscal year 2018, 38,687 individuals were granted asylum, including 25,439 affirmative grants and 13,248 defensive grants. The commenter stated that this was the highest number of grants since fiscal year 2002.

The commenter cited the BIA: ''The ultimate consideration when balancing factors in the exercise of discretion is to determine whether a grant of relief, or in this case protection, appears to be in the best interest of the United States.'' *Matter of D–A–C–,* 27 I&N Dec. 575, 578 (BIA 2019) (citing *Matter of C–V–T–,* 22 I&N Dec. 7, 11 (BIA 1998) and *Matter of Mendez,* 21 I&N Dec. 296, 305 (BIA 1996)). The commenter stated that criminal aliens, as described in the NPRM, should not be granted the benefit of asylum because their admission would not be in the best interest of the United States.

The commenter emphasized that the NPRM would not bar individuals from all forms of fear-based protection and that individuals who were barred from asylum under the NPRM could still apply for withholding of removal under the INA or protection under the regulations issued pursuant to the legislation implementing the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (''CAT'' and ''CAT regulations'').[4] The commenter opined that the NPRM would improve the integrity of the asylum system.

The commenter stated that the crimes and conduct listed in the NPRM should constitute a ''conclusive determination that an applicant does not merit asylum in the exercise of discretion.'' The commenter stated that the NPRM would ensure fair and uniform application of the immigration laws because aliens who have been convicted of similar crimes would not receive different outcomes depending on their adjudicator.

The commenter stated that the NPRM was authorized by the Act, which the commenter stated provides for regulations establishing additional conditions or limitations on asylum. The commenter stated that the NPRM was consistent with existing limitations on asylum eligibility in the statute because several statutory provisions exclude individuals from asylum eligibility on the basis of criminal conduct or other conduct indicating that the applicant does not merit asylum. *See* INA 208(b)(2)(A)(ii) (8 U.S.C. 1158(b)(2)(A)(ii)) (particularly serious crime); INA 208(b)(2)(A)(iii) (8 U.S.C. 1158(b)(2)(A)(iii)) (serious nonpolitical crime outside the United States); INA 208(b)(2)(B)(i) (8 U.S.C. 1158(b)(2)(B)(i)) (conviction for aggravated felony); INA 208(b)(2)(B)(ii) (8 U.S.C. 1158(b)(2)(B)(ii)) (offenses designated as particularly serious crimes or serious nonpolitical crimes by regulation); INA 208(b)(2)(A)(i) (8 U.S.C. 1158(b)(2)(A)(i)) (alien engaged in persecution of another on account of a protected ground); INA 208(b)(2)(A)(iv) (8 U.S.C. 1158(b)(2)(A)(iv)) (reasonable grounds to regard alien as a danger to the security of the United States); INA 208(b)(2)(A)(v) (8 U.S.C. 1158(b)(2)(A)(v)) (alien presents national security concerns or engaged in terrorist activity).

The commenter supported the NPRM's proposed limitation on asylum eligibility for those who have been convicted of a felony, stating that felonies are categorized as such because they present more serious criminal conduct, which has a higher social cost. The commenter asserted that a felony conviction should be such a heavily weighted negative factor that it should conclusively establish that an alien does not merit asylum. The commenter supported defining a crime by the maximum possible sentence, as opposed to the actual sentence imposed, because of the variability of sentences that can be imposed on individuals who commit the same crime yet appear before different judges or are charged in different jurisdictions. The commenter asserted that immigration consequences should not vary based on the jurisdiction or a judge's ''individual personality'' and instead should be standardized in the interest of fairness, uniformity, and efficiency.

Commenters also supported the NPRM's proposed limitation on eligibility for individuals convicted of alien harboring in violation of section 274(a)(1)(A) of the Act (8 U.S.C. 1324(a)(1)(A)). Specifically, the

[3] The Departments reviewed all 581 comments submitted in response to the rule; however, the Departments did not post 5 of the comments to regulations.gov for public inspection. Of these comments, three were duplicates of another comment written by the same commenter, and two were written in Spanish. Accordingly, the Departments posted 576 comments.

[4] Adopted and opened for signature Dec. 10, 1984, G.A. Res. 39/46, 39 U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/RES/39/708 (1984) (entered into force June 26, 1987; for the United States Apr. 18, 1988) (implemented in the immigration context in principal part at 8 CFR 208.16(c) through 208.18 and 8 CFR 1208.16(c) through 1208.18). *See* Foreign Affairs Reform and Restructuring Act of 1998 (''FARRA''), Public Law 105–277, div. G, sec. 2242, 112 Stat. 2681, 2631–822 (8 U.S.C. 1231 note).

commenters stated that smuggling involves a business where people are routinely treated not as human beings, but as chattel. The commenters stated that individuals who participate in smuggling, or who place others into the hands of smugglers, should not be eligible for asylum because the conduct required for such a conviction demonstrates contempt for U.S. immigration law and a disregard for the value of human life. Commenters similarly supported the NPRM's proposed limitation on eligibility for asylum for aliens who have been convicted of illegal reentry in violation of section 276 of the Act (8 U.S.C. 1326). Commenters stated that such individuals have demonstrated contempt for U.S immigration law and should not be granted asylum. Commenters stated that a conviction under section 276 of the Act (8 U.S.C. 1326) requires that an alien repeatedly violated the immigration laws because such a conviction requires that the alien illegally reentered after a prior removal and intentionally chose not to present himself or herself at a port of entry. The commenters stated that whether or not the final rule includes the felony bar to asylum, it should incorporate a mandatory bar for those convicted of illegal reentry.

Commenters also expressed support for the NPRM's proposed limitation on asylum eligibility for individuals who have committed criminal acts on behalf of or in furtherance of a criminal street gang. The commenters stated that such activity is an indicator of ongoing danger to the community. The commenters noted that, although widespread criminal activity is not a sufficient legal basis to receive asylum protection, adjudicators routinely hear testimony about the harm suffered by people subjected to extortion threats, murders, kidnappings, and sexual assaults by organized criminal groups. The commenters stated that the United States immigration system should not award a discretionary benefit to those who would destabilize communities at home and abroad through violence.

Commenters supported the NPRM's approach authorizing adjudicators to determine—on the basis of sufficient evidence—whether a particular criminal act was committed ''in support, promotion, or furtherance of a criminal street gang.'' Specifically, the commenters stated that the range of crimes committed by street gangs is broad and that not all gang members are convicted of a gang participation offense even when they commit a crime on behalf of the gang. The commenters noted that such a determination would not be based on ''mere suspicion'' but would only occur where the adjudicator knows or has reason to believe that the crime was committed in furtherance of gang activity on the basis of competent evidence. The commenters stated that ''[g]ang violence is a scourge on our communities, and those who further the goals of criminal street gangs should not be put on a path to citizenship.''

Commenters expressed support for the NPRM's proposed limitation on asylum eligibility where an individual has been convicted of multiple driving-under-the-influence (''DUI'') offenses or a single offense resulting in death or serious bodily injury. The commenters stated that drunk and impaired driving is a dangerous activity that kills more than 10,000 people in the United States each year and injures many more. The commenters stated that individuals with recidivist DUI records, or who have already caused injury or death, should not be rewarded with asylum. The commenters expressed support for the NPRM's proposed limitation on asylum eligibility for individuals who have been convicted of certain misdemeanors. The commenters encouraged the Departments to consider including misdemeanor offenses involving sexual abuse or offenses reflecting a danger to children, asserting that such offenses are indicative of an ongoing danger to the community.

The commenters expressed support for the NPRM's approach to treating vacated, expunged, or modified convictions and sentences. The commenter stated that the approach is consistent with the Attorney General's decision in *Matter of Thomas and Thompson,* 27 I&N Dec. 674 (A.G. 2019). The commenters also stated that such an approach would be appropriate in the interests of uniform application of the law across jurisdictions by helping to ensure that aliens convicted of the same or similar conduct receive the same consequence with respect to asylum eligibility.

The commenters expressed support for the NPRM's proposed removal of 8 CFR 208.16(e) and 1208.16(e), stating that these provisions are unnecessary. Specifically, the commenters stated that the current regulations require an adjudicator who denies an asylum application in the exercise of discretion to revisit and reconsider that denial by weighing factors that would already have been considered in the original discretionary analysis. The commenters stated that there should not be a presumption that the adjudicator did not properly weigh discretionary factors in the first instance. The commenters stated that, as noted by the NPRM, such a requirement is inefficient, requiring additional adjudicatory resources to re-evaluate a decision that was only just decided by the same adjudicator. The commenters also stated that an alien already has opportunities to seek review of that discretionary decision through motions or an appeal.

Other commenters expressed general support for the NPRM. Some commenters stated that such a rule would make America safer. One commenter stated that further restrictions on asylum were necessary because individuals who have no basis to remain in the United States ''routinely ask to use political asylum as a last ditch effort to remain.'' At least one commenter stated that the NPRM would not adversely affect ''innocent asylum seeker[s] truly escaping political persecution.'' Other commenters stated that all applications for relief should require at least a minimum of good character and behavior. One commenter stated that the NPRM ''is a direct result of state and local governments working to nullify undocumented criminal activity by dropping charges, expunging records or pardoning crimes, including serious crimes like armed robbery * * * sex assault, domestic abuse, wire fraud, identity theft etc.''

One commenter expressed support for the NPRM's proposed limitation on asylum eligibility for individuals who are convicted of offenses related to controlled substances, stating that the United States must bar those who engage in drug trafficking into the United States. Another commenter expressed support for the proposed limitations on asylum eligibility for individuals who are convicted of domestic violence offenses or who engage in identity theft, stating that such individuals should not have the opportunity to be lawfully present in the United States.

Response: The Departments note the commenters' support for the rule. The Departments have taken the commenters' recommendations under advisement.

C. Comments Expressing Opposition to the Proposed Rule

1. General Opposition

Comment: Many commenters expressed general opposition to the NPRM. Some provided no reasoning, simply stating, ''I oppose this proposed rule'' with varying degrees of severity. Many commenters also asked the Departments to withdraw the NPRM. Others, as explained in the following sections, provided specific points of

opposition or their reasoning underlying their opposition.

Response: The Departments are unable to provide a detailed response to comments that express only general opposition without providing reasoning for their opposition. The following sections of this final rule provide the Departments' responses to comments that offered specific points of opposition or reasoning underlying their opposition.

2. Violation of Law

a. Violation of Domestic Law

Commenters asserted that the proposed rule violated United States law in three main ways: First, it violated law regarding particularly serious crimes; second, it improperly disposed of the categorical approach to determine immigration consequences of criminal offenses; and third, it violated law regarding the validity of convictions for immigration purposes. Overall, commenters were concerned that the NPRM's provisions contradicting case law would result in the ''wrongful exclusion'' of immigrants from asylum eligibility.

i. Law Regarding ''Particularly Serious Crime'' Bar

Comment: Commenters opposed the NPRM, stating that it violates domestic law and contravenes existing case law from the BIA, the circuit courts of appeals, and the Supreme Court of the United States regarding the particularly serious crime bar to asylum for multiple reasons. *See* INA 208(b)(2)(A)(ii) (8 U.S.C. 1158(b)(2)(A)(ii)). In general, commenters alleged that the NPRM was untethered to the approach set out by Congress regarding particularly serious crimes and that if Congress had sought to sweepingly bar individuals from asylum eligibility based on their conduct or felony convictions, as outlined in the NPRM, it would have done so in the Act. Commenters stated that adding seven new categories of barred conduct rendered the language of section 208(b)(2) of the Act (8 U.S.C. 1158(b)(2)) essentially meaningless and drained the term ''particularly serious crime'' of any sensible meaning because the Departments were effectively considering all offenses, regardless of seriousness, as falling under the particularly serious crime bar to asylum. One organization asserted that this violated the Supreme Court's requirements for statutory interpretation, citing *Corley* v. *United States,* 556 U.S. 303, 314 (2009) (''[O]ne of the most basic interpretive canons[ ] [is] that a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.'' (alterations and quotation marks omitted)).

At the same time, commenters also asserted that the additional crimes to be considered particularly serious by the proposed rule have been repeatedly recognized as not particularly serious. For example, commenters cited *Matter of Pula,* 19 I&N Dec. 467, 474 (BIA 1987), and noted the BIA's conclusion 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.'' Paraphrasing *Delgado* v. *Holder,* 648 F.3d 1095, 1110 (9th Cir. 2010) (Reinhardt, J., concurring in part and concurring in the judgment), commenters stated that, outside of the aggravated felony context, ''it has generally been well understood by the Board of Immigration Appeals and the Courts of Appeals that low-level, 'run-of-the-mill' offenses do not constitute particularly serious crimes.''

Commenters asserted that low-level offenses like misdemeanor DUI with no injury or simple possession of a controlled substance cannot constitute a particularly serious crime. In support of this proposition, commenters cited *Mellouli* v. *Lynch,* 575 U.S. 798 (2015) (possession of drug paraphernalia was not a controlled substances offense); *Carachuri-Rosendo* v. *Holder,* 560 U.S. 563 (2010) (subsequent marijuana possession offense is not an aggravated felony); and *Leocal* v. *Ashcroft,* 543 U.S. 1 (2004) (conviction for DUI was not an aggravated felony crime of violence). Commenters asserted that if the Departments wished to abrogate the Supreme Court's interpretation of the statute, they should do so by passing new legislation, not by proposing what the commenters consider to be unlawful rules.

Moreover, commenters asserted that the ''essential key to determining whether a crime is particularly serious * * * is whether the nature of the crime is one which indicates that the alien poses a danger to the community.'' *Matter of G–G–S–,* 26 I&N Dec. 339 (BIA 2014) (quotation marks omitted). Commenters argued that despite this analytical requirement, the proposed rule arbitrarily re-categorizes many offenses as particularly serious without consideration of whether the nature of the crime indicates that the alien poses a danger to the community. Commenters expressed additional concern that this categorization removes all discretion from the adjudicator to determine whether an individual's circumstances merit such a harsh penalty.

Commenters further asserted that, because Congress made commission of a ''particularly serious crime'' a bar to asylum but did not make commission of other categories of crimes such a bar, Congress intended to preclude that result. Commenters alleged that the NPRM violated the canon of construction articulated in *United States* v. *Vonn,* 535 U.S. 55, 65 (2002), *expressio unius est exclusio alterius,* which means that ''expressing one item of a commonly associated group or series excludes another left unmentioned,'' because it attempted to create additional categories of crime bars to asylum eligibility in a manner inconsistent with the statute and congressional intent. Commenters analogized these NPRM provisions to another rule that had categorically barred ''arriving aliens'' from applying for adjustment of status in removal proceedings. *See* 8 CFR 245.1(c)(8) (1997). The Federal courts of appeals were split over whether that now-rescinded rule circumvented the Act and congressional intent because adjustment of status was ordinarily a discretionary determination.[5]

Commenters further alleged that the NPRM unlawfully categorically exempted a wide range of offenses from a positive discretionary adjudication of asylum. Commenters acknowledged that the Attorney General can provide for ''additional limitations and conditions'' on asylum applications consistent with the asylum statute by designating offenses as per se particularly serious, *see* INA 208(b)(2)(B)(ii) (8 U.S.C. 1158(b)(2)(B)(ii)), but commenters emphasized that crimes that are not particularly serious are still subject to a discretionary determination. Commenters stated that Congress did not intend to authorize the Attorney General to categorically bar ''large swaths of asylum seekers from protection.'' Commenters alleged that the Departments purposefully wrote the NPRM in this way (designating the bars as both particularly serious crimes and categorical exceptions to positive

[5] *Compare Scheerer* v. *U.S. Att'y Gen.,* 445 F.3d 1311, 1321–22 (11th Cir. 2006) (holding that the regulation was unlawful); *Bona* v. *Gonzales,* 425 F.3d 663, 668–71 (9th Cir. 2005) (same); *Zheng* v. *Gonzales,* 422 F.3d 98, 116–20 (3d Cir. 2005) (same), *and Succar* v. *Ashcroft,* 394 F.3d 8, 29 (1st Cir. 2005) (same), *with Akhtar* v. *Gonzales,* 450 F.3d 587, 593–95 (5th Cir. 2006) (upholding validity of the regulation), *rehearing en banc granted and remanded on other grounds,* 461 F.3d 584 (2006) (en banc), *and Mouelle* v. *Gonzales,* 416 F.3d 923, 928–30 (8th Cir. 2005) (same), *vacated on other grounds,* 126 S. Ct. 2964 (2006).

discretionary adjudication) to ''insulate the Proposed Rules from review.''

Response: The Departments disagree with comments asserting that the rule violates domestic law. Commenters asserted that Congress did not intend for the Attorney General to categorically bar ''large swaths of asylum seekers from protection.'' However, Congress, in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (''IIRIRA''), vested the Attorney General with broad authority to establish conditions or limitations on asylum. Public Law 104–208, div. C, 110 Stat. 3009, 3009–546.

At that time, Congress created three categories of aliens who are barred from applying for asylum and adopted six other mandatory bars to asylum eligibility. IIRIRA, sec. 604(a), 110 Stat. at 3009–690 through 3009–694 (codified at INA 208(a)(2)(A)–(C), (b)(2)(A)(i)–(vi) (8 U.S.C. 1158(a)(2)(A)–(C), (b)(2)(A)(i)–(vi))). Congress further expressly authorized the Attorney General to expand upon two bars to asylum eligibility—the bars for ''particularly serious crimes'' and ''serious nonpolitical crimes.'' INA 208(b)(2)(B)(ii) (8 U.S.C. 1158(b)(2)(B)(ii)). Congress also vested the Attorney General with the ability to establish by regulation ''any other conditions or limitations on the consideration of an application for asylum,'' so long as those limitations are ''not inconsistent with this chapter.'' INA 208(d)(5)(B) (8 U.S.C. 1158(d)(5)(B)).

Significantly, ''[t]his delegation of authority means that Congress was prepared to accept administrative dilution of the asylum guarantee in § 1158(a)(1),'' as ''the statute clearly empowers'' the Attorney General and the Secretary to ''adopt[ ] further limitations'' on eligibility to apply for or receive asylum. *R–S–C* v. *Sessions,* 869 F.3d 1176, 1187 & n.9 (10th Cir. 2017). In authorizing ''additional limitations and conditions'' by regulation, the statute gives the Attorney General and the Secretary broad authority in determining what the ''limitations and conditions'' should be. The Act instructs only that additional limitations on eligibility are to be established ''by regulation,'' and must be ''consistent with'' the rest of section 208 of the Act (8 U.S.C. 1158). INA 208(b)(2)(C) (8 U.S.C. 1158(b)(2)(C)); *see also* INA 208(d)(5)(B) (8 U.S.C. 1158(d)(5)(B)).

Moreover, a long-held principle of administrative law is that an agency, within its congressionally delegated policymaking responsibilities, may ''properly rely upon the incumbent administration's view of wise policy to inform its judgments.'' *Chevron, U.S.A., Inc.* v. *Nat. Res. Def. Council, Inc.,* 467 U.S. 837, 865 (1984). Accordingly, an agency may make policy choices that Congress either inadvertently or intentionally left to be resolved by the agency charged with administration of the statute, given the current realities faced by the agency. *See id.* at 865–66. Through the publication of the NPRM, the Departments have properly exercised this congressionally delegated authority. Such policymaking is well within the confines of permissible agency action. Additionally, despite commenters' assertions that the Departments should pursue these changes through legislative channels, the Departments, as part of the Executive Branch, do not pursue legislative changes but instead rely on regulatory authority to interpret and enforce legislation as enacted by Congress.

As explained in the NPRM, Congress granted the Attorney General and the Secretary broad authority to determine additional ''limitations and conditions'' on asylum. For example, the Attorney General and the Secretary have authority to impose procedural requirements for asylum seekers and to designate by regulation additional crimes that could be considered particularly serious crimes or serious nonpolitical crimes. *See* INA 208(b)(2)(B)(ii) (8 U.S.C. 1158(b)(2)(B)(ii)); *see also* INA 208(2)(5)(B) (8 U.S.C. 1158(d)(5)(B)).

Based on the comments received, the Departments realize that the preamble to the NPRM resulted in confusion regarding which authority the Departments relied on in promulgating this rule. Specifically, commenters raised concerns regarding the Departments' reliance on section 208(b)(2)(B)(ii) of the Act (8 U.S.C. 1158(b)(2)(B)(ii)) in support of some of the new bars to asylum eligibility. In response to these concerns and confusion, the Departments emphasize that, as in the proposed rule, the regulatory text itself does not designate any offenses covered in 8 CFR 208.13(c)(6) or 1208.13(c)(6) as specific particularly serious crimes.[6] Instead, this rule, like the proposed rule, sets out seven new ''additional limitations,'' consistent with the Departments' authority at INA 208(b)(2)(C) (8 U.S.C. 1158(b)(2)(C)) to establish ''additional limitations and conditions'' on asylum eligibility. *See* 8 CFR 208.13(c)(6), 1208.13(c)(6).

This reliance on the authority at section 208(b)(2)(C) of the Act (8 U.S.C. 1158(b)(2)(C)) is consistent with the proposed rule. There, although the Departments cited the authority at section 208(b)(2)(B)(ii) of the Act (8 U.S.C. 1158(b)(2)(B)(ii)) to designate offenses as particularly serious crimes, the Departments also cited the authority at section 208(b)(2)(C) (8 U.S.C. 1158(b)(2)(C)) in support of each category of bars included in the rule. *See generally* 84 FR at 69645–54. The references throughout the preamble in the NPRM to the Attorney General's and the Secretary's authorities to designate additional particularly serious crimes accordingly highlighted one of two alternative bases for the inclusion of most of the new bars to asylum eligibility and sought to elucidate the serious nature of these crimes and the Departments' reasoning for including these offenses in the new provisions. In other words, although the Departments are not specifically designating any categories of offenses as ''particularly serious crimes,'' the authority of the Attorney General and the Secretary to deny eligibility to aliens convicted of such offenses helps demonstrate that the new bars are ''consistent with'' the INA because the offenses to which the new bars apply—similar to ''particularly serious crimes''—indicate that the aliens who commit them may be dangerous to the community of the United States or otherwise may not merit eligibility for asylum. As a result, the Departments need not address in detail commenters' concerns about whether discrete categories of offenses should constitute ''particularly serious crimes'' because (1) the new rule does not actually designate any specific offense as such crimes; and (2) section 208(b)(2)(C) of the Act (8 U.S.C. 1158(b)(2)(C)), as already discussed and as recognized by the Departments, independently authorizes the Attorney General and the Secretary to establish additional limitations and conditions on asylum eligibility.

Commenters asserted that Congress intended for the only criminal bars to asylum to be those contemplated by the particularly serious crime and serious nonpolitical crime bars. The Departments, however, disagree. Although the INA explicitly permits the Attorney General and the Secretary to designate additional crimes as particularly serious crimes or serious nonpolitical crimes, this does not mean that any time the Attorney General and the Secretary decide to limit eligibility for asylum based on criminal activity,

[6] The Departments do not intend, however, to imply that an immigration adjudicator could not or should not find these offenses to be particularly serious crimes in the context of adjudicating individual asylum applications on a case-by-case basis.

the limit must be based on either a particularly serious crime or a serious nonpolitical crime. Rather, the Attorney General and the Secretary may choose to designate certain criminal activity as a limitation or condition on asylum eligibility separate and apart from the scope of crimes considered particularly serious. These additional limitations must simply be established by regulation and must be consistent with the rest of section 208 of the Act (8 U.S.C. 1158).

Nothing in the Act suggests that Congress intended for the particularly serious crime bar at section 208(b)(2)(A)(ii) of the Act (8 U.S.C. 1158(b)(2)(A)(ii)) or the serious nonpolitical crime bar at section 208(b)(2)(A)(iii) of the Act (8 U.S.C. 1158(b)(2)(A)(iii)) to be the sole bars to asylum based on criminal activity. The Departments disagree with comments suggesting that existing exceptions to asylum eligibility occupy the entire field of existing exceptions. The Attorney General and the Secretary have the authority to impose additional limitations on asylum eligibility that are otherwise consistent with the limitations contained section 208(b)(2) of the Act (8 U.S.C. 1158(b)(2)). Those existing limitations include limitations on eligibility because of criminal conduct. *See, e.g.,* INA 208(b)(2)(A)(ii), (iii) (particularly serious crime and serious nonpolitical crime)) (8 U.S.C. 1158(b)(2)(A)(ii), (iii)). Deciding to impose additional limitations on asylum eligibility that are also based on criminal conduct, as the Departments are doing in this rulemaking, is accordingly consistent with the statute. *See* INA 208(b)(2)(C) (8 U.S.C. 1158(b)(2)(C)).

Of note, in *Trump* v. *Hawaii,* the Supreme Court determined that the INA's provisions regarding the entry of aliens ''did not implicitly foreclose the Executive from imposing tighter restrictions,'' even in circumstances in which those restrictions concerned a subject ''similar'' to the one that Congress ''already touch[ed] on in the INA.'' 138 S. Ct. 2392, 2411–12 (2018). Thus, by the same reasoning, Congress's statutory command that certain aliens are ineligible for asylum based on a conviction for a particularly serious crime or serious nonpolitical crime does not deprive the Attorney General and Secretary of authority, by regulation, to deny asylum eligibility for certain other aliens whose circumstances may—in a general sense—be ''similar.''

Commenters' references to the proposed rule revising 8 CFR 245.1(c)(8) (1997) (limitations on eligibility for adjustment of status) and subsequent case law striking down that proposed rule are inapposite. The First Circuit explained that the adjustment of status statute grants the Attorney General discretion to grant applications, but that this authority does not extend to grant the Attorney General authority to define eligibility for that relief. *Succar,* 394 F.3d at 10. However, unlike the adjustment of status statute, INA 245(a) (8 U.S.C. 1255(a)), the asylum statute explicitly grants the Attorney General authority to define additional limitations on eligibility for relief that are ''consistent with this section.'' [7] INA 208(b)(2)(C) (8 U.S.C. 1158(b)(2)(C)). This express grant of authority contradicts any implied limitation on the Attorney General's authority that might otherwise be inferred from Congress's delineation of certain statutory bars.

ii. Law Regarding the Categorical Approach

Comment: Commenters asserted that the proposed rule violated the Supreme Court's longstanding categorical approach. Commenters stated that ''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.'' Additionally, commenters noted that the Supreme Court has ''long deemed undesirable'' a ''*post hoc* investigation into the facts of the predicate offenses.'' *Moncrieffe* v. *Holder,* 569 U.S. 184, 200 (2013). Commenters argued that the proposed rule directly contravenes this directive to avoid post hoc investigations.

Commenters emphasized that the categorical approach promotes fairness and due process, as well as judicial and administrative efficiency by avoiding ''pseudo-criminal trials.'' Citing *Moncrieffe,* commenters noted concern that if an immigration adjudicator were required to determine the nature and amount of remuneration involved in, for example, a marijuana-related conviction, the ''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.'' *Id.* at 201. Commenters noted that this would result in a disparity of outcomes based on the presiding immigration judge and would further burden the immigration court system. Moreover, commenters noted that the Supreme Court has repeatedly applied the categorical approach and found that its virtues outweigh its shortcomings. Citing *Mathis* v. *United States,* 136 S. Ct. 2243, 2252–53 (2016), commenters noted that the Supreme Court articulated basic reasons for adhering to the elements-only inquiry of the categorical approach, including ''serious Sixth Amendment concerns'' and ''unfairness to defendants'' created by alternative approaches.

Commenters asserted that the Departments' concern regarding the unpredictable results of the categorical approach is misleading because immigration adjudicators may already utilize a facts-based analysis to determine whether an offense is a ''particularly serious crime'' that would bar asylum. Commenters further alleged that the Departments recognized that this was a red herring by noting that the BIA has rectified some anomalies by determining that certain crimes, although not aggravated felonies, nonetheless constitute particularly serious crimes. *See* 84 FR at 69646.

Commenters further noted that, even if an offense does not rise to the level of a particularly serious crime, immigration adjudicators may deny asylum as a matter of discretion. In addition, commenters averred that for gang-related and domestic violence offenses, the proposed rule undermined criminal judgments and violated due process because the proposed rule disregarded the established framework for determining whether a conviction is an aggravated felony. Rather than looking to the elements of the offense, as currently required by the categorical approach, commenters noted that the proposed rule required adjudicators to consider ''gang-related'' or ''domestic violence'' conduct that may not have been one of the required elements for a

[7] Moreover, at least two Federal courts of appeals rejected the reasoning in *Succar. See supra* note 5; *see also Lopez* v. *Davis,* 531 U.S. 230, 243–44 (2001) (''We also reject [the] argument * * * that the agency must not make categorical exclusions, but may rely only on case-by-case assessments. Even if a statutory scheme requires individualized determinations, which this scheme does not, the decisionmaker has the authority to rely on rulemaking to resolve certain issues of general applicability unless Congress clearly expresses an intent to withhold that authority. The approach pressed by [the petitioner]—case-by-case decisionmaking in thousands of cases each year—could invite favoritism, disunity, and inconsistency. The [agency] is not required continually to revisit issues that may be established fairly and efficiently in a single rulemaking proceeding.'' (citations, footnote, and quotation marks omitted)); *Fook Hong Mak* v. *INS,* 435 F.2d 728, 730 (2d Cir. 1970) (''We are unable to understand why there should be any general principle forbidding an administrator, vested with discretionary power, to determine by appropriate rulemaking that he will not use it in favor of a particular class on a case-by-case basis * * *.'').

conviction and therefore not objected to by the asylum applicant or his or her attorney during the criminal proceeding.

Response: The Departments first note that the traditional elements-to-elements categorical approach extolled by the commenters and as set out in *Mathis* by the Supreme Court is an interpretive tool frequently applied by the courts to determine the immigration-related or penal consequences of criminal convictions. *Cf. Mathis,* 136 S. Ct. at 2248 (''To determine whether a prior conviction is for generic burglary (or other listed crime) courts apply what is known as the categorical approach * * * .''). However, this traditional categorical approach is not the only analytical tool blessed by the Supreme Court, and the exact analysis depends on the language of the statute at issue. For example, in *Nijhawan* v. *Holder,* 557 U.S. 29, 38 (2009), the Court held that the aggravated felony statute at section 101(a)(43) of the Act (8 U.S.C. 1101(a)(43)) ''contains some language that refers to generic crimes and some language that almost certainly refers to the specific circumstances in which a crime was committed.'' Based on the language of section 101(a)(43)(M)(i) of the Act (8 U.S.C. 1101(a)(43)(M)(i)), the Supreme Court held that the INA required a ''circumstance-specific'' analysis to determine whether an aggravated felony conviction for a fraud or deceit offense involved $10,000 or more under INA 101(a)(43)(M)(i) (8 U.S.C. 1101(a)(43)(M)(i)). *Id.* at 40. And in *Mathis* itself, the Supreme Court observed that the categorical approach is not the only permissible approach: Again relying on the language as written in a statute by Congress, the Supreme Court explained that ''Congress well knows how to instruct sentencing judges to look into the facts of prior crimes: In other statutes, using different language, it has done just that.'' *Mathis,* 136 S. Ct. at 2252 (noting the determination in *Nijhawan* that a circumstance-specific approach applies when called for by Congress).

Nevertheless, the Departments did not purport to end the use of the traditional categorical approach for determining asylum eligibility through the proposed rule. Instead, the Departments explained that the use of the categorical approach has created inconsistent adjudications and created inefficiencies through the required complexities of the analysis in immigration adjudications. *See* 84 FR at 69646–47. The Departments' concerns with the categorical approach are in line with those of an increasing number of Federal judges and others who are required to work within its confines. *See, e.g., Lopez-Aguilar* v. *Barr,* 948 F.3d 1143, 1149 (9th Cir. 2020) (Graber, J., concurring) (''I write separately to add my voice to the substantial chorus of federal judges pleading for the Supreme Court or Congress to rescue us from the morass of the categorical approach. * * * The categorical approach requires us to perform absurd legal gymnastics, and it produces absurd results.''); *see also Lowe* v. *United States,* 920 F.3d 414, 420 (6th Cir. 2019) (Thapar, J., concurring) (''[I]n the categorical-approach world, we cannot call rape what it is. * * * [I]t is time for Congress to revisit the categorical approach so we do not have to live in a fictional world where we call a violent rape non-violent.'').

As a result, the Departments proposed, for example, that an alien who has been convicted of ''[a]ny felony under Federal, State, tribal, or local law'' would be ineligible for asylum. *See* 8 CFR 208.13(c)(6)(vi)(A), 1208.13(c)(6)(vi)(A) (proposed). This provision would not require an adjudicator to conduct a categorical analysis and compare the elements of the alien's statute of conviction with a generic offense. As explained in the NPRM, the Departments believe this will create a more streamlined and predictable approach that will increase efficiency in immigration adjudications. 84 FR at 69647. It will also increase predictability because it will be clear and straightforward which offenses will bar an individual from asylum.

The Attorney General and the Secretary have the authority to place additional limitations on eligibility for asylum, provided that they are consistent with the rest of section 208 of the Act (8 U.S.C. 1158). INA 208(b)(2)(C) (8 U.S.C. 1158(b)(2)(C)). There is no obligation that any criminal-based limitation implemented pursuant to this authority must correspond with a particular generic offense to which an adjudicator would compare the elements of the alien's offense using the categorical approach, particularly when not every criminal provision implemented by Congress itself requires such an analysis. *See Nijhawan,* 557 U.S. at 36; *see also United States* v. *Keene,* 955 F.3d 391, 393 (4th Cir. 2020) (holding that Congress did not intend for the violent crimes in aid of racketeering activity statute (18 U.S.C. 1959) to require a categorical analysis because ''the statutory language * * * requires only that a defendant's *conduct,* presently before the court, constitute one of the enumerated federal offenses as well as the charged state crime'' (emphasis in original)). Additionally, prior case law interpreting and applying the categorical approach to determine whether a crime is particularly serious does not apply where, like here, the Departments are designating additional limitations on eligibility for asylum under the authority at section 208(b)(2)(C) of the Act (8 U.S.C. 1158(b)(2)(C)).[8]

Finally, the Departments expect immigration adjudicators to determine whether an alien is barred from asylum eligibility under the other provisions of the proposed rule due to the alien's conviction or conduct in keeping with case law. For example, in order to determine whether an alien's misdemeanor conviction is a conviction for an offense ''involving * * * the possession or trafficking of a controlled substance or controlled substance paraphernalia,'' the adjudicator would be required to review the specific elements of the underlying offense as required by the categorical approach. On the other hand, the inquiry into whether conduct is related to street-gang activity or domestic violence as promulgated by the rule is similar to statutory provisions that already require an inquiry into conduct-based allegations that may bar asylum but that do not require a categorical approach analysis. *See* INA 208(b)(2)(A)(i) (8 U.S.C. 1158(b)(2)(A)(i)) (bar to asylum based on persecution of others); INA 240A(b)(2)(A) (8 U.S.C. 1229b(b)(2)(A)) (immigration benefits for aliens who are battered or subjected to extreme cruelty).

iii. Law Regarding the Validity of Convictions

Comment: Commenters also asserted that the proposed rule's establishment of criteria for determining whether a conviction or sentence is valid for immigration purposes exceeded the Act's statutory grant of authority, violated case law, and violated the Constitution. Broadly speaking,

[8] The proposed rule preamble cited both the authority at section 208(b)(2)(B)(ii) of the Act (8 U.S.C. 1158(b)(2)(B)(ii)) to designate offenses as particularly serious crimes and the authority at section 208(b)(2)(C) of the Act (8 U.S.C. 1158(b)(2)(C)) to establish additional limitations on asylum eligibility in support of the inclusion of the new categories of bars in the proposed rule. *See* 84 FR at 69645–54. The regulatory text, however, does not actually designate any additional offenses as ''particularly serious crimes.'' The text instead aligns with section 208(b)(2)(C) by setting out ''[a]dditional limitations on asylum eligibility.'' *See id.* at 65659. Section 208(b)(2)(B)(ii) remains relevant to the current rule in that the new bars are ''consistent with'' the INA partly because they deny eligibility as a result of crimes or conduct that share certain characteristics with ''particularly serious crimes,'' but the Departments clarify that they are promulgating this rule under section 208(b)(2)(C). Further discussion of the interaction of the rule with the ''particularly serious crime'' bar is set out above in section II.C.2.a.i.

commenters asserted that the NPRM is contrary to the intent of Congress because it attempts to ''rewrite immigration law.'' First, commenters asserted that the proposed rule violated the full faith and credit owed to State court decisions. Second, commenters asserted that the Departments misread and misinterpreted applicable case law in justifying the presumption against the validity of post-conviction relief. Third, commenters expressed concern with the rebuttable presumption against the validity of post-conviction relief in certain circumstances created by the proposed rule.

Commenters expressed opposition to the NPRM's rebuttable presumption that an order vacating a conviction or modifying, clarifying, or otherwise altering a sentence is for the purpose of ameliorating the conviction's immigration consequences in certain circumstances, *see* 8 CFR 208.13(c)(8), 1208.13(c)(8) (proposed), because they alleged that it could violate principles of federalism under the Constitution's Full Faith and Credit Clause, U.S. Const. art. IV, sec. 1, as codified by the Full Faith and Credit Act, 28 U.S.C. 1738. Commenters asserted that the proposed rule abandoned the presumption of regularity that should accompany State court orders. By precluding an adjudicator from considering a post-conviction order entered to cure substantive or procedural constitutional deficiencies, adjudicators are effectively given permission to second-guess State court decisions, which would undermine the authority of and attribute improper motives to State and Federal tribunals. Commenters alleged that, in this way, immigration judges would become fact-finders who look beyond State court records. Further, one commenter contended that the NPRM undermined local authority to ''evaluate the impact and consequences certain conduct should have on its residents by adding broad misdemeanor offenses as a bar to asylum relief,'' which the commenter asserted would interfere with a local authority's ''sovereign prerogative to shape its law enforcement policies to best account for its complex social and political realities.''

Commenters averred that the Departments cited ''a misleading quote'' from *Matter of F–,* 8 I&N Dec. 251, 253 (BIA 1959), which would allow asylum adjudicators to look beyond the face of the State court order. *See* 84 FR at 69656. Commenters asserted that the Departments failed to read *Matter of F-* in its entirety and that, if they had, they would have noted that the BIA instead offered support in favor of presuming the validity of a State court order unless there is a reason to doubt it. *Matter of F–,* 8 I&N Dec. at 253 (''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.'').

Additionally, commenters stated the proposed rule violates circuit courts of appeals case law holding that the BIA may not consider outside motives. Commenters cited *Pickering* v. *Gonzales,* 465 F.3d 263, 267–70 (6th Cir. 2006), which held that the BIA was limited to reviewing the authority of the court issuing a vacatur and was not permitted to review outside motives, such as avoiding negative immigration consequences. Commenters also cited *Reyes-Torres* v. *Holder,* 645 F.3d 1073, 1077–78 (9th Cir. 2011), and noted that the court held that the respondent's motive was not relevant to the immigration court's inquiry into whether the decision vacating his conviction was valid. Finally, commenters cited *Rodriguez* v. *U.S. Attorney General,* 844 F.3d 392, 397 (3d Cir. 2006), which held that the immigration judge may rely only on ''reasons explicitly stated in the record and may not impute an unexpressed motive for vacating a conviction.'' Commenters asserted that, in direct contravention of these cases, the proposed rule grants ''vague and indefinite authority to look beyond a facially valid vacatur,'' which violates asylum seekers' rights to a full and fair proceeding.

Commenters also asserted that the Departments improperly extended the decision in *Matter of Thomas and Thompson,* 27 I&N Dec. 674, to all forms of post-conviction relief. By extending this decision, commenters stated that the proposed rule imposes an ultra vires and unnecessary burden on asylum seekers. Commenters first asserted that the Attorney General's decision in *Matter of Thomas and Thompson* had no justification in the text or history of the Act. Specifically, commenters stated that the Act does not limit the authority of immigration judges by requiring them to consider only State court sentence modifications that are based on substantive or procedural defects in the underlying criminal proceedings. Rather, commenters asserted, the Act requires a ''convict[ion] by a final judgment.'' Commenters argued that, because a vacated judgment is neither ''final'' nor a ''judgment,'' it would have no effect on immigration proceedings. Commenters argued therefore that the Act does not permit immigration judges to treat a vacated judgment as valid and effective based on when, how, or why it was vacated. Moreover, commenters asserted that ''[c]ourt orders are presumptively valid, not the other way around.''

Commenters asserted that the BIA, in *Matter of Cota-Vargas,* 23 I&N Dec. 849, 852 (BIA 2005), *overruled by Matter of Thomas and Thompson,* 27 I&N Dec. 674, relied on the text of the Act and the legislative history behind Congress's definition of ''conviction'' and ''sentence'' in section 101(a)(48) of the Act (8 U.S.C. 1101(a)(48)) to hold that proper admissions or findings of guilt were treated as convictions for immigration purposes, even if the conviction itself was later vacated. Commenters argued that, as a result, neither the text of the Act nor the legislative history supports the conclusion reached in *Matter of Thomas and Thompson,* and hence that the decision should not be extended to the proposed rule. Commenters stated that the same is true of orders modifying, clarifying, or altering a judgment or sentence, as recognized by the BIA in *Matter of Cota-Vargas,* 23 I&N Dec. at 852. Specifically, commenters quoted *Matter of Cota-Vargas* in noting that the NPRM's approach to ''sentence modifications has no discernible basis in the language of the Act.''

Commenters also objected to the two situations in which the rebuttable presumption against the validity of an order modifying, clarifying, or altering a judgment or sentence arises: When a court enters a judgment or sentencing order after the asylum seeker is already in removal proceedings; or when the asylum seeker moves the court to modify, clarify, or alter a judgment or sentencing order more than one year after it was entered. Commenters cited the holding in *Padilla* v. *Kentucky,* 559 U.S. 356, 374 (2010), that noncitizen defendants have a Sixth Amendment right to be competently advised of immigration consequences before agreeing to a guilty plea. Commenters alleged that the presumption is unlawful under *Padilla* because it holds asylum applicants whose rights were violated under *Padilla* to a different standard. Commenters similarly asserted that the presumption would prejudice asylum seekers who have not had an opportunity to seek review of their criminal proceedings until applying for asylum. Commenters stated that asylum applicants would be forced to rebut the presumption that an order, entered after the asylum seeker was

placed in removal proceedings or requested more than one year after the date of conviction or sentence was entered, is invalid. In this way, commenters alleged, the NPRM would ''compound the harm to immigrants who * * * have been denied constitutionally compliant process in the United States criminal legal system.''

One commenter asserted that some orders changing a sentence or conviction are entered after removal proceedings began because the alien had not received the constitutionally required advice regarding immigration consequences stemming from his or her criminal convictions. Other commenters explained that because criminal defendants oftentimes lack legal representation in post-conviction proceedings, they may have lacked knowledge of their constitutional rights or resources to challenge their convictions or related issues. Commenters also explained that asylum applicants may not have had reason to suspect defects in their criminal proceedings until they applied for asylum and met with an attorney. Commenters asserted that the NPRM would also harm those people if they realized these defects more than one year after their convictions were entered.

Another commenter explained that ''state and federal sentencing courts should have more discretion to ameliorate the consequences of criminal convictions for a non-citizen's immigration proceedings. Collateral sanctions imposed on persons convicted of crimes—such as ineligibility to apply for relief from removal and other immigration consequences—should be subject to waiver, modification, or another form of relief if the sanctions are inappropriate or unfair in a particular case.''

Response: The Attorney General and the Secretary are granted general authority to ''establish such regulations [as each determines to be] necessary for carrying out'' their authorities under the INA. INA 103(a)(1), (a)(3), and (g)(2) (8 U.S.C. 1103(a)(1), (a)(3), and (g)(2)); *see also Tamenut* v. *Mukasey,* 521 F.3d 1000, 1004 (8th Cir. 2008) (en banc) (per curiam) (describing INA 103(g)(2) (8 U.S.C. 1103(g)(2)) as ''a general grant of regulatory authority''); *cf. Narenji* v. *Civiletti,* 617 F.2d 745, 747 (DC Cir. 1979) (''The [INA] need not specifically authorize each and every action taken by the Attorney General, so long as his action is reasonably related to the duties imposed upon him.''). As stated above, the Attorney General and the Secretary also have the congressionally provided authority to place additional limitations and conditions on eligibility for asylum, provided that they are consistent with section 208 of the Act (8 U.S.C. 1158). INA 208(b)(2)(C) (8 U.S.C. 1158(b)(2)(C)). Prescribing the effect to be given to vacated, expunged, or modified convictions or sentences is an ancillary aspect of prescribing additional limitations or conditions on asylum eligibility.

As explained in the NPRM, the rule codifies the principle set forth in *Matter of Thomas and Thompson,* 27 I&N Dec. at 680, that, if the underlying reasons for the vacatur, expungement, or modification were for ''rehabilitation or immigration hardship,'' the conviction remains effective for immigration purposes. *See* 84 FR at 69655. Even before *Matter of Thomas and Thompson* was decided, courts of appeals repeatedly accepted the result reached in that case. *See id.; see also Saleh* v. *Gonzales,* 495 F.3d 17, 24 (2d Cir. 2007); *Pinho* v. *Gonzales,* 432 F.3d 193, 215 (3d Cir. 2005). Therefore, the Departments reject commenters' assertions that the rule improperly relies on or extends *Matter of Thomas and Thompson.*[9] In addition, the Departments note that agencies may decide whether to announce reinterpretations of a statute through rulemaking or through adjudication. *Matter of Thomas and Thompson,* 27 I&N Dec. at 688 (citing, *inter alia, NLRB* v. *Bell Aerospace Co.,* 416 U.S. 267, 294 (1974)). In *Matter of Thomas and Thompson,* the Attorney General elected to address prior BIA precedent regarding the validity of modifications, clarifications, or other alterations through administrative adjudication. *Id.* at 689. That the Attorney General declined to consider additional issues on this topic through the administrative adjudication does not foreclose him from later promulgating additional interpretations or reinterpretations of the Act through rulemaking, as is being done in this final rule. *See Bell Aerospace Co.,* 416 U.S. at 294.

The Departments also reject commenters' claims that the approach set forth by the rule violates the Full Faith and Credit Clause, U.S. Const. art. IV, sec. 1, or the Full Faith and Credit Act, 28 U.S.C. 1738. The Full Faith and Credit provisions of 28 U.S.C. 1738 apply to courts and not administrative agencies. *See NLRB* v. *Yellow Freight Sys., Inc.,* 930 F.2d 316, 320 (3d Cir. 1991) (federal administrative agencies are not bound by section 1738 because they are not ''courts''); *see also Am. Airlines* v. *Dep't. of Transp.,* 202 F.3d 788, 799 (5th Cir. 2000) (28 U.S.C. 1738 did not apply to the Department of Transportation because it is ''an agency, not a 'court'''').

Moreover, as explained by the Second Circuit, and as reiterated by the Attorney General in *Matter of Thomas and Thompson,* when an immigration judge reviews a State conviction for an offense, the immigration judge is merely comparing the State conviction to the Federal definition of an offense under the Act. *Saleh,* 495 F.3d at 26 (''[T]he BIA is simply interpreting how to apply Saleh's vacated State conviction for receiving stolen property to the INA and is not refusing to recognize or relitigating the validity of Saleh's California state conviction.''); *Matter of Thomas and Thompson,* 27 I&N Dec. at 688 (''[T]he immigration judge in such a case simply determines the effect of that order for the purposes of federal immigration law.''). As a result, because the State court order remains effective and unchallenged for all other purposes, there is no intrusion on State law and no violation of the principles of federalism and comity. *Matter of Thomas and Thompson,* 27 I&N Dec. at 688.

The Departments reject commenters' assertions that the NPRM improperly quotes *Matter of F–,* 8 I&N Dec. 251. The NPRM cites *Matter of F-* only to support the proposition that the alien must establish that a court issuing an order vacating or expunging a conviction or modifying a sentence had jurisdiction and authority to do so. 84 FR at 69656. No law compels the Departments to accept State court orders entered without jurisdiction, and there is no sound public policy reason for doing so. Further, adopting such a policy would also potentially raise difficulties for the faithful and consistent administration of the immigration laws, as the Departments could be required to accept a State court judgment declaring an alien to be a United States citizen, even though a State court cannot confer or establish United States citizenship. Both

[9] To the extent the commenters disagree with the substance of the Attorney General's decision in *Matter of Thomas and Thompson,* the Departments note that this rulemaking is not the mechanism for expressing such criticisms. The Attorney General has the authority to review administrative determinations in immigration proceedings, which includes the power to refer cases for review. INA 103(a)(1), (g) (8 U.S.C. 1103(a)(1), (g)); 8 CFR 1003.1(h)(1); *see also Xian Tong Dong* v. *Holder,* 696 F.3d 121, 124 (1st Cir. 2012) (the Attorney General is authorized to direct the BIA to refer cases to him for review and, given this authority, his decisions are entitled to *Chevron* deference). When the Attorney General certifies a case to himself, he has broad discretion to review the issues before him. *See Matter of J–F–F–,* 23 I&N Dec. 912, 913 (A.G. 2006).

Matter of F- and the regulatory language simply restate the longstanding proposition that adjudicators in the Departments are not bound by judgments rendered by courts without jurisdiction, and even the full language noted by commenters from *Matter of F-* adheres to that proposition. *Matter of F–,* 8 I&N Dec. at 253 (explaining that, although ''familiar principles of law require the acceptance at face value of a judgment regularly granted by a competent court,'' the ''presumption of regularity and of jurisdiction may be overcome by extrinsic evidence or by the record itself'').

Commenters' statements that the Departments' interpretation of ''conviction'' runs contrary to Congress's intent in defining the term are similarly misplaced. As explained by the Attorney General, in enacting section 101(a)(48) of the Act (8 U.S.C. 1101(a)(48)), Congress made clear that immigration consequences should flow from the original determination of guilt. *Matter of Thomas and Thompson,* 27 I&N Dec. at 682 (describing subsequent case law analyzing Congress's intent in enacting a definition for conviction). To the extent that commenters relied on *Matter of Cota-Vargas,* 23 I&N Dec. 849, the Attorney General expressly overruled that decision and explained that Congress did intend to clarify the definition of ''conviction'' for immigration purposes. *Matter of Thomas and Thompson,* 27 I&N Dec. at 679, 682.

Regarding commenters' concerns about the creation of a rebuttable presumption against the validity of an order modifying, clarifying, or altering a judgment or sentence, the Departments reiterate that this is merely a presumption. Individuals will be able to overcome the presumption by providing evidence that the modification, clarification, or vacatur was sought for genuine substantive or procedural reasons. As noted in the NPRM, the purpose of this presumption is to promote finality in immigration proceedings by encouraging individuals to pursue legitimate concerns regarding the validity of prior convictions. 84 FR at 69656.

The Departments disagree that creating a rebuttable presumption is unlawful under *Padilla* v. *Kentucky,* 559 U.S. 356. In *Padilla,* the Supreme Court held that noncitizen defendants have a Sixth Amendment right to be competently advised of immigration consequences before agreeing to a guilty plea. *Id.* at 374. The rule does not affect this right, and noncitizen defendants continue to retain this right in criminal proceedings. Moreover, if a noncitizen defendant is not properly apprised of the immigration consequences of a guilty plea, that individual continues to have the right to pursue the necessary action to address that error through the criminal justice system. Similarly, an individual whose Sixth Amendment rights were determined to have been violated in contravention of *Padilla* would be able to present this evidence in immigration proceedings and, if the evidence is sufficient, overcome the presumption that the individual was seeking a modification, clarification, or vacatur for immigration purposes.

Regarding commenters' assertions that State and Federal sentencing courts should have more discretion to ameliorate the consequences of criminal convictions for a non-citizen's immigration proceedings, the Departments disagree. Administration and enforcement of the nation's immigration laws as written by Congress are entirely within the purview of the Executive Branch, specifically the Attorney General and the Secretary. *See* INA 103 (8 U.S.C. 1103). The Attorney General and the Secretary are granted discretion and authority to determine the manner in which to administer and enforce the immigration laws. *Id.* At the same time, this rule will not have any bearing on how States or other jurisdictions implement their criminal justice system because, as explained, any post-conviction relief remains valid for all other purposes.

b. Violation of International Law

Comment: Numerous commenters alleged that the proposed rule violates the United States' obligations to protect refugees and asylum seekers under international law, including obligations flowing from the Protocol relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223 (''the Protocol'' or ''the 1967 Protocol''), which incorporates Articles 2 to 34 of the 1951 Convention relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6233, 6259–76 (''the Refugee Convention''). Commenters stated that, by virtue of signing the Protocol, the United States is bound to create refugee laws that comply with the Protocol. Commenters asserted that the current laws, regulations, and processes governing asylum adjudications are already exceedingly harsh and are not compliant with international obligations. Commenters claimed that, rather than working to better align the United States with international obligations, the proposed rule's new categorical bars to asylum violate both the language and spirit of the Refugee Convention.

Commenters speculated that the proposed rule will violate the principle of non-refoulement, as described in Article 33(1) of the Refugee Convention, which requires that ''[n]o contracting state shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.'' Commenters noted that, in considering non-refoulement, the United States is obligated to ensure a heightened consideration to children. Commenters also claimed that the exception to refugee protection contained in Article 33(2) of the Refugee Convention [10] does not affect non-refoulement obligations. Commenters also outlined the United States' obligations to protect migrants, irrespective of migration status, as outlined in the Universal Declaration of Human Rights and other human rights instruments. Commenters stated that to comply with these protection obligations, the United States must respond to the protection needs of migrants, with a particular duty of care for migrants in vulnerable situations.

Commenters also asserted that the proposed rule violates the United States' obligations under customary international law. These commenters cited Article III of the U.S. Constitution and *Sosa* v. *Alvarez-Machain,* 542 U.S. 692, 729 (2004), in asserting that customary international law is recognized as and must be applied as U.S. law. Commenters stated that, unlike treaty law, customary international law cannot be derogated by later legislation and remains in full force at all times. Commenters claimed that even good faith efforts by States to change a rule are violations of customary international law until the rule has been changed by a consensus of States through *opinio juris* and state practice. Despite this summary of customary international law, these commenters did not specify how the proposed rule violates customary international law.

Other commenters averred that the proposed rule violates international law by expanding the definition of a ''particularly serious crime'' beyond the parameters of the term as defined by the United Nations High Commissioner for

[10] Article 33(2) of the Refugee Conviction provides: ''The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.''

Refugees (''UNHCR'') by rendering nearly all criminal convictions bars to asylum. Commenters recognized that Article 33(2) of the Refugee Convention allows states to exclude or expel individuals from refugee protection if they have been ''convicted by a final judgment of a particularly serious crime'' and ''constitute[] a danger to the community of that country.'' However, commenters asserted that this clause is intended only for ''extreme cases,'' in which the particularly serious crime is a ''capital crime or a very grave punishable act.'' Commenters cited UNHCR's statement that the crime ''must belong to the gravest category'' and that the individual must ''become an extremely serious threat to the country of asylum due to the severity of crimes perpetrated by them in the country of asylum.'' Again citing UNHCR, commenters further asserted that this exception does not include less extreme crimes such as ''petty theft or the possession for personal use of illicit narcotic substances.''

Commenters also expressed concern that the proposed rule's categorical bars do not allow for an individualized analysis as to whether an individual who has been convicted of a particularly serious crime also presents a danger to the community. Commenters noted that, in the proposed rule, the Departments cited the need for increased efficiency as a justification for creating these additional bars. However, commenters responded that an individualized determination is exactly what is required by the Refugee Convention. Specifically, commenters claimed that the Departments ignored UNHCR guidelines,[11] which require not only a conviction for a particularly serious crime but also a determination that the individual constitutes a danger to the community of the country of refuge. Commenters averred that a conviction, without more, does not make an individual a present or future danger to the community. Commenters accordingly asserted that the Refugee Convention's ''particularly serious crime'' bar should apply only after a determination that an individual was convicted of a particularly serious crime and a separate assessment demonstrates that he or she is a present or future danger.

In addition, commenters alleged that the Act, in combination with subsequent agency interpretations, have already expanded the term ''particularly serious crime'' far beyond its contemplated definition by creating the categorical ''particularly serious crime'' bar that incorporates the aggravated felony definition. Similarly, commenters stated that adjudicators already have overly broad discretion to deny asylum based on alleged criminal conduct. These commenters claimed that the proposed rule would cause the United States to further depart from its international obligations by creating additional bars without consideration of other factors, such as dangerousness. Commenters alleged that, in justifying the proposed rule, the Departments improperly cited the ''serious non-political crime'' bar that applies only to conduct that occurred outside the United States.

In addition to these alleged violations of international law, commenters also asserted that the Departments' emphasis on the discretionary nature of asylum violates U.S. treaty obligations, congressional intent, and case law. Commenters noted that, although a refugee seeking protection in the United States does not always have a claim to mandatory protection, Congress's intent, in enacting the Refugee Act of 1980, Public Law 96–212, 94 Stat. 102 (''the Refugee Act''), was to expand the availability of refugee protection and bring the United States into compliance with its obligations under the 1967 Protocol. Commenters alleged that the proposed rule does the opposite by providing seven categorical bars to asylum and, as a result, violates the spirit and intent of the Refugee Act.

Commenters alleged that the Departments' reliance on the Attorney General's discretion to enact the proposed changes is ultra vires because the Attorney General, even in his discretion, may not violate domestic law, international treaties, or fundamental human rights. Specifically, commenters averred that the Attorney General's discretion is limited by the criteria in sections 208(b) and (d) of the Act (8 U.S.C. 1158(b) and (d)) as well as the legislative history regarding these sections, which, according to the commenters, clearly incorporate international law and legal norms. Commenters stated, moreover, that where the United States is a party to a treaty, any decision to abrogate the treaty must be clearly expressed by Congress.

One commenter expressed concern with the Departments' interpretation and reliance on Article 34 of the Refugee Convention, which provides that parties ''shall as far as possible facilitate the assimilation and naturalization of refugees.'' This commenter criticized the Departments' analysis regarding the availability of alternative relief for individuals barred from asylum under the proposed rule. Specifically, the commenter noted that, although Article 34 requires the United States only to make efforts to naturalize refugees, not to naturalize all refugees, this does not mean that the United States then has the discretion to limit access to the asylum system in the first place.

Response: As explained in the NPRM, this rule is consistent with the United States' obligations as a party to the 1967 Protocol, which incorporates Articles 2 through 34 of the 1951 Refugee Convention.[12] This rule is also consistent with U.S. obligations under Article 3 of the CAT, as implemented in the immigration regulations pursuant to the implementing legislation.

As an initial matter, the rule affects eligibility for asylum but does not place any additional limitations on statutory withholding of removal or protection under the CAT regulations. The United States implemented the non-refoulement provision of Article 33(1) of the Refugee Convention through the withholding of removal provision at section 241(b)(3) of the Act (8 U.S.C. 1231(b)(3)), and the non-refoulement provision of Article 3 of the CAT through the CAT regulations, rather than through the asylum provisions at section 208 of the Act (8 U.S.C. 1158). *See INS* v. *Cardoza-Fonseca,* 480 U.S. 421, 429, 440–41 (1987); *Matter of C-T-L–,* 25 I&N Dec. 341 (BIA 2010) (applying section 241(b)(3)); *see also* Foreign Affairs Reform and Restructuring Act of 1998 (''FARRA''), Public Law 105–277, div. G, sec. 2242, 112 Stat. 2681, 2631–822; 8 CFR 208.16 through 208.18; 1208.16 through 1208.18. The Supreme Court has explained that asylum ''does not correspond to Article 33 of the Convention, but instead corresponds to Article 34,'' which provides that contracting States '''shall as far as possible facilitate the assimilation and naturalization of refugees.' '' *Cardoza-Fonseca,* 480 U.S. at 441. Article 34 ''is

[11] Commenters cited paragraph 154 the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees.

[12] The Departments also note that neither of these treaties is self-executing, and that they are therefore not directly enforceable in U.S. law except to the extent that they have been implemented by domestic legislation. *Al-Fara* v. *Gonzales,* 404 F.3d 733, 743 (3d Cir. 2005) (''The 1967 Protocol is not self-executing, nor does it confer any rights beyond those granted by implementing domestic legislation.''); *Auguste* v. *Ridge,* 395 F.3d 123, 132 (3d Cir. 2005) (CAT ''was not self-executing''); *see also INS* v. *Stevic,* 467 U.S. 407, 428 n.22 (1984) (''Article 34 merely called on nations to facilitate the admission of refugees to the extent possible; the language of Article 34 was precatory and not self-executing.'').

precatory; it does not require the implementing authority actually to grant asylum to all those who are eligible.'' *Id.*

Because the rule does not affect statutory withholding of removal or CAT protection, the proposed rule is consistent with the non-refoulement provisions of the 1951 Refugee Convention, the 1967 Protocol, and the CAT. *See Matter of R-S-C–,* 869 F.3d at 1188 & n.11 (explaining that ''the Refugee Convention's non-refoulement principle—which prohibits the deportation of aliens to countries where the alien will experience persecution—is given full effect by the Attorney General's withholding-only rule''); *Cazun* v. *Att'y Gen. U.S.,* 856 F.3d 249, 257 & n.16 (3d Cir. 2017); *Ramirez-Mejia* v. *Lynch,* 813 F.3d 240, 241 (5th Cir. 2016); *Maldonado* v. *Lynch,* 786 F.3d 1155, 1162 (9th Cir. 2015) (explaining that Article 3 of the CAT, which sets out the non-refoulement obligations of parties, was implemented in the United States by FARRA and its implementing regulations).

The rule does not affect the withholding of removal process or standards. INA 241(b)(3) (8 U.S.C. 1231(b)(3)); 8 CFR 208.16, 1208.16. An alien who can demonstrate that he or she would more likely than not face persecution on account of a protected ground or torture may qualify for statutory withholding of removal or CAT protection. Therefore, because individuals who may be barred from asylum by the rule remain eligible to seek statutory withholding of removal and CAT protection, the rule does not violate the principle of non-refoulement. *Cf. Garcia* v. *Sessions,* 856 F.3d 27, 40 (1st Cir. 2017) (discussing the distinction between asylum and withholding of removal and explaining that ''withholding of removal has long been understood to be a mandatory protection that must be given to certain qualifying aliens, while asylum has never been so understood'').

Commenters asserted, without support, that the United States must respond to the needs of migrants to comply with the 1948 Universal Declaration of Human Rights. *See* Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (1948) (''UDHR''). The UDHR is a non-binding human rights instrument, not an international agreement, and thus it does not impose legal obligations on the United States. *Alvarez-Machain,* 542 U.S. at 728, 734–35 (citing John P. Humphrey, The U.N. Charter and the Universal Declaration of Human Rights, in The International Protection of Human Rights 39, 50 (Evan Luard ed., 1967) (quoting Eleanor Roosevelt as stating that the Declaration is '''a statement of principles * * * setting up a common standard of achievement for all peoples and all nations' and 'not a treaty or international agreement * * * impos[ing] legal obligations.' '')). In any case, although the UDHR proclaims the right of ''[e]veryone'' to ''seek and to enjoy'' asylum, UDHR Art. 14(1), it does not purport to state specific standards for establishing asylum eligibility, and it certainly cannot be read to impose an obligation on the United States to grant asylum to ''everyone,'' *see id.,* or to prevent the Attorney General and the Secretary from exercising their discretion granted by the INA, consistent with U.S. obligations under international law as implemented in domestic law. *See* UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations Under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol* 3 (Jan. 26, 2007), *https://www.unhcr.org/4d9486929.pdf* (''The principle of *non-refoulement* as provided for in Article 33(1) of the 1951 Convention does not, as such, entail a right of the individual to be granted asylum in a particular State.''). The United States' overall response to the needs of migrants extends beyond the scope of this rulemaking.

To the extent that commenters made blanket assertions that the rule violates customary international law or other international documents and statements of principles, the commenters ignore the fact that the rule leaves the requirements for an ultimate grant of statutory withholding of removal or CAT withholding or deferral of removal unchanged.

As explained in additional detail in section II.C.2.a.i of this preamble, the rule did not designate additional particularly serious crimes in the regulatory text. Because the Departments have the independent authority for these changes under INA 208(b)(2)(C) (8 U.S.C. 1158(b)(2)(C)), the Departments need not further respond to comments regarding the current ''particularly serious crime'' bar, as those comments extend beyond the scope of this rulemaking. Nevertheless, commenters' assertions that the proposed rule improperly and unlawfully expands the definition of ''particularly serious crime'' beyond the definition provided by UNHCR are misguided. UNHCR's interpretations of or recommendations regarding the Refugee Convention and the Protocol, such as set forth in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees (Geneva 1992) (reissued Feb. 2019), are ''not binding on the Attorney General, the BIA, or United States courts.'' *INS* v. *Aguirre-Aguirre,* 526 U.S. 415, 427 (1999). ''Indeed, the Handbook itself disclaims such force, explaining that 'the determination of refugee status under the 1951 Convention and the 1967 Protocol * * * is incumbent upon the Contracting State in whose territory the refugee finds himself.' '' *Id.* at 427–28. To the extent such guidance ''may be a useful interpretative aid,'' *id.* at 427, it would apply to statutory withholding of removal—which is the protection that implements Article 33 of the Convention—and which, as discussed above, this rule does not affect.

Commenters also relied on the advisory UNHCR Handbook to assert that an adjudicator must make an individualized assessment as to whether an asylum applicant presents or will present a danger to the community. Again, as noted above, the Departments clarify in section II.C.2.a.i that the rule did not designate additional particularly serious crimes in the regulatory text. Regardless, the Departments have longstanding authority under U.S. law to create asylum-related conditions without an individualized consideration of present or future danger to the community.[13] For example, in 2000, Attorney General Janet Reno limited asylum eligibility pursuant to the authority at section 208(b)(2)(C) of the Act (8 U.S.C. 1158(b)(2)(C)) based on ''a fundamental change in circumstances'' or the ability of an alien to reasonably relocate within the alien's country of nationality or last habitual residence, even where that alien had established he or she had suffered past persecution. *See* Asylum Procedures, 65 FR 76121, 76133–36 (Dec. 6, 2000) (adding 8 CFR 208.13(b)(1)(i)–(ii)). As outlined in the NPRM, the Attorney General and Congress have previously established several mandatory bars to asylum eligibility. 84 FR at 69641. The Departments note that the adjudicator must still make an individualized determination as to whether a given offense falls into the category of conduct

[13] In addition, even if this rulemaking did enact regulatory provisions requiring an interpretation of particularly serious crimes, U.S. law has long held that, once an alien is found to have been convicted of a particularly serious crime, there is no need for a separate determination whether he or she is a danger to the community. *See Matter of N-A-M–,* 24 I&N Dec. 336, 343 (BIA 2007), *aff'd, N-A-M-* v. *Holder,* 587 F.3d 1052 (10th Cir. 2009), *cert. denied,* 562 U.S. 1141 (2011); *Matter of Q-T-M-T–,* 21 I&N Dec. 639, 646–47 (BIA 1996); *Matter of K–,* 20 I&N Dec. 418, 423–24 (BIA 1991); *Matter of Carballe,* 19 I&N Dec. 357, 360 (BIA 1986).

contemplated by an individual bar. *Komarenko* v. *INS,* 35 F.3d 432, 436 (9th Cir. 1994) (upholding particularly serious crime bar), *abrogated on other grounds by Abebe* v. *Mukasey,* 554 F.3d 1203 (9th Cir. 2009). In addition, as explained above, the UNHCR Handbook is not binding on the Attorney General, the BIA, or United States courts, although it ''may be a useful interpretative aid.'' *Aguirre-Aguirre,* 526 U.S. at 427.

The Departments disagree with commenters' assertions that, by relying on the discretionary nature of asylum, the rule violates U.S. treaty obligations, congressional intent, and case law. As explained above, because the rule does not alter eligibility for withholding of removal or CAT protection, the rule does not violate U.S. treaty obligations and ensures continued compliance with U.S. non-refoulement obligations. Additionally, Congress's intent in enacting the Refugee Act was ''a desire to revise and regularize the procedures governing the admission of refugees into the United States.'' *Stevic,* 467 U.S. at 425. Rather than expanding the availability of refugee protection, as asserted by commenters, the Refugee Act's definition of refugee does ''not create a new and expanded means of entry, but instead regularizes and formalizes the policies and practices that have been followed in recent years.'' *Id.* at 426 (quoting H.R. Rep. No. 96–608, at 10 (1979)). Moreover, case law supports the Attorney General's authority under U.S. law to limit asylum. *See Yang* v. *INS,* 79 F.3d 932, 936–39 (9th Cir. 1996) (upholding regulatory implementation of the firm resettlement bar); *see also Komarenko,* 35 F.3d at 436 (upholding regulatory implementation of the ''particularly serious crime'' bar).

Regarding the Attorney General's and the Secretary's discretion to enact the rule, the Departments disagree that the rule is ultra vires because, as explained above, Congress has granted the Attorney General and the Secretary the authority to limit eligibility for asylum. *See* INA 208(b)(2)(C) (8 U.S.C. 1158(b)(2)(C)). Moreover, the rule does not violate applicable obligations under domestic law or international treaties for the reasons discussed above.

3. Concerns With Categorical Bars

In addition to comments generally opposing the seven bars proposed by the NPRM, commenters also raised concerns related to specific bars.

a. Felonies

Comment: Commenters opposed the proposed limitation on asylum eligibility for individuals who have been convicted of any felony under Federal, State, tribal, or local law. *See* 8 CFR 208.13(c)(6)(vi)(A), 1208.13(c)(6)(vi)(A) (proposed). Commenters generally stated that the proposed limitation was overbroad and that the Departments failed to support their stated position that offenses carrying potential sentences of more than one year correlate to recidivism and dangerousness. Commenters asserted that the proposed limitation would ''sweep in'' minor conduct, including some State misdemeanors.

Commenters also opposed the Departments' proposed definition of the term ''felony,'' *see* 8 CFR 208.13(c)(7)(i), 1208.13(c)(7)(i) (proposed), as any crime defined as a felony by the relevant jurisdiction of conviction, or any crime punishable by more than one year imprisonment. Commenters objected to both portions of the proposed definition.

Specifically, commenters opposed the definition's reliance on the maximum possible sentence of an offense over the actual sentence imposed. Commenters opposed the Departments' reasoning for that determination. *See* 84 FR at 69646 (''[T]he sentence actually imposed often depends on factors such as offender characteristics that may operate to reduce a sentence but do not diminish the gravity of the crime.'' (alteration and quotation marks omitted)). Commenters stated that imposing a sentence requires careful consideration of numerous factors, including any mitigating circumstances, and that the proposed definition dismissed careful sentencing considerations by prosecutors and criminal sentencing courts, which are charged with considering public safety. Commenters stated that the actual sentence imposed is a more faithful and accurate measure of whether an individual's conduct was ''particularly serious'' and that not every offense that would be a felony under the proposed definition is or should be considered a ''particularly serious crime.'' Commenters also stated that not every alien convicted of a crime that is punishable by more than one year of imprisonment is a danger to the community who should be barred from asylum eligibility.

Commenters also opposed the proposal that the definition of felony include any offense that is labeled as a felony in its respective jurisdiction, regardless of the maximum term of imprisonment or other factors. Commenters stated that, with certain types of offenses, the difference between misdemeanors and felonies does not necessarily involve aggravated conduct or heightened risk to the public but rather factual elements, such as the alleged dollar value of a stolen good. Accordingly, commenters stated, it would be inappropriate to categorically bar eligibility for asylum on this basis.

Commenters asserted that a categorical bar against all felonies, as defined by the NPRM, would result in drastic inconsistencies and unfair results and would undermine the Departments' stated goal of uniformity and consistency. Commenters stated that the proposed definition would improperly treat a broad range of offenses as equally severe. Additionally, commenters stated, a broad range of criminal conduct encompassing varying degrees of severity or dangerousness could be charged under the same disqualifying offense.

At the same time, commenters suggested that identical conduct in different States (or other jurisdictions) would have different consequences on eligibility for asylum, depending on whether the jurisdiction labeled the crime as a felony or set a maximum penalty of over one year of imprisonment. As an example, one commenter asserted that felony theft threshold amounts among the States vary considerably, ranging from $200 to $2,500 or more, but noted that the proposed rule would treat these varying offenses equally under the proposed definition. The commenter stated that the definition was overbroad and did not exercise the ''special caution'' that should be taken with asylum cases given the high stakes involved. Other commenters stated that the desire for consistency should not be elevated over ''legitimate concerns of fairness and accurate assessments of dangerousness.''

One commenter opined that the proposed limitation would ignore the federalist nature of the U.S. criminal justice system, where each State has its own criminal code and makes individual determinations about which conduct should be criminalized, and how.

Commenters stated that the ''harsh inequities'' created by the rule would dissuade aliens who are fleeing persecution to plead guilty to misdemeanor charges that could carry a one-year sentence, even if the plea agreement would not include any incarceration, which could in turn have a host of unintended collateral consequences in the criminal justice system. Numerous commenters offered specific examples of State laws that they asserted would improperly be considered disqualifying offenses under the proposed limitation and accompanying definition. For example,

commenters stated that some States, such as Massachusetts, define misdemeanors, which may carry a sentence of one year or more in a ''house of correction,'' much more broadly than many other States. Commenters also listed statutes from New York,[14] Maryland,[15] and several other States that they believed should not qualify as a basis for limiting eligibility to asylum.

Response: The Departments disagree with commenters' opposition to the inclusion of any felony conviction as a bar to asylum eligibility and to the corresponding proposed definition of ''felony'' for the purposes of determining whether the bar applies. As an initial matter, to the extent commenters expressed concern that the inclusion of any felony is an inaccurate measure of whether an individual's conduct was ''particularly serious'' or that not every offense that would be a felony under the proposed definition is or should be considered a ''particularly serious crime,'' the Departments need not address these concerns in detail because this rule, like the proposed rule, designates these offenses as additional limitations on asylum eligibility pursuant to INA 208(b)(2)(C) (8 U.S.C. 1158(b)(2)(C)).[16] *See* 8 CFR 208.13(c)(6), 1208.13(c)(6).

As explained above, the Departments reiterate the explanation in the NPRM that the inclusion of any felony conviction as a bar to asylum eligibility is intended to avoid inconsistencies, inefficiencies, and anomalous results that often follow from the application of the categorical approach. 84 FR at 69645–46. In addition, the felony limitation on eligibility for asylum is consistent with other losses of benefits for felony convictions. *See* 84 FR at 69647 (explaining that treating a felony conviction as disqualifying for purposes of obtaining the discretionary benefit of asylum would be consistent with the disabilities arising from felony convictions in other contexts and would reflect the ''serious social costs of such crimes'').

The Departments disagree with commenters' concerns that the felony limitation and related definition of ''felony'' would result in drastic inconsistencies and unfair results, undermining the stated purpose of the rule. As described in the NPRM, the existing reliance on the categorical approach to determine the immigration consequences of convictions has far too often resulted in seemingly inconsistent or anomalous results. 84 FR at 69645–46.[17] The rule will significantly help to curtail inconsistencies and confusion over what offenses may be disqualifying for purposes of asylum, as all aliens who have been convicted of the same level of offense will receive the same treatment during asylum proceedings.

The Departments understand that the States have different criminal codes with different definitions of crimes, levels of offense, and other differences. With respect to commenters' federalism concerns, Congress has plenary authority over aliens, and that authority has been delegated the Departments. *See Zadvydas* v. *Davis,* 533 U.S. 678, 695 (2001) (citing *INS* v. *Chadha,* 462 U.S. 919, 941–42 (1983), for the proposition that Congress must choose ''a constitutionally permissible means of implementing'' that power); INA 208(b)(2)(C), (d)(5)(B) (8 U.S.C. 1158(b)(2)(C), (d)(5)(B)). Additionally, as stated in the NPRM and above in section II.C.2.A.ii, the categorical approach is overly complex, leads to inconsistent treatment of aliens who have been convicted of serious criminal offenses, and presents a strain on judicial and administrative resources. Although some aliens who have been convicted of serious criminal offenses are appropriately barred from discretionary benefits under the Act, such as asylum, others are not. *See, e.g., Lowe,* 920 F.3d at 420 (Thapar, J., concurring) (''[I]n the categorical-approach world, we cannot call rape what it is. * * * [I]t is time for Congress to revisit the categorical approach so we do not have to live in a fictional world where we call a violent rape non-violent.''). This rule will provide certainty by establishing a bright-line rule that is both easy to understand and will apply uniformly to all applicants who have been convicted of felonies, which the Departments believe to be significant offenses. Aliens are being given advance notice through the NPRM, which was published on December 19, 2019, 84 FR at 69646, and by this publication of the final rule, that any felony conviction will be a bar to eligibility for the discretionary benefit of asylum. *Cf.* 8 CFR 208.3(c)(6)(vi)(A), 8 CFR 1208.3(c)(6)(vi)(A) (proposed) (barring aliens who have been convicted of felonies ''on or after [the effective] date'').

The Departments disagree that the proposed definition of ''felony'' implicates federalism concerns by defining the term ''felony,'' as it is to be used in this context, differently from States' (or other jurisdictions') definitions of felonies. In fact, the Departments believe that the felony definition is consistent with principles of federalism by primarily deferring to each State's choice of what offenses to define as felonies. Similarly, the alternative definition capturing any crime punishable by more than one year of imprisonment is consistent with the Federal definition and many States' definitions of ''felony.'' *See, e.g.,* 18 U.S.C. 3559 (defining ''felonies'' as offenses with a maximum term of imprisonment of more than one year); 1 Wharton's Criminal Law § 19 & n.23 (15th ed.) (surveying State laws).

Congress has delegated to the Departments, not the States or other jurisdictions, the authority to set additional limitations on eligibility for

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[14] *See* N.Y.P.L. 145.05. (criminalizing the causing of $250 worth of property damage); N.Y.P.L. 275.34 (criminalizing the recording of a movie in a theater two times); N.Y.P.L. 220.06 (criminalizing simple possession of more than half an ounce of a narcotic).

[15] *See* MD. CODE, ALCO. BEV. 6–307; MD. CODE, ALCO. BEV. 6–402 (criminalizing the sale of alcohol to a visibly intoxicated person with a sentence of up to two years); MD. CODE, CRIM. LAW 3–804 (criminalizing the use of a telephone to make a single anonymous phone call to annoy or embarrass another person with a sentence of up to three years); MD. CODE, CRIM. LAW 4–101 (criminalizing the simple possession of a ''dangerous weapon,'' including a utility knife, on one's person, with a sentence of up to three years); MD. CODE, CRIM. LAW 6–105 (criminalizing the burning of property under $1,000 with a sentence of up to 18 months); MD. CODE, CRIM. LAW 6–205 (criminalizing the unauthorized entry into a dwelling with a sentence of up to three years); MD. CODE, CRIM. LAW 7–203 (criminalizing the temporary use of another person's vehicle without his or her consent (*i.e.,* ''joyriding'') with a sentence of up to four years); MD. CODE, TAX–GEN. 13–1015 (criminalizing the import, sale or transportation of unstamped cigarettes within the state of Maryland with a sentence of up to two years).

[16] The proposed rule's preamble cited both the authority at section 208(b)(2)(B)(ii) of the Act (8 U.S.C. 1158(b)(2)(B)(ii)) to designate offenses as particularly serious crimes and the authority at section 208(b)(2)(C) of the Act (8 U.S.C. 1158(b)(2)(C)) to establish additional limitations on asylum eligibility in support of the designation of all felonies as bars to asylum eligibility. *Compare* 84 FR at 69645 (explaining that the Attorney General and the Secretary could reasonably exercise their discretion to ''classify felony offenses as particularly serious crimes for purposes of 8 U.S.C. 1158(b)(2)(B)(ii)''), *with id.* at 69647 (explaining that, in addition to their authority under section 208(b)(2)(C), ''the Attorney General and the Secretary ''further propose relying on their respective authorities under section 208(b)(2)(C) of the INA, 8 U.S.C. 1158(b)(2)(C), to make all felony convictions disqualifying for purposes of asylum eligibility''). The regulatory text, however, does not actually designate any additional offenses as ''particularly serious crimes.'' Instead, the discussion of particularly serious crimes helps illustrate how issuing the new bars pursuant to section 208(b)(2)(C) is ''consistent with'' the rest of the INA because the new bars—similar to the ''particularly serious crime'' bar—exclude from eligibility those aliens whose conduct demonstrates that they are dangerous to the United States or otherwise do not merit eligibility for asylum. Further discussion of the interaction of the rule with the ''particularly serious crime'' bar is set out above in section II.C.2.a.i.

[17] Further discussion of the problems with the categorical approach is set out above in section II.C.2.a.ii.

asylum, and the Departments have reasonably determined that the offenses encompassed within the definition should be disqualifying offenses. This rule will not have any direct bearing on how States or other jurisdictions implement their criminal justice system.

With respect to commenters' concerns that the rule will affect how and when aliens enter into plea deals for criminal offenses, such pleadings take place during criminal proceedings, not immigration proceedings. Although asylum adjudications may rely on the information derived from criminal proceedings, the Departments believe that any effects that the rule might have outside of the immigration context are beyond the context of this rulemaking. *Cf. San Francisco* v. *USCIS,* 944 F.3d 773, 804 (9th Cir. 2019) (''Any effects [of a DHS rule] on [healthcare] entities are indirect and well beyond DHS's charge and expertise.''). Additionally, the Departments believe that this rule would actually provide more clarity in the pleading process because the rule sets forth straightforward guidelines about what offenses would and would not be disqualifying offenses for purposes of asylum. In turn, criminal defense attorneys will be better able to advise their clients on the predictable immigration consequences of a conviction. *Cf. Padilla,* 559 U.S. at 357 (''There will, however, undoubtedly be numerous situations in which the deportation consequences of a plea are unclear. In those cases, a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry adverse immigration consequences. But when the deportation consequence is truly clear, as it was here, the duty to give correct advice is equally clear.'').

Second, regarding the commenters' concerns with the definition for the term ''felony,'' *see* 8 CFR 208.13(c)(7)(i), 1208.13(c)(7)(i) (proposed), the Departments disagree that the definition should look to the actual sentence imposed instead of the maximum possible sentence. As noted in the NPRM, consideration of an offense's maximum possible sentence is generally consistent with the way other Federal laws define felonies. *See* 84 FR at 69646; *see also, e.g.,* 5 U.S.C. 7313(b) (''For the purposes of this section, 'felony' means any offense for which imprisonment is authorized for a term exceeding one year.''); *cf.* U.S.S.G. 2L1.2 cmt. n.2 ('''Felony' means any federal, state, or local offense punishable by imprisonment for a term exceeding one year.''). The Model Penal Code and most States likewise define a felony as a crime with a possible sentence in ''excess of one year.'' Model Penal Code § 1.04(2); *see also* 1 Wharton's Criminal Law § 19 & n.23 (15th ed.) (surveying State laws).

In addition, as recognized by the commenters, sentencing courts and prosecutors consider a number of factors when imposing a sentence, many of which have no bearing on the seriousness of the crime committed. Specifically, in *Matter of N-A-M–,* 24 I&N Dec. 336 (BIA 2007), the BIA explained that the sentence imposed might be based on conduct ''subsequent and unrelated to the commission of the offense, such as cooperation with law enforcement authorities,'' or ''offender characteristics.'' *Id.* at 343 (determining that the respondent had been convicted of a particularly serious crime even where no term of imprisonment was imposed); *see also Holloway* v. *Att'y Gen. U.S.,* 948 F.3d 164, 175 (3d Cir. 2020) (''[T]he maximum penalty that may be imposed often reveals how the legislature views an offense. Put succinctly, the maximum possible punishment is certainly probative of a misdemeanor's seriousness.'' (footnote and internal quotation marks omitted)). Such considerations are necessarily unrelated to the seriousness of the actual crime, and the sentence imposed is ''not the most accurate or salient factor to consider in determining the seriousness of an offense.'' *Matter of N-A-M–,* 24 I&N Dec. at 343; *see also Holloway,* 948 F.3d at 175 n.12 (stating that the penalty imposed may be more reflective of how a sentencing judge viewed an offender than the offense itself).

The Departments therefore reject recommendations to consider the sentence imposed when determining whether a conviction is a felony, as opposed to the NPRM's proposal to consider the maximum possible sentence associated with a given offense. The Departments are persuaded by the reasoning of the U.S. Court of Appeals for the Third Circuit, which recognized that, in cases where the analysis centers around an offense, and not the offender (as in the ''particularly serious crime'' analysis), ''the maximum punishment is a more appropriate data point because it provides insight into how a state legislature views a crime—not how a sentencing judge views an individual.'' *Holloway,* 948 F.3d at 175 n.12. Thus, the Departments continue to believe that lengthier maximum sentences are associated with more serious offenses that appropriately should have consequences when determining asylum eligibility. 84 FR at 69646.

Furthermore, as noted above, the Departments are acting within their designated authority pursuant to section 208(b)(2)(C) of the Act (8 U.S.C. 1158(b)(2)(C)) (authority to establish additional limitations and conditions on eligibility for asylum) to designate felonies, as defined in the rule, as disqualifying offenses for purposes of asylum eligibility. *See* section II.C.2.a.i. Assuming, arguendo, that the commenters are correct that felonies as defined by the final rule do not necessarily reflect an alien's dangerousness, the Departments' authority to set forth additional limitations and conditions on asylum eligibility under this provision requires only that such conditions and limitations be consistent with section 208 of the Act (8 U.S.C. 1158). *See* INA 208(b)(2)(C) (8 U.S.C. 1158(b)(2)(C)) (''The Attorney General may by regulation establish additional limitations and conditions, consistent with this section, under which an alien shall be ineligible for asylum under paragraph (1).''). Unlike the designation of particularly serious crimes, there is no requirement that the aliens subject to these additional conditions or limitations first meet a particular dangerousness threshold. *Compare id., with* INA 208(b)(2)(B)(ii) (8 U.S.C. 1158(b)(2)(B)(ii)), *and* INA 208(b)(2)(A)(ii) (8 U.S.C. 1158(b)(2)(A)(ii)) (providing that ''[t]he Attorney General may designate by regulation offenses'' for which an alien would be considered ''a danger to the community of the United States'' by virtue of having been convicted of a ''particularly serious crime''). Instead, section 208(b)(2)(C) of the Act (8 U.S.C. 1158(b)(2)(C) confers broad discretion on the Attorney General and the Secretary to establish a wide range of conditions on asylum eligibility, and the designation of felonies as defined in the rule as an additional limitation on asylum eligibility is consistent with the rest of the statutory scheme. For example, Congress's inclusion of other crime-based bars on eligibility demonstrates the intent to allow the Attorney General and Secretary to exercise the congressionally provided authority to designate additional types of criminal offenses or related behavior as bars to asylum eligibility. *See* INA 208(b)(2)(A)(ii), (iii) (particularly serious crime and serious nonpolitical crime) (8 U.S.C. 1158(b)(2)(A)(ii), (iii)). Indeed, by expressly including ''serious nonpolitical crimes'' as a statutory basis for ineligibility, Congress indicated that ''particularly serious crimes'' need not be the only crime-based bar on asylum

eligibility. And by further excluding from eligibility aliens who engage in certain harmful conduct, regardless of whether those aliens pose a danger to the United States, *see* INA 208(b)(2)(A)(i) (persecutor bar) (8 U.S.C. 1158(b)(2)(A)(i)), Congress indicated that ''dangerousness'' need not be the only criterion by which eligibility for asylum is to be determined.

b. Alien Smuggling or Harboring

Comment: Commenters raised several concerns with respect to the NPRM's proposed bar to asylum eligibility for aliens convicted of harboring or smuggling offenses under sections 274(a)(1)(A) and (a)(2) of the Act (8 U.S.C. 1324(a)(1)(A), (a)(2)). *See* 8 CFR 208.13(c)(6)(i), 1208.13(c)(6)(i) (proposed).

First, commenters asserted that the NPRM improperly broadened the existing statutory bar to asylum for many individuals who have been convicted of alien smuggling or harboring under sections 274(a)(1)(A) and (a)(2) of the Act (8 U.S.C. 1324(a)(1)(A), (a)(2)). Specifically, commenters noted that such convictions already constitute aggravated felonies under the Act that would bar an alien from eligibility for asylum,[18] ''except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual).'' *See* INA 101(a)(43)(N) (8 U.S.C. 1101(a)(43)(N)). Commenters opposed the NPRM, asserting that it improperly proposed removing the limited exception to this bar and imposing a blanket bar against anybody convicted of such an offense. Commenters asserted that adjudicators should have the discretion to decide whether individuals convicted of such offenses, who are not already statutorily precluded because their convictions are not considered aggravated felonies, should be barred from asylum.

Commenters also asserted that the proposed limitation undermined congressional intent. Specifically, commenters stated that Congress intended to make asylum available to those present in the United States, without regard to how they entered, and would not have intended to bar from asylum first-time offenders who were convicted for helping their family members escape persecution. *See* INA 208(a)(1) (8 U.S.C. 1158(a)(1)) (providing that an alien ''who arrives in the United States (whether or not at a designated port of arrival * * *)'' may apply for asylum in accordance with the rest of the section). Commenters stated that this congressional intent is demonstrated by the fact that Congress did not consider such offenses to be aggravated felonies and thus, in turn, particularly serious crimes that would bar asylum eligibility.

Commenters also asserted that the proposed limitation undermined UNHCR's recognition that aliens must sometimes commit crimes ''as a means of, or concomitant with, escape from the country where persecution was feared,'' and that the fear of persecution should be considered a mitigating factor when considering such convictions. However, the commenters did not elaborate on how this assertion pertains to aliens who commit crimes concomitant with another person's escape from a country where persecution may be feared.

Commenters asserted that the Departments failed to properly explain how all smuggling and harboring convictions under section 274 of the Act (8 U.S.C. 1324) reflected a danger to the community that should result in a categorical bar to asylum.

Numerous commenters stated that they opposed the proposed limitation because it unfairly penalized asylum seekers for helping their family members, such as minor children and spouses, to come to the United States for any reason, including to escape from persecutors, traffickers, or abusers. Commenters stated that the proposed bar would force family members to choose between their loved ones remaining in danger in their countries of origin and themselves or their family being barred from asylum and returned to their persecutors. At least one commenter stated that the Departments illogically concluded that the hazard posed to a child or spouse being smuggled is greater than the harm the same child or spouse would face in the country of origin.

At least one commenter suggested that children in particular would be harmed by the proposed bar because children are often derivatives on their parents' asylum application and may have nobody else to care for them in the United States if their parents are deported. Commenters also stated that asylum seekers often travel to the United States in family units and that some types of persecution are ''familial by nature, culture, and law.'' Commenters suggested that the proposed limitation would undermine the sanctity of the family and eliminate family reunification options, which would result in permanent separation of families.

Commenters asserted that survivors of domestic violence who are forced to flee to the United States without their children should not be barred from asylum for trying to later reunite the family.

Commenters also objected to the Departments' assertion that families could present themselves at the United States border, stating that this may not be possible due to recently implemented policies and regulations. Some commenters asserted that the proposed bar ''is particularly insidious'' in light of documents[19] that they claimed revealed efforts to utilize smuggling prosecutions against parents and caregivers as part of a strategy to deter families from seeking asylum in the United States and that the NPRM proposed an expansion of those efforts.

At least one commenter stated that the proposed bar, in addition to the above-described policies, would harm good Samaritans who provide humanitarian aid to migrants traversing deserts with harsh conditions. At least one commenter expressed concerns that existing prohibitions against harboring, which include ''transportation,'' could be applied to punish those who engage in routine conduct like driving someone to work or to a doctor's appointment. *See* INA 274(a)(1)(A)(iii) (8 U.S.C. 1324(a)(1)(A)(iii)) (establishing criminal penalties for an individual who ''conceals, harbors, or shields from detection [or attempts to do so], [an] alien in any place, including * * * any means of transportation'').

Commenters also generally asserted that the proposed limitation would multiply the harms that asylum seekers face in coming to the United States.

Response: The Departments disagree with comments suggesting that the additional limitation on eligibility for asylum for aliens who have been convicted of bringing in or harboring certain aliens pursuant to sections 274(a)(1)(A), (2) of the Act (8 U.S.C. 1324(a)(1)(A), (2)) is inappropriate or unlawful.

The Departments reject commenters' concerns that the additional limitation is an unlawful expansion of existing bars to asylum eligibility set forth at

[18] A conviction for an aggravated felony is automatically considered a conviction for a particularly serious crime that would bar an alien from asylum eligibility under section 208(b)(2)(A)(ii) of the Act (8 U.S.C. 1158(b)(2)(A)(ii)). INA 208(b)(2)(B)(i) (8 U.S.C. 1158(b)(2)(B)(i)).

[19] Commenters cited Ryan Devereaux, *Documents Detail ICE Campaign to Prosecute Migrant Parents as Smugglers,* The Intercept (Apr. 29, 2019), *https://theintercept.com/2019/04/29/ice-documents-prosecute-migrant-parents-smugglers/* (describing how, in May 2017, DHS allegedly set out to target parents and family members of unaccompanied minors for prosecution).

section 101(a)(43)(N) of the Act (8 U.S.C. 1101(a)(43)(N)). It is within the Departments' delegated authority to set forth additional limitations on asylum eligibility. *See* INA 208(b)(2)(C) (8 U.S.C. 1158(b)(2)(C)). In other words, the Departments may expand upon the existing grounds for ineligibility and the disqualifying offenses, even when those or similar grounds have already been assigned immigration consequences, and the Departments have done so in this rulemaking. *Cf. Hawaii,* 138 S. Ct. 2411–12 (holding that Congress ''did not implicitly foreclose * * * tighter restrictions,'' even in circumstances in which those restrictions concerned a subject ''similar'' to the one that Congress ''already touch[ed] on in the INA'').

The Departments disagree with commenters that adjudicators should have the discretion to determine whether aliens who have been convicted of offenses under sections 274(a)(1)(A), (2) of the Act (8 U.S.C. 1324(a)(1)(A), (2)) should be eligible for asylum. Convictions for such offenses are serious and harmful. As noted in the NPRM, even first-time alien smuggling offenses display a serious disregard for U.S. immigration law and pose a potential hazard to smuggled family members, which often include a vulnerable child or spouse. 84 FR at 69648. And as also noted in the NPRM, the Act already bars most individuals who have been convicted of this offense from asylum eligibility, thus demonstrating congressional recognition of the seriousness of such offenses. *Id.* at 69647. Accordingly, the Departments have concluded that no aliens who have been convicted of such offenses should merit the discretionary benefit of asylum.

The Departments disagree with commenters that an additional limitation on eligibility for aliens who have been convicted of alien smuggling or harboring offenses contravenes the ''whether or not at a designated port of arrival'' language in the asylum statute at section 208(a)(1) of the Act (8 U.S.C. 1158(a)(1)). The Departments stress that this additional limitation has no bearing on the asylum applicant's manner of entry; rather it involves the asylum applicant's conduct with respect to unlawful entry of others. Thus, the Departments do not further address these comments.

Comments concerning statements or guidance from UNHCR are misplaced. UNHCR's interpretations of or recommendations regarding the Refugee Convention and Refugee Protocol ''may be a useful interpretative aid,'' but they are ''not binding on the Attorney General, the BIA, or United States courts.'' *Aguirre-Aguirre,* 526 U.S. at 427. Indeed, as noted already, ''the Handbook itself disclaims such force, explaining that 'the determination of refugee status under the 1951 Convention and the 1967 Protocol * * * is incumbent upon the Contracting State in whose territory the refugee finds himself.' '' *Id.* at 427–28.

The Departments disagree with commenters who stated that the Departments failed to explain how all smuggling and harboring convictions reflected a danger to the community that should result in a categorical bar to asylum.[20] The Departments believe that they adequately explained their reasoning in the NPRM that such offenses place others, including children, in potentially hazardous situations that could result in injury or death, and that they reflect a flagrant disregard for immigration laws. As a result, those people who commit these offenses present a danger to the community. 84 FR at 69648.

Additionally, as stated above, the Departments have designated such alien smuggling or harboring offenses as discrete bases for ineligibility pursuant to the authority provided by section 208(b)(2)(C) of the Act (8 U.S.C. 1158(b)(2)(C)) (authority to establish additional limitations and conditions on eligibility for asylum). Assuming, arguendo, that commenters are correct that the offenses designated by the rule do not accurately reflect an alien's dangerousness, the Departments' authority to set forth additional limitations and conditions on asylum eligibility under this provision requires only that such conditions and limitations be consistent with section 208 of the Act (8 U.S.C. 1158). *See* INA 208(b)(2)(C) (8 U.S.C. 1158(b)(2)(C)) (''The Attorney General may by regulation establish additional limitations and conditions, consistent with this section, under which an alien shall be ineligible for asylum under paragraph (1).''). Unlike the designation of particularly serious crimes, there is no requirement that the aliens subject to the conditions or limitations meet a threshold of dangerousness. *Compare id., with* INA 208(b)(2)(B)(ii) (8 U.S.C. 1158(b)(2)(B)(ii)), *and* INA 208(b)(2)(A)(ii) (8 U.S.C. 1158(b)(2)(A)(ii)) (providing that ''[t]he Attorney General may designate by regulation offenses'' for which an alien would be considered ''a danger to the community of the United States'' by virtue of having been convicted of a ''particularly serious crime''). Instead, section 208(b)(2)(C) of the Act (8 U.S.C. 1158(b)(2)(C) confers broad discretion on the Attorney General and the Secretary to establish a wide range of conditions on asylum eligibility, and the designation of the alien smuggling and harboring offenses included in the rule as an additional limitation on asylum eligibility is consistent with the rest of the statutory scheme. For example, Congress's inclusion of other crime-based bars to asylum eligibility demonstrates the intent to allow the Attorney General and Secretary to exercise the congressionally provided authority to designate additional types of criminal offenses or related behavior as bars to asylum eligibility. *See* INA 208(b)(2)(A)(ii), (iii) (particularly serious crime and serious nonpolitical crime) (8 U.S.C. 1158(b)(2)(A)(ii), (iii)). And, as explained previously, Congress's inclusion of statutory bars on eligibility for aliens who engage in certain harmful conduct or commit certain types of crimes that are not ''particularly serious,'' *see* INA 208(b)(2)(A)(i), (iii) (8 U.S.C. 1158(b)(2)(A)(i), (iii)), demonstrates that the ''dangerousness'' associated with the conduct is not the sole criterion by which the Departments may consider whether an alien should be eligible for asylum.

The Departments disagree that this rule would undermine family values or particularly harm children. The Departments believe that the rule helps families and children by discouraging the dangerous practices of alien smuggling and harboring. The Departments disagree with commenters' assertions that current administrative policies or practices prevent families from presenting themselves at the border. In any event, commenters' concerns referencing such policies or practices are outside the scope of this rulemaking.

Finally, regarding commenters' concerns for good Samaritans, the Departments note again that the bar requires a conviction for it to apply in a particular case. As a result, an individual who leaves provisions or other assistance for individuals traversing the harsh terrain at the southern border would not be ineligible for asylum under this bar unless he or she is in fact prosecuted and convicted. As with the other bars, the Departments understand that the individual circumstances surrounding each offense will vary and that some cases may involve mitigating circumstances, but

[20] In addition, the Departments note that some commenters agreed with the Departments' determination regarding the dangerousness of these offenses. For example, one organization stated that ''the conduct required for such a conviction demonstrates contempt for U.S. immigration law and a disregard for the value of human life.''

the Departments find that in the context of asylum eligibility, adjudicators should not look behind a conviction to readjudicate an alien's criminal culpability. Although the individual circumstances behind an alien's prosecution may vary, the Departments have concluded that, to promote adjudicative efficiency, it is appropriate to provide a clear standard that defers to the original prosecutor's determination to pursue a conviction of the alien for his or her conduct, as well as the criminal court's existing determination of proof beyond a reasonable doubt that the alien engaged in the conduct.

c. Illegal Reentry

Comment: Commenters specified several reasons for opposing the NPRM's proposed limitation on eligibility for asylum for aliens convicted of illegal reentry under section 276 of the Act (8 U.S.C. 1326). *See* 8 CFR 208.13(c)(6)(i), 1208.13(c)(6)(i) (proposed). Under section 276(a) of the Act (8 U.S.C. 1326(a)), aliens who unlawfully reenter the United States after having been previously removed are subject to fines and to a term of imprisonment of two years or less. Section 276(b) of the Act (8 U.S.C. 1326(b)) describes certain aliens, such as those who have been removed after commission of an aggravated felony, who face significantly higher penalties for unlawfully reentering the United States after previously having been removed and authorizes sentences of imprisonment up to 20 years as possible penalties.

Some commenters asserted that the Departments improperly concluded that aliens who have been convicted of such offenses are per se dangers to the community, as recidivist offenders of the law, because the NPRM did not consider whether an alien's prior offenses were serious. *See* 84 FR at 69648.

Commenters asserted that the proposed limitation would violate Article 31(1) of the Refugee Convention, which generally prohibits imposing penalties based on a refugee's manner of entry or presence in the country. Commenters stated that this is a critical principle 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.'' Commenters stated that the NPRM did not sufficiently explain how the proposed limitation was consistent with the Convention.

Commenters also asserted that the proposed limitation undermined congressional intent and was not consistent with other provisions in the Act. Specifically, commenters stated that Congress, in accordance with international treaty obligations, has ''clearly supported the right to claim asylum anywhere on the U.S. border or at a land, sea, or air port of entry'' for almost 40 years. The commenters cited the Refugee Act, where, they stated, Congress authorized asylum claims by any foreign national ''physically present in the United States or at a land border or port of entry.'' The commenters stated that Congress later expressly reaffirmed this position in enacting section 208(a)(1) of the Act (8 U.S.C. 1158(a)(1)), which states that ''[a]ny alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival * * *)'' may apply for asylum. Commenters believed that this provision ''reflected Congress's ongoing intent to comply with international law, as well as its recognition that allowing an applicant for refugee status to assert a claim for asylum at any point along a land border is a necessary component of essential refugee protections.''

Commenters also asserted that the proposed limitation was inconsistent with the Act because it would treat all immigration violations as just as serious as those violations that should fall under the particularly serious crime bar, thus rendering meaningless the limiting language of ''particularly serious crimes'' in the statute. *See* INA 208(b)(2)(A)(ii) (8 U.S.C. 1158(b)(2)(A)(ii)).

Commenters asserted that the proposed limitation was inconsistent with any of the other bars previously recognized by the BIA or the circuit courts because the crime of illegal reentry under section 276 of the Act (8 U.S.C. 1326) has no element of danger or violence to others and has no victim.

Commenters stated that the BIA and the circuit courts have also recognized that an alien's manner of entry should have little effect on eligibility for asylum. *See, e.g., Hussam F.* v. *Sessions,* 897 F.3d 707, 718 (6th Cir. 2018) (holding that it was an abuse of discretion to deny asylum as a matter of discretion when the only negative factor was the alien's ''intentional failure to disclose that his passport was obtained in a non-traditional manner''); *Zuh* v. *Mukasey,* 547 F.3d 504, 511 n.4 (4th Cir. 2008) (''When an alien uses fraudulent documents to escape imminent capture or further persecution, courts and [immigration judges] may give this factor little to no weight.''); *Huang* v. *INS,* 436 F.3d 89, 100 (2d Cir. 2006) (''As with peripheral embellishments, if illegal manner of flight and entry were enough independently to support a denial of asylum, we can readily take notice, from the facts in numerous asylum cases that come before us, that virtually no persecuted refugee would obtain asylum. It follows that Wu's manner of entry, on the facts in this record, could not bear the weight given to it by the [immigration judge].''); *Mamouzian* v. *Ashcroft,* 390 F.3d 1129, 1138 (9th Cir. 2004) (''[I]n order to secure entry to the United States and to escape their persecutors, genuine refugees may lie to immigration officials and use false documentation.''); *Matter of Pula,* 19 I&N Dec. at 473–74 (holding that the circumvention of the immigration laws is one factor for consideration).

Commenters stated that asylum seekers are often motivated to illegally reenter the United States after having been deported to seek protection from harm rather than for criminal purposes, and that individuals who legitimately fear returning to their countries of origin have been criminally prosecuted under section 276 of the Act (8 U.S.C. 1326). Commenters were concerned that the proposed bar would further criminalize vulnerable individuals fleeing persecution and would result in denial of meritorious claims for asylum. Commenters opined that such individuals should not be barred from asylum.

Commenters stated that the Departments did not take into consideration that trafficking victims may have reentered the United States without authorization ''either because they were smuggled in by [a] trafficker, or because they were removed by the U.S., and then returned to find safety.''

Commenters stated that ''racial and ethnic disparity in the number of sentenced offenders is even more pronounced in the context of illegal reentry'' and that ''latinx immigrants are disproportionately impacted by over-prosecution of illegal reentry offenses and harsh sentencing of illegal reentry convictions.''

Some commenters described anecdotes of ''clients who have had to enter the United States without inspection due to cartel kidnappings, fears of being separated at the border, or misinformation by coyotes.'' One commenter stated that juveniles who were apprehended at the border and placed in Department of Health and Human Services (''HHS'') Office of Refugee Resettlement (''ORR'') custody might request to return to their country

of origin due to ''detention fatigue.'' The commenter stated that, upon return, these juveniles might face the same or new persecution, forcing them to flee once again.

One commenter stated that this proposed limitation was unnecessary because many convictions under section 276 of the Act (8 U.S.C. 1326) already qualify as aggravated felonies. INA 101(a)(43)(O) (8 U.S.C. 1101(a)(43)(O)) (providing that ''an offense described in section 1325(a) [illegal entry] or 1326 of this title [illegal reentry] committed by an alien who was previously deported on the basis of an [aggravated felony as defined by section 101(a)(43) of the Act (8 U.S.C. 1101(a)(43))]'' is an aggravated felony). Additionally, commenters stated that the proposed limitation was unnecessary because individuals who are convicted under section 276 of the Act (8 U.S.C. 1326) are also subject to reinstatement of a prior order of removal under section 241(a)(5) of the Act (8 U.S.C. 1231(a)(5)), and, thus, are barred from applying for asylum if the prior order is reinstated. *See* INA 241(a)(5) (8 U.S.C. 1231(a)(5)) (stating that an alien whose ''prior order of removal is reinstated * * * is not eligible and may not apply'' for any relief under the INA); 8 CFR 1208.31(e), (g)(2), 1241.8(e). The commenters suggested that the Departments inappropriately expanded the bar to categorically exclude anyone convicted of illegal reentry.

Some commenters stated that the proposed limitation was improper because underlying removal orders that are the basis for an illegal reentry conviction are often incorrectly issued and do not withstand legal scrutiny.

Commenters expressed concern that individuals who attempt illegal reentry into the United States to flee persecution may have been previously removed from the United States without being aware of their right to apply for asylum. Commenters opined that such individuals ''would not have knowingly abandoned their right.'' Commenters also stated that some individuals may have been prevented from seeking asylum during prior entries.

Commenters asserted that asylum seekers who illegally reenter could have been incorrectly found to lack a credible fear in prior credible fear interviews. Some commenters stated that asylum seekers with legitimate claims may have been previously removed because they were unable to establish eligibility for relief without adequate access to legal representation. Some commenters asserted that there are credible reports that DHS officers do not comply with requirements to inform individuals subject to expedited removal of their rights or to refer those with a fear of return to asylum officers for credible fear screenings, even when requested, and that DHS officers have engaged in harassment or the spread of misinformation that interferes with individuals' abilities to pursue asylum. One commenter stated that there is a higher risk that credible fear interviews may result in erroneous denial because border patrol officers, not asylum officers, have been conducting asylum interviews. Commenters proposed that the illegal reentry bar to asylum eligibility would ''essentially punish asylum seekers for the failure of DHS officers to follow the agency's own rules.'' Commenters stated that preserving discretion, rather than implementing a categorical bar, would ensure that meritorious asylum claims are heard and correct previous errors.

Some commenters stated that the Departments did not take into account that illegal reentry ''may be the only possible option'' for asylum applicants. Commenters asserted that ''current U.S. violations of international and domestic law regarding access to territory'' further intensified this proposition. Commenters stated that they believed that a number of the Executive Branch's administrative policies—such as (1) ''metering'' at the border; (2) the Migrant Protection Protocols (''MPP''), *see* DHS, *Policy Guidance for Implementation of the Migrant Protection Protocols* (Jan. 25, 2019), *https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf;* (3) the ''third-country transit bar,'' *see* Asylum Eligibility and Procedural Modifications, 84 FR 33829 (July 16, 2019); and (4) international asylum cooperative agreements, *see* Implementing Bilateral and Multilateral Asylum Cooperative Agreements Under the Immigration and Nationality Act, 84 FR 63994 (Nov. 19, 2019)—drive asylum seekers to enter illegally rather than wait to present themselves at a port of entry, which in turn subjects them to the illegal reentry bar. Commenters suggested that, given these policies, the Departments incorrectly asserted that aliens who have previously been removed from the United States may present themselves at a port of entry. *See* 84 FR at 69648. One commenter suggested that many individuals who are driven to enter the United States unlawfully due to these policies do so with the intention of turning themselves in to U.S. Border Patrol authorities. Commenters also raised concerns that the proposed limitation would ''condemn to persecution those who are simply trying to enter the [United States] to reunite with their family and community.'' Commenters were also concerned that individuals with convictions under section 276 of the Act (8 U.S.C. 1326) would be punished twice for the same crime by also being barred from asylum.

Some commenters stated that the NPRM unfairly punished individuals who have fled persecution multiple times or who have faced persecution arising after they had been removed, resulting in multiple unlawful entries. Commenters stated that refugee protection principles upon which asylum law is based require newly arising claims to be examined. Commenters specifically stated that, in proposing the illegal reentry bar, the Departments did not consider that immigrant survivors of violence who are removed to their countries of nationality may face violent retaliation and possibly death at the hands of their abusers or perpetrators and may flee the same perpetrators of domestic and sexual violence multiple times. Commenters asserted that a discretionary assessment was necessary to ensure that meritorious claims are heard.

Response: The Departments disagree with commenters who oppose the rule's additional limitation on asylum eligibility for those who have been convicted of illegal reentry under section 276 of the Act (8 U.S.C. 1326). The Departments have appropriately exercised their delegated authority to impose additional limitations on asylum eligibility per section 208(b)(2)(C) of the Act (8 U.S.C. 1158(b)(2)(C)).

First, the Departments clarify that this rule, like the proposed rule, designates these offenses as additional limitations on asylum eligibility pursuant to INA 208(b)(2)(C) (8 U.S.C. 1158(b)(2)(C)).[21] *See* 8 CFR 208.13(c)(6), 1208.13(c)(6). Regardless of commenters' concerns regarding the dangerousness of these crimes, section 208(b)(2)(C) of the Act (8 U.S.C. 1158(b)(2)(C)) offers a discrete basis

[21] Although the Departments at times cited both the authority at section 208(b)(2)(B)(ii) of the Act (8 U.S.C. 1158(b)(2)(B)(ii)) to designate offenses as a particularly serious crime and the authority at section 208(b)(2)(C) of the Act (8 U.S.C. 1158(b)(2)(C)) to establish additional limitations on asylum eligibility in support of the designation of a subset of the included bars in the proposed rule, *see* 84 FR at 69645–54, the references to the authority to designate additional particularly serious crimes highlighted an alternative basis for the inclusion of most of the new bars to asylum eligibility and sought to elucidate the serious nature of these crimes and the Departments' reasoning for including these offenses in the new provisions. Further discussion of the interaction of the rule with the ''particularly serious crime'' bar is set out above in section II.C.2.a.i.

under which the Departments may designate these offenses as bases for ineligibility. Although the ''particularly serious crime'' designation would justify the conclusion that an alien is dangerous, *see* section 208(b)(2)(A)(ii) of the Act (8 U.S.C. 1158(b)(2)(a)(ii)) (''the alien, having been convicted by final judgment of a particularly serious crime, constitutes a danger to the community of the United States''), the Attorney General's and the Secretary's authorities to set forth additional limitations and conditions on asylum eligibility under section 208(b)(2)(C) of the Act (8 U.S.C. 1158(b)(2)(C)) require only that such limitations or conditions be ''consistent with [section 208 of the Act (8 U.S.C. 1158)].'' Thus, even assuming, arguendo, that the offenses designated by the final rule do not necessarily reflect an alien's dangerousness, the Attorney General and the Secretary retain the authority to promulgate the new bar. Accordingly, the Departments are unpersuaded by commenters' concerns regarding whether these offenses may not pose a danger to the community because such a finding is not required under section 208(b)(2)(C) of the Act (8 U.S.C. 1158(b)(2)(C)).

With respect to commenters who expressed concern that the proposed limitation would violate Article 31 of the Refugee Convention, as well as undermine congressional intent and established case law, the Departments note that the rule's limitations on eligibility for asylum are consistent with Article 31 of the Refugee Convention. Courts have held, in the context of upholding the bar on eligibility for asylum in reinstatement proceedings under section 241(a)(5) of the INA, 8 U.S.C. 1231(a)(5), that limiting the ability to receive asylum does not constitute a prohibited ''penalty'' under Article 31(1) of the Refugee Convention.[22] *Cazun,* 856 F.3d at 257 & n.16; *Mejia,* 866 F.3d at 588.

The proposed rule is also consistent with Article 34 of the Refugee Convention, concerning assimilation of refugees, as implemented by section 208 of the INA, 8 U.S.C. 1158. Section 208 of the INA reflects that Article 34 is precatory and not mandatory, and accordingly does not provide that all refugees shall receive asylum. *See Cardoza-Fonseca,* 480 U.S. at 441; *Garcia,* 856 F.3d at 42; *Cazun,* 856 F.3d at 257 & n.16; *Mejia* v. *Sessions,* 866 F.3d 573, 588 (4th Cir. 2017); *R–S–C,* 869 F.3d at 1188; *Ramirez-Mejia,* 813 F.3d at 241. As noted above, Congress has long recognized the precatory nature of Article 34 by imposing various statutory exceptions and by authorizing the creation of new bars to asylum eligibility through regulation. Courts have likewise rejected arguments that other provisions of the Refugee Convention require every refugee to receive asylum. Courts have also rejected the argument that Article 28 of the Refugee Convention, governing issuance of international travel documents for refugees ''lawfully staying'' in a country's territory, mandates that every person who might qualify for withholding must also be granted asylum. *Garcia,* 856 F.3d at 42; *R–S–C,* 869 F.3d at 1188. Additionally, as noted above, the United States implemented the non-refoulement obligation of Article 33(1) of the Refugee Convention through the withholding-of-removal provision at section 241(b)(3) of the Act (8 U.S.C. 1231(b)(3)), and the non-refoulement obligation of the CAT under the CAT regulations, rather than through the asylum provisions at section 208 of the Act (8 U.S.C. 1158). *See Cardoza-Fonseca,* 480 U.S. at 429, 440–41. Individuals who may be barred from asylum by the rule remain eligible to seek withholding of removal and protection under CAT in accordance with non-refoulement obligations.

Additionally, as noted in the NPRM, the statutory bar on applying for asylum and other forms of relief when an order of removal is reinstated has been upheld by every circuit to consider the question. 84 FR at 69648; *see Garcia* v. *Sessions,* 873 F.3d 553, 557 (7th Cir. 2017), *cert. denied,* 138 S. Ct. 2648 (2018); *R–S–C,* 869 F.3d at 1189; *Mejia,* 866 F.3d at 587; *Garcia,* 856 F.3d at 30; *Cazun,* 856 F.3d at 260; *Perez-Guzman* v. *Lynch,* 835 F.3d 1066, 1082 (9th Cir. 2016); *Jimenez-Morales* v. *U.S. Att'y Gen.,* 821 F.3d 1307, 1310 (11th Cir. 2016); *Ramirez-Mejia* v. *Lynch,* 794 F.3d 485, 489–90 (5th Cir. 2015); *Herrera-Molina* v. *Holder,* 597 F.3d 128, 137–38 (2d Cir. 2010). This reflects a broad understanding that individuals who repeatedly enter the United States unlawfully should not be eligible for the discretionary benefit of asylum and that limiting such eligibility does not conflict with section 208(a) of the Act (8 U.S.C. 1158(a)).

The Departments disagree with commenters' assertions that current administrative practices prevent asylum seekers from lawfully presenting themselves at the border. In any event, commenters' concerns referencing such policies or practices are outside the scope of this rulemaking.

With respect to commenters' concerns that the rule should not apply to those who unlawfully reentered the United States because of their desire to be reunited with family members living in the United States or to individuals who have been victims of trafficking or smuggling, the Departments believe that evaluations of mitigating factors or criminal culpability based on motives are more appropriately reserved for criminal proceedings. As stated in the NPRM, the Departments believe it is reasonable to limit eligibility for asylum to exclude aliens convicted of illegal reentry because this type of offense demonstrates that an alien has repeatedly flouted the immigration laws. *See* 84 FR at 69648. The Departments have a legitimate interest in maintaining the orderly and lawful admission of aliens into the United States. Aliens convicted of illegal reentry have engaged in conduct that undermines that goal.

In response to commenters who suggested that the rule would result in denial of meritorious claims, the Departments note that those with a legitimate fear of persecution or torture may still apply for statutory withholding of removal or CAT withholding and deferral, forms of protection that this final rule does not affect. Additionally, these commenters misapprehend the purpose of this rulemaking. Awarding the discretionary benefit of asylum to individuals described in this rule would, among other things, encourage lawless behavior and subject the United States and its communities to the dangers associated with the crimes or conduct in which such persons have engaged. The Departments have appropriately exercised their authority to impose additional limitations on asylum eligibility to bar such individuals from that relief. Accordingly, those persons do not have meritorious asylum claims. By definition, if an applicant is ineligible for the discretionary benefit of asylum because of this rule, or any other statutory or regulatory limitation, he or she does not have a meritorious claim for asylum.

The Departments disagree with commenters' concerns that individuals with convictions under section 276 of the INA (8 U.S.C. 1326) would be punished twice for the same crime by

[22] The Ninth Circuit recently indicated—erroneously, in the view of the Departments—that removal can be considered a ''penalty'' under Article 31(1) of the Refugee Convention. *E. Bay Sanctuary Covenant* v. *Trump,* 950 F.3d 1242, 1276 (9th Cir. 2020). In doing so, however, the Ninth Circuit cited the Supreme Court's decision in *Padilla,* 559 U.S. at 364, which discussed immigration penalties in terms of criminal proceedings, not Article 31(1) of the Refugee Convention. Further, the Ninth Circuit noted its observation solely in the context of limiting asylum eligibility based on manner of entry, and the court did not reach other asylum restrictions such as this rule.

being barred from asylum. The Departments emphasize that immigration proceedings are civil in nature, and thus denial of relief from removal is not a punishment, particularly with respect to a discretionary benefit such as asylum. *Cf. Mejia,* 866 F.3d at 588 (''We therefore perceive no basis for concluding that depriving aliens, upon illegal re-entry, additional opportunities to apply for discretionary relief constitutes a 'penalty.'''). In addition, commenters' logic would have far-reaching implications that would undermine the entire statutory scheme that imposes any immigration consequences on account of an alien's criminal convictions, including eligibility for forms of relief or removability from the United States, *see, e.g.,* INA 212(a)(2) (8 U.S.C. 1182(a)(2)) (criminal grounds of inadmissibility); 237(a)(2) (8 U.S.C. 1227(a)(2)) (criminal grounds of deportability), but there has never been any reason to question the framework in such a manner, *see, e.g., Nijhawan,* 557 U.S. at 36 (analyzing whether convictions for certain crimes constituted aggravated felonies for purposes of the INA without questioning whether immigration penalties could be imposed for those convictions).

d. Criminal Street Gang Activity

Comment: Several commenters opposed the imposition of a bar to asylum eligibility based on the furtherance of criminal street gang activity.

As an initial matter, commenters noted that, under the current asylum system, a conviction for an offense categorized as a gang-related crime would bar an individual from asylum in most cases. However, commenters expressed concern that the NPRM extends culpability for gang-related crime beyond offenses categorized as gang-related crimes and would also bar individuals from asylum if an adjudicator ''knows or has reason to believe the crime was committed in furtherance of criminal street gang activity.'' Commenters asserted that the standard for this bar is so broad that individuals not associated with gangs could be included in this category and barred from asylum.

At the same time, commenters argued that the proposed rule does not sufficiently detail how an individual qualifies as a street gang member or how an activity is to be categorized as gang-related. As a result, commenters expressed concern that the proposed rule granted immigration adjudicators too much latitude to determine whether a crime fits into the vague category of supporting, promoting, or furthering the activity of a criminal street gang. Commenters were concerned that information in databases of gang-related crimes or factors such as where the criminal activity occurred may lead to improper categorization of gang-related activity. Commenters were similarly concerned that the bar does not account for the circumstances of the offense, such as whether coercion or threats forced the asylum applicant to undertake the criminal activity. Commenters asserted that immigration adjudicators should, at a minimum, be permitted to consider such factors as coercion or duress prior to granting or denying asylum.

Commenters asserted that the ''reason to believe'' standard is ultra vires and unconscionably limits asylum eligibility for those most in need of protection. Commenters asserted that the ''reason to believe'' standard grandly expands the number of convictions for which an eligibility analysis is required and would ''sweep[] in even petty offenses that would otherwise not trigger immigration consequences.'' Commenters asserted, moreover, that the ''reason to believe'' standard for determining whether there is a sufficient link between the underlying conviction and the gang-related activity is ''overly broad and alarmingly vague.''

Additionally, commenters argued that the ''reason to believe'' standard places the adjudicator in the role of a second prosecutor and requires the adjudicator to decide, without the benefit of a criminal trial and attendant due process of law, whether a crime could have been potentially gang-related. At the same time, commenters stated that immigration adjudicators, who are not criminologists, sociologists, or criminal law experts, would be required to analyze past misdemeanor convictions to determine whether there is a link to gang activity, regardless of whether the individual was also charged or convicted of a street gang offense.

Commenters cited concerns regarding the admission of ''all reliable evidence'' to determine whether there was ''reason to believe'' that the conduct implicated gang-related matters. They averred that this phrase was potentially limitless and that its scope required both parties to present fulsome arguments regarding an offense's possible gang connections. Moreover, commenters asserted that the proposed rule fails to articulate what type of evidence or non-adjudicated conduct may be considered by an adjudicator when determining whether a bar to asylum applies.

In addition, commenters expressed concern that permitting adjudicators to rely on ''all reliable evidence'' will result in immigration adjudicators relying on any type of evidence, including police reports, unsubstantiated or subsequently recanted hearsay statements, and discredited methods of gang identification, such as gang databases. Commenters asserted that this will result in a compounded disparate racial impact based on over-inclusion of young people of color in those gang databases. Commenters asserted that gang databases are ''notoriously inaccurate, outdated, and infected by racial bias.'' Additionally, commenters stated that gang databases are unregulated and that an individual may be included in a database simply based on ''living in a building or even neighborhood where there are gang members, wearing certain colors or articles of clothing, or speaking to people law enforcement believe to be gang members.''

One commenter referenced a decision of the Supreme Judicial Court of Massachusetts holding that the information contained in gang databases is hearsay, not independently admissible, and raises serious Confrontation Clause concerns. *Commonwealth* v. *Wardsworth,* 124 NE3d 662, 678–79 & nn.24–25 (Mass. 2019). That commenter also asserted that, despite the concern expressed by the Supreme Judicial Court of Massachusetts regarding the use of gang databases, immigration judges continue to regularly rely on such reports. By relying on such unreliable evidence, commenters averred, the proposed rule will exacerbate due process violations already occurring as a result of unsubstantiated gang ties.

Commenters further noted that, because these databases disparately affect young people of color, relying on these databases would multiply the harm already caused by racially disparate policing and racially disparate rates of guilty pleas to minor offenses. Commenters claimed that asylum seekers of color are subject to racially disparate policing, which results in racially disparate rates of guilty pleas to minor offense, and which also results in this population being erroneously entered and overrepresented in gang databases. In support of the inaccuracy of these databases, one commenter cited concerns that police departments falsify gang affiliations of youth encountered by police officers. As a result, commenters asserted, the proposed rule would ''invite extended inquiry into the character of young men of color'' who

may otherwise have meritorious asylum claims and who are already subject to racially suspect policing practices.

Commenters noted that police reports are inherently unreliable in the absence of the protections offered by the Confrontation Clause of the Sixth Amendment and the Federal Rules of Evidence, neither of which apply in immigration court. Regarding the unreliability of evidence, one commenter provided an example where neither the police officers nor the alleged victims were required to testify. Without this testimony, the commenter alleged, the immigration adjudicator would be unable to determine whether a victim had a motive to lie to the police, whether the victim later recanted his or her statements, or whether the police officer misunderstood some critical fact. Moreover, commenters asserted that, although immigration adjudicators would be unable to rely on uncorroborated allegations such as those contained in arrest reports, adjudicators could nevertheless shield denials based on such information by relying on discretion.

Commenters stated that the proposed rule would exacerbate due process violations that already occur as a result of unsubstantiated information about gang ties. Commenters claimed that asylum applicants are already subjected to wrongful denials of asylum based on allegations of gang activity made by DHS. Commenters alleged that DHS relies on unreliable foreign databases and ''fusion'' intelligence-gathering centers outside of the United States. For example, one commenter alleged that information regarding gang affiliations gathered from the fusion intelligence-gathering center in El Salvador has already been used against asylum seekers, despite having been found to be inaccurate. At the same time, commenters asserted that immigration adjudicators routinely premise enforcement, detention, and discretionary denials of relief on purported gang membership and often grant deference to gang allegations made by Immigration and Customs Enforcement (''ICE'') personnel. Commenters asserted that the already expanded use of gang databases to apprehend and remove foreign nationals has been widely criticized as an overbroad, unreliable, and often biased measure of gang membership and involvement.

Additionally, commenters expressed disagreement with the Departments' position that all gang-related offenses could be considered as particularly serious crimes. Commenters criticized the Departments' reliance on statistics from up to 16 years ago to demonstrate that gang members commit violent crimes and drug crimes. Commenters disagreed with the Departments' conclusion that all crimes that may be construed as connected to gang activity are particularly serious. Commenters asserted instead that it is illogical to argue that, because gang members may commit some violent crimes and drug crimes, all crimes committed by anyone remotely connected with a gang are particularly serious.

Commenters also asserted that the proposed rule will result in asylum seekers who live in economically distressed areas but who have a minor criminal conviction, for example for a property crime, being excluded from protection. Commenters asserted that including even minor crimes construed as gang-related in the ''particularly serious crime'' bar and preventing those individuals from accessing asylum is ''disingenuous at best, and tinged with racial animus at worst.'' Commenters asserted that this bar would perpetuate racial bias within the immigration court system.

Commenters asserted that the gang-related-crimes bar should not be introduced at all due to the complex nature of gang ties and the frequency with which individuals are mislabeled as being part of a gang. These commenters argued that the risk of erroneously barring legitimate asylum seekers from eligibility is too high. Another commenter noted that it was ''particularly cruel'' to create a bar related to gang offenses ''in the wake of this Administration's refusal to countenance gang violence as a ground to asylum.'' Moreover, commenters asserted that the INA and existing regulations already permit immigration adjudicators to deny asylum as a matter of discretion. Adding this new bar based on gang-related activity, according to these commenters, risks excluding bona fide asylum seekers from protection without adding any useful adjudicatory tool to the process.

Commenters noted that previous attempts to expand the grounds of removal and inadmissibility to include gang membership failed to pass both houses of Congress. One commenter noted concern that an individual could be erroneously convicted of a gang-related crime because of the widespread nature of gang activity in Central America. This commenter also expressed concern that, because gangs in Central America may act with impunity and ''often control a corrupt judiciary,'' an individual could be erroneously convicted of a crime for refusing to acquiesce to a gang's demands.

Response: As explained further in section II.C.2.a.i, the bar based on activity related to criminal street gangs is enacted pursuant to the Attorney General's and the Secretary's designated authorities to establish additional limitations and conditions on asylum. INA 208(b)(2)(C) (8 U.S.C. 1158(b)(2)(C)).[23] This authority requires such conditions and limitations to be consistent with section 208 of the Act (8 U.S.C. 1158) and does not require that the offenses meet a threshold of dangerousness or seriousness. *Compare* INA 208(b)(2)(C) (8 U.S.C. 1158(b)(2)(C)) (''The Attorney General may by regulation establish additional limitations and conditions, consistent with this section, under which an alien shall be ineligible for asylum under paragraph (1)''), *with* INA 208(b)(2)(B)(ii) (8 U.S.C. 1158(b)(2)(B)(ii)) *and* INA 208(b)(2)(A)(ii) (8 U.S.C. 1158(b)(2)(A)(ii)) (providing that ''[t]he Attorney General may designate by regulation offenses'' for which an alien would be considered a ''danger to the community of the United States'' by virtue of ''having been convicted by a final judgment of a particularly serious crime''). Although the Departments have determined that the included offenses involving criminal street gangs represent dangerous offenses and that the offenders represent particular dangers to society, *see* 84 FR at 69649–50, the Departments would nevertheless be acting within the authority of section 208(b)(2)(C) of the Act (8 U.S.C. 1158(b)(2)(C)) if commenters are correct that some offenses included are not connected to dangerousness. Section 208(b)(2)(C) of the Act (8 U.S.C. 1158(b)(2)(C) confers broad discretion on the Attorney General and the Secretary to establish a wide range of conditions on asylum eligibility, and the designation of criminal street gang-

[23] The proposed rule preamble cited both the authority at section 208(b)(2)(B)(ii) of the Act (8 U.S.C. 1158(b)(2)(B)(ii)) to designate offenses as a particularly serious crime and the authority at section 208(b)(2)(C) of the Act (8 U.S.C. 1158(b)(2)(C)) to establish additional limitations on asylum eligibility in support of the designation of gang-related crimes as bars to asylum eligibility. *Compare* 84 FR at 69650 (''Regardless, criminal street gangs-related offenses—whether felonies or misdemeanors—could reasonably be designated as 'particularly serious crimes' pursuant to 8 U.S.C. 1158(b)(2)(B)(ii).''), *with id.* (''Moreover, even if 8 U.S.C. 1158(b)(2)(B)(ii) did not authorize the proposed bar, the Attorney General and the Secretary would propose designating criminal gang-related offenses as disqualifying under 8 U.S.C. 1158(b)(2)(C).''). Nevertheless, the authority at section 208(b)(2)(C) (8 U.S.C. 1158(b)(2)(C)) aligns with the regulatory text and was used to support all of the categories of bars set out in the rule.

related offenses as defined in the rule as an additional limitation on asylum eligibility is consistent with the rest of the statutory scheme. For example, Congress's inclusion of other crime-based bars to asylum eligibility demonstrates the intent to allow the Attorney General and the Secretary to exercise the congressionally provided authority to designate additional types of criminal offenses or related behavior as bars to asylum eligibility. *See* INA 208(b)(2)(A)(ii), (iii) (particularly serious crime and serious nonpolitical crime) (8 U.S.C. 1158(b)(2)(A)(ii), (iii)). Moreover, Congress has expressly excluded from eligibility certain aliens who engage in conduct or commit crimes of a certain character or gravity, regardless of whether those aliens are ''dangerous'' to the United States, and regardless of whether those crimes have been formally designated as ''particularly serious.'' *See* INA 208(b)(2)(A)(i), (iii) (8 U.S.C. 1158(b)(2)(A)(i), (iii)). The Departments have concluded that criminal street gang-related offenses are sufficiently similar to such conduct and crimes that aliens who commit such offenses should not be rewarded with asylum and the many benefits that asylum confers.

Further, the Departments disagree with comments asserting the criminal street gang-related offenses are not necessarily indicative of a danger to the United States. *See* 84 FR at 69650. Specifically, the Departments believe that such offenses are strong indicators of recidivism and ongoing, organized criminality. *Id.* Based on the data and research articulated in the NPRM, the Departments believe that individuals who enter the United States and are then convicted of a crime related to criminal street gang activity present an ongoing danger to the community and should therefore be ineligible for asylum. Significantly, the Departments reject commenters' assertions that the Departments relied on data that was over 16 years old. Although one of the reports relied upon in the NPRM was published in 2004, additional studies and information were cited ranging from 2010 to 2015. *See* 84 FR at 69650. Additionally, the White House recently issued a fact sheet observing that ''[a]pproximately 38 percent of all murders in Suffolk County, New York, between January 2016 and June 2017'' were linked to a single criminal gang—MS–13—alone. The White House, *Protecting American Communities from the Violence of MS–13* (Feb. 6, 2020), *https://www.whitehouse.gov/briefings-statements/protecting-american-communities-violence-ms-13/; see also* Alan Feuer, *MS–13 Gang: 96 Charged in Sweeping Crackdown on Long Island,* N.Y. Times (Dec. 20, 2019), *https://www.nytimes.com/2019/12/20/nyregion/ms-13-long-island.html;* Proc. No. 9928, 84 FR 49187, 49187 (Sept. 13, 2019) (explaining that the DOJ is working with law enforcement in El Salvador, Guatemala, and Honduras to ''help coordinate the fight against MS–13, the 18th Street Gang, and other dangerous criminal organizations that try to enter the United States in an effort to ravage our communities,'' and that this partnership ''targets gangs at the source and works to ensure that these criminals never reach our borders''); *id.* (observing that, in 2017 and 2018, ICE officers ''made 266,000 arrests of aliens with criminal records, including those charged or convicted of 100,000 assaults, nearly 30,000 sex crimes, and 4,000 violent killings''). These more recent examples demonstrate the continued threat posed by gang-related crime.

The Departments disagree with commenters' assertions that the rule fails to sufficiently detail how an individual qualifies as a street gang member or how an activity is to be categorized as a gang-related event. As an initial matter, the rule does not purport to categorize individuals as street gang members. Rather, the inquiry is limited into whether an adjudicator knows or has reason to believe that a prior conviction for a Federal, State, tribal, or local crime was committed in support, promotion, or furtherance of criminal street gang activity. 84 FR at 69649. This rule defines ''criminal street gang'' by referencing how that term is defined in the convicting jurisdiction or, alternatively, as the term is defined in 18 U.S.C. 521(a). The Departments believe that the language of the Federal statute conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices, as do the definitions in the convicting jurisdictions. This rule leaves the determination of whether a crime was in fact committed ''in furtherance'' of gang-related activity to adjudicators in the first instance. As noted in the NPRM, to the extent that this type of inquiry may lead to concerns regarding inconsistent application of the bar, the Departments reiterate that the BIA is capable of ensuring a uniform approach. *See* 8 CFR 1003.1(e)(6)(i).

In response to commenters who suggested that the rule would result in denial of meritorious claims, the Departments note that those with legitimate fear of persecution or torture may still apply for statutory withholding of removal or protection under the CAT regulations, as discussed in section II.C.5. In addition, and as explained previously, these commenters misapprehend the purpose of this rulemaking. The Departments have concluded that persons subject to the new bars do not warrant asylum because awarding the discretionary benefit of asylum to such individuals would encourage lawless behavior, subject the United States to certain dangers, and otherwise undermine the policies underlying the statutory framework for asylum. These persons accordingly do not have meritorious asylum claims. And, because nothing in the INA precludes the imposition of these new bars, the fact that these persons' claims might otherwise be meritorious is irrelevant.

Regarding commenters' concerns with the ''reason to believe'' standard articulated in the rule, the Departments note that this standard is used elsewhere in the INA. For example, when considering admissibility, immigration judges consider whether there is reason to believe that the individual ''is or has been an illicit trafficker in any controlled substance.'' INA 212(a)(2)(C) (8 U.S.C. 1182(a)(2)(C)). In accordance with this provision, courts have upheld findings of inadmissibility in the absence of a conviction. *See Cuevas* v. *Holder,* 737 F.3d 972, 975 (5th Cir. 2013) (holding ''that an alien can be inadmissible under [INA 212(a)(2)(C) (8 U.S.C. 1182(a)(2)(C))] even when not convicted of a crime''); *Garces* v. *U.S. Att'y Gen.,* 611 F.3d 1337, 1345 (11th Cir. 2010) (stating that section 1182(a)(2)(C) of the Act (8 U.S.C. 1182(a)(2)(C)) renders an alien inadmissible based on a ''reason to believe'' standard, which does not require a conviction); *Lopez–Umanzor* v. *Gonzales,* 405 F.3d 1049, 1053 (9th Cir. 2005) (''Section 1182(a)(2)(C) does not require a conviction, but only a 'reason to believe' that the alien is or has been involved in drug trafficking.''). The bar on criminal street gang-related activity is narrower in scope than the inadmissibility charge based on illicit trafficking in that the bar in this rule still requires a conviction. As such, the Departments believe that the ''reason to believe'' standard is appropriately applied to the final rule.

Similarly, the ''all reliable evidence'' standard is not a new standard in immigration proceedings. Immigration judges routinely consider any relevant evidence provided in removal hearings by either party. 8 CFR 1240.1(c). Additionally, the BIA held, in the context of evaluating whether a crime constitutes a particularly serious crime,

that, once the elements of the offense are examined and found to potentially bring the offense within the ambit of a particularly serious crime, the adjudicator may consider all reliable information in making a ''particularly serious crime'' determination, including but not limited to the record of conviction and sentencing information. *Matter of N-A-M–,* 24 I&N Dec. at 337–38. The Ninth Circuit has held that the BIA's interpretation in *Matter of N-A-M-* is reasonable. *Anaya-Ortiz* v. *Holder,* 594 F.3d 673, 678 (9th Cir. 2010). Additionally, various circuit courts have applied the ''all reliable information'' standard articulated in *Matter of N-A-M-* in considering whether crimes are particularly serious. *See, e.g., Luziga* v. *Att'y Gen. U.S.,* 937 F.3d 244, 253 (3d Cir. 2019); *Marambo* v. *Barr,* 932 F.3d 650, 655 (8th Cir. 2019).

The Departments disagree with commenters' concerns about adjudicators' reliance on arrest reports and uncorroborated information. As an initial point, most asylum claims are based significantly on hearsay evidence that is uncorroborated by non-hearsay evidence. Such evidence, however, does not necessarily make an asylum claim unreliable or insusceptible to proper adjudication. Adjudicators assessing asylum applications are well versed in separating reliable from unreliable information, assigning appropriate evidentiary weight to the evidence submitted by the applicant and DHS, and determining whether corroborative evidence needs to be provided. *See* INA 208(b)(1)(B) (8 U.S.C. 1158(b)(1)(B)). Moreover, this rule does not provide adjudicators with unfettered discretion; instead, adjudicators must consider such evidence in the context of making a criminal street gang determination under the ''reason to believe'' standard. An asylum officer's assessment of eligibility necessarily must explain the consideration of the evidence of record as it applies to the evaluation of bars to asylum and the burden of proof, and it must also explain the exercise of discretion. Similarly, immigration judges are already charged with considering material and relevant evidence. 8 CFR 1240.1(c). To make this determination, immigration judges consider whether evidence is ''probative and whether its use is fundamentally fair so as not to deprive the alien of due process of law.'' *Ezeagwuna* v. *Ashcroft,* 325 F.3d 396, 405 (3d Cir. 2003) (quoting *Bustos-Torres* v. *INS,* 898 F.2d 1053, 1055 (5th Cir. 1990)). Nothing in this rule undermines or withdraws from this standard. Moreover, the Departments would not purport to impinge on an adjudicator's evidentiary determination or direct the result of such a determination. If aliens have concerns about the reliability of any evidence, aliens may challenge the reliability of that evidence as part of their arguments to the adjudicator. As a result, the Departments have concluded that concerns regarding the reliability of gang databases or other evidence are more properly addressed in front of the immigration judge or asylum officer in individual cases.

The Departments disagree with comments that adjudicators should have the discretion to determine whether factors such as coercion or duress affected an individual's involvement in criminal street gang-related activity. The Departments believe that criminal street gang-related activity is serious and harmful in all circumstances. As stated in the NPRM, ''[c]riminal gangs of all types * * * are a significant threat to the security and safety of the American public.'' 84 FR at 69650. Accordingly, the Departments have concluded that aliens who have been convicted of such offenses do not merit the discretionary benefit of asylum, even if their gang involvement was potentially the result of coercion or some other unique circumstance. In addition, the Departments believe that considerations regarding criminal culpability for criminal street gang-related offenses would be best addressed during the individual's underlying criminal proceedings.

Commenters' assertions that the rule will exacerbate harms caused by racially disparate policing practices or that the result of this rule will disproportionately affect people of color are outside the scope of this rulemaking. *Cf. San Francisco,* 944 F.3d at 803–04 (''Any effects [of the public charge rule] on [healthcare] entities are indirect and well beyond DHS's charge and expertise.''). The rulemaking does not address actual or alleged injustices of the criminal justice system, as referenced by the commenters. Moreover, the rule was not racially motivated, nor did racial animus or a legacy of bias play any role in the publication of the rule. Rather, this final rule is being published to categorically preclude from asylum eligibility certain aliens with various criminal convictions because the Departments determined that individuals engaging in criminal activity that is related to criminal street gangs present a sufficient danger to the United States to warrant exclusion from the discretionary benefit of asylum. To the extent that the rule disproportionately affects any group referenced by the commenters, any such impact is beyond the scope of this rule, as this rule was not drafted with discriminatory intent towards any group, and the provisions of the rule apply equally to all applicants for asylum.

e. Driving Under the Influence of an Intoxicant

Comment: Commenters opposed the proposed categorical bar to asylum based on a DUI conviction. Commenters stated that the proposed categorical bars encompass crimes with a wide range of severity, and commenters asserted that DUI does not rise to a comparable level of severity as a particularly serious crime warranting its promulgation as a categorical bar to asylum. Other commenters similarly stated that, because DUI does not involve conduct that is necessarily dangerous on its own, the offense is not serious enough to support a categorical bar to asylum. Commenters provided examples of allegedly low-level convictions for DUI, based on examples such as a court concluding that, when ''the key is in the ignition and the engine is running, a person 'operates' a vehicle, even if that person is sleeping or unconscious,'' *State* v. *Barac,* 558 SW3d 126, 130 (Mo. Ct. App. 2018), or when a person operates a vehicle while under the influence but no injury to another person results. Accordingly, commenters asserted that DUI is not necessarily serious or sufficiently dangerous to warrant a categorical bar. One commenter summarized the concern by stating that offenses related to DUI are ''excessively overbroad in the convictions and conduct covered[ ] and are not tailored to identify conduct that is 'serious' or identify individuals who pose a danger to the community.''

Commenters also asserted that creating a blanket categorical bar to asylum based on a DUI conviction would eliminate the opportunity for adjudicators to consider the facts before them in exercising discretion. Commenters stated that adjudicators should consider the severity of the DUI offense given relevant facts, such as the applicant's criminal history, the underlying cause of the applicant's criminal record involving DUI, the applicant's efforts towards rehabilitation, the length of time passed since the conviction, the applicant's potential danger to the community, and the applicant's risk of persecution if returned to his or her home country.

Commenters noted that multiple DUI convictions are not an absolute bar to cancellation of removal under INA 240A(b) (8 U.S.C. 1229b(b)) and cited the Attorney General's opinion that

such offenses were inconclusive of an individual's character, thus allowing individuals to rebut the presumption with evidence of good character and rehabilitation. *Matter of Castillo-Perez,* 27 I&N Dec. 664 (A.G. 2019). Commenters stated that, ''if individuals seeking discretionary cancellation of removal are afforded the opportunity to show that they merit permanent residence in spite of their prior convictions for driving under the influence, it is nonsensical to promulgate a rule denying asylum seekers that same opportunity.''

Finally, commenters noted that low-income people and people of color are more likely to be pulled over and charged with DUI. These commenters alleged that the proposed rule accordingly exacerbates the unjust criminal justice system by including these provisions as a bar to asylum eligibility.

Response: The Departments disagree that DUI does not warrant a categorical bar to asylum eligibility.

Although commenters provided limited examples of times where an individual convicted of a DUI offense fortunately may not have caused actual harm to others, these sorts of DUI convictions alone would not render an alien ineligible for asylum under this rule. The final rule bars aliens with DUI convictions from asylum eligibility under two grounds in 8 CFR 208.13(c)(6)(iii), (c)(6)(iv) and 1208.18(c)(6)(iii), (c)(6)(iv). First, under 8 CFR 208.13(c)(6)(iii) and 1208.13(c)(6)(iii), a single DUI offense would only be disqualifying if it ''was a cause of serious bodily injury or death of another person.'' Second, under 8 CFR 208.13(c)(6)(iv)(A) and 1208.13(c)(6)(iv)(A), any second or subsequent DUI offense would be disqualifying. Accordingly, a single conviction that does not cause bodily injury or death to another would not be a bar to asylum, but would continue to be considered by adjudicators in determining whether an alien should receive asylum as a matter of discretion.

The Departments maintain that DUI convictions, particularly those covered by this rule (based on actions that cause serious bodily injury or death or that indicate recidivism, along with the risk of harm from such recurrent dangerous behavior), constitute serious, dangerous activity that threatens community safety. First, the Departments reiterate that DUI laws exist, in part, to protect unknowing persons from the dangerous people who ''choose to willingly disregard common knowledge that their criminal acts endanger others.'' 84 FR at 69651. Second, the Supreme Court and other Federal courts have repeatedly echoed the gravity of such acts. *See Begay* v. *United States,* 553 U.S. 137, 141 (2008) (''Drunk driving is an extremely dangerous crime.''), *abrogated on other grounds by Johnson* v. *United States,* 576 U.S. 591 (2015); *United States* v. *DeSantiago-Gonzalez,* 207 F.3d 261, 264 (5th Cir. 2000) (''[T]he very nature of the crime * * * presents a 'serious risk of physical injury' to others[.]''); *Marmolejo-Campos* v. *Holder,* 558 F.3d 903, 913 (9th Cir. 2009) (''[T]he dangers of drunk driving are well established * * *.''); *see also Holloway,* 948 F.3d at 173–74 (''A crime that presents a potential for danger and risk of harm to self and others is 'serious.' * * * 'There is no question that drunk driving is a serious and potentially deadly crime * * *. The imminence of the danger posed by drunk drivers exceeds that at issue in other types of cases.' '' (quoting *Virginia* v. *Harris,* 558 U.S. 978, 979–80 (2009) (Roberts, C.J., dissenting from denial of writ of certiorari))).

It is well within the Departments' authority to condition asylum eligibility based on a DUI conviction. The INA authorizes the Attorney General and the Secretary to establish by regulation additional limitations and conditions on asylum eligibility, INA 208(b)(2)(C), (d)(5)(B) (8 U.S.C. 1158(b)(2)(C), (d)(5)(B)), and Federal courts have upheld BIA discretionary denials of asylum based on DUI convictions, even in circumstances where a DUI conviction does not constitute a particularly serious crime. *See, e.g., Kouljinski* v. *Keisler,* 505 F.3d 534, 543 (6th Cir. 2007). For the reasons above, DUI is a serious crime that represents a blatant disregard for the laws and societal values of the United States; accordingly, the final rule limits asylum eligibility by considering a DUI conviction to be a categorical bar to asylum.

For these reasons, the Departments decline to tailor the bar to precisely identify serious conduct, evaluate severity of conduct, identify individuals who pose a danger to communities, or provide discretion to adjudicators, as suggested by commenters. The Departments will no longer afford discretion to adjudicators considering DUI convictions in the circumstances defined by this rule; elimination of such discretion is, again, well within the Departments' authority. *See* INA 208(b)(2)(C), (d)(5)(B) (8 U.S.C. 1158(b)(2)(C), (d)(5)(B)).

Regarding DUI convictions in the context of cancellation of removal under INA 240A(b) (8 U.S.C. 1229b(b)), the Departments note that cancellation of removal is separate from asylum, and this rule contemplates asylum only. *See* 84 FR at 69640 (stating that the Departments propose to amend their respective regulations governing the bars to ''asylum eligibility''). Although both forms of relief may eventually lead to lawful permanent resident status in the United States, cancellation of removal generally applies to a different class of aliens, and its conditions and requirements are different from asylum relief.[24] *Compare* INA 240A(b) (8 U.S.C. 1229b(b)), *with* INA 208 (8 U.S.C. 1158)). Cancellation of removal requires ''good moral character,'' which asylum relief neither requires nor mentions. Thus, references to DUI convictions and their relative effect on the good moral character requirement for cancellation of removal are irrelevant to asylum eligibility. Commenters conflate two separate forms of relief from removal intended for separate populations with separate eligibility provisions.

Likewise, the Attorney General's statement in *Matter of Castillo-Perez,* 27 I&N Dec. at 671—that multiple DUI convictions were not necessarily conclusive evidence of an individual's character—was made in regards to eligibility for cancellation of removal, not asylum.[25] Accordingly, that case has no bearing on this rulemaking.

[24] Generally, cancellation of removal is a discretionary form of relief in which the Attorney General may cancel removal and adjust status to lawful permanent resident (''LPR'') of an otherwise inadmissible or deportable alien who has been physically present in the United States for a continuous period of not less than 10 years preceding the date of the application; has been a person of good moral character during such period; has not been convicted of an offense under INA 212(a)(2), 237(a)(2), or 237(a)(3) (8 U.S.C. 1182(a)(2), 1226(a)(2), or 1226(a)(3)); and establishes that removal would result in exceptional and extremely unusual hardship to the applicant's U.S. citizen or LPR spouse, parent, or child. *See* INA 240A(b) (8 U.S.C. 1229b(b)). In contrast, asylum is a discretionary benefit that precludes an alien from removal, creates a pathway to LPR status and citizenship, and affords various ancillary benefits such as work authorization, opportunity for certain family members to obtain derivative asylee and LPR status, and authorization, in some cases, to receive certain financial assistance from the government. *See* INA 208 (8 U.S.C. 1158). Asylum eligibility includes the following factors: The alien must be physically present or arrive in the United States, the alien must meet the definition of ''refugee'' under INA 101(a)(42)(A) (8 U.S.C. 1101(a)(42)(A)), and the alien must otherwise be eligible for asylum in that no statutory bars or limitations apply. *See* INA 208(a)(1) (8 U.S.C. 1158(a)(1)), INA 208(b)(1)(A) (8 U.S.C. 1158(b)(1)(A)), INA 208(b)(2) (8 U.S.C. 1158(b)(2)) and 8 CFR 1240.8(d); *see also* 84 FR at 69642.

[25] Nevertheless, the Attorney General in the context of discussing eligibility for cancellation of removal as a matter of discretion made clear that ''[m]ultiple DUI convictions are a serious blemish on a person's record and reflect disregard for the safety of others and for the law.'' *Castillo-Perez,* 27 I&N Dec. at 670. This reasoning as to the

Continued

In sum, the rulemaking categorically bars asylum eligibility for those with one or more DUI convictions in order to protect communities from the dangers of driving under the influence. *See* 84 FR at 69650–51; *see also* 84 FR at 69640. It does not consider other factors of apparent concern to commenters, such as financial status, race, or nationality. The rulemaking also does not address actual or alleged injustices of the criminal justice system, as referenced by the commenters. Such considerations are outside the scope of this rulemaking.

f. Battery or Domestic Violence

Comment: Commenters opposed the proposed bar to asylum based on domestic assault or battery, stalking, or child abuse. Broadly, commenters opposed a bar to asylum based on ''mere allegations of conduct without any adjudication of guilt'' for several reasons. First, commenters stated that a bar based on conduct, not convictions, violates INA 208(b)(2)(A) (8 U.S.C. 1158(b)(2)(A)), which bars noncitizens who, ''having been convicted by a final judgment of a particularly serious crime, constitute[ ] a danger to the community of the United States.'' In accordance with the plain text and judicial interpretation of this section of the Act, commenters asserted, the statute prohibits application of the ''particularly serious crime'' bar based only on non-adjudicated facts, thereby precluding separation of ''the seriousness determination from the conviction.'' Accordingly, commenters stated that the proposed application of the ''particularly serious crime'' bar based on conduct involving domestic assault or battery directly contradicts the statute, which requires a final judgment of conviction. Commenters also alleged that the proposed rule violates the Supreme Court's holding that ''conviction'' refers to the ''crime as generally committed,'' rather than the actual conduct. *See Sessions* v. *Dimaya,* 138 S. Ct. 1204, 1217 (2018); *see also Delgado,* 648 F.3d at 1109 n.1 (Reinhardt, J., concurring in part and concurring in the judgment). One commenter asserted that the statute ''only bars asylum seekers for alleged conduct in exceptional circumstances like potential terrorist activity or persecution of others. * * * [C]onduct-based asylum bars should be used only in very limited circumstances, and in this case should not be expanded.''

Relatedly, commenters raised constitutional concerns. Commenters cited constitutional principles that ''individuals have a right to defend themselves against criminal charges and are presumed innocent until proven guilty. Individuals should not be excluded from asylum eligibility based on allegations of criminal misconduct that have not been proven in a court of law.'' Accordingly, commenters opposed the NPRM because it ''deprives the individual the opportunity to challenge the alleged behavior and does away with the presumption of innocence.'' More specifically, a commenter claimed that, under the NPRM, an incident and subsequent arrest related to domestic assault or battery would trigger an inquiry into the alien's conduct, thereby undermining the criminal justice system and constitutional due process protections for criminal defendants who may not have access to counsel. The commenter alleged that, regardless of whether the alien was convicted of the offense, the alien may still be barred from asylum relief following an adjudicator's independent inquiry into the incident.

Commenters also stated that a bar based on conduct alone, especially in the context of domestic assault or battery, could disproportionately penalize innocent individuals and victims, and subsequently their spouses and children, who may be denied immigration status or be left with an abuser. First, commenters explained that specific barriers—including discrimination, community ostracism, community or religious norms, or lack of eligibility for certain services—deter aliens from even initially contacting law enforcement. Second, if law enforcement was involved, commenters expressed concern about cross arrests in which both the perpetrator of abuse and the victim are arrested but no clear determinations of fault are made. Commenters stated that ''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.'' Further, commenters alleged that ''identifying the primary aggressor is not always consistently nor correctly conducted,'' especially if survivors acted in self-defense. Commenters also expressed concern that survivors of domestic assault or battery are oftentimes vulnerable, with the result that a bar based on conduct alone could affect populations with overlapping vulnerabilities. For example, commenters specifically referenced lesbian, gay, bisexual, transgender, and queer or questioning (''LGBTQ'') survivors, who are already allegedly prone to experience inaction by law enforcement in response to domestic violence, and limited English proficiency individuals, who may be unable to fully describe the abuse to police officers, prompting officers to then use the offenses' perpetrators for interpretation.

One commenter expressed concern that the NPRM establishes a lower standard by which admission may be denied because other forms of admission require an actual conviction or factual admission to form the basis of denial. Accordingly, the commenter stated that similarly situated persons would be treated inconsistently based upon the mechanism for admission that they choose. This commenter also asserted that U nonimmigrant status and Violence Against Women Act of 1994, Public Law 103–322, 108 Stat. 1902 (''VAWA'') relief are insufficient alternative forms of relief because they generally require acknowledgement from a local authority, negating the need for a fact-finding hearing. Presumably then, most individuals affected by the NPRM would be ineligible for these alternative forms of relief. In addition, the commenter noted that granting those benefits is entirely different from making an asylum applicant overcome an asylum bar.

Commenters also identified unintended consequences of the proposed rule, explaining that individuals may act maliciously. One commenter suggested that individuals may file for baseless temporary restraining orders or protective orders to try to block domestic violence victims' applications for employment authorization documents following an asylum application. Another commenter speculated that abusers may falsely accuse or frame survivors of domestic violence to terrorize or control them. One commenter asserted that survivors may be hesitant to report abuse or request a restraining order if it could negatively impact the immigration status of the perpetrator, especially in situations where they share a child. Another commenter stated that it would ''undoubtedly embolden[ ] perpetrators more and len[d] more strength to otherwise weak accusations.''

Some commenters generally stated that the NPRM too broadly categorized domestic violence offenses as particularly serious crimes. Relatedly, another commenter stated that the bar is too vague and requires adjudicators to

seriousness of DUI offenses supports the type of categorical bar at issue here and does not conflict with the Departments' determination that DUI offenses should categorically bar asylum eligibility.

become experts in domestic criminal law jurisdictions of every State to determine whether, for example, conduct ''amounts to'' domestic assault or battery, stalking, or child abuse. Further, the commenter noted that the NPRM's definition of battery and extreme cruelty is different from the various States' criminal laws, which creates inconsistent application. That commenter also alleged that the proposed exceptions for individuals who have been battered or subjected to extreme cruelty are ''insufficient, vague, and place[d] a high burden on victims.'' Another commenter asserted that it is ''unclear how 'serious' will be defined, and whether and how detrimental and potentially false information provided by abusers will be considered in decision-making.'' One commenter suggested that ''the presentation of evidence under oath by adverse parties is a more appropriate forum for adjudications as to whether or not domestic violence took place, and will likely lead to fewer determinations that will cruelly strip immigrant survivors of their right to seek asylum.'' Another commenter asserted that the NPRM does not include a framework or limits to guide an adjudicator's inquiry, especially in the context of false accusations. For these reasons, commenters opposed the NPRM because it allegedly would cause inconsistent and unjust results.

Some commenters claimed that the proposed bar is unnecessary because the current bars for those with domestic violence convictions or aggravated felony convictions allow for ''the denial of asylum protection for these types of crimes when appropriate,'' whereas the proposed bar denies asylum protection for vulnerable individuals. Accordingly, commenters believed that ''immigration judges should retain discretion in these situations and be permitted to grant relief in situations where the asylum seeker is not at fault.''

Many commenters alleged that the proposed bar conflicts with VAWA. One commenter alleged that the NPRM ''distorts language contained in VAWA * * * in order to create barriers for asylum seekers.'' Commenters stated that VAWA gives discretion to adjudicators ''based on a number of factors and circumstances.'' Accordingly, commenters stated that the proposed ''blunt approach'' conflicts with VAWA and lacks ''evidence-based justification for treating asylum seekers differently.'' Commenters were also concerned with the lack of ''analogous protections in the asylum context to protect a survivor from the devastating effects of a vindictive abuser's unfounded allegations.''

Commenters also disagreed with the proposed approach towards the burden of proof as compared to VAWA. Because of the ''vastly different interests at stake,'' commenters stated that VAWA's low burden of proof is necessary for several reasons: More harm results from erroneously denying relief than erroneously granting relief, a lower standard maximizes the self-petitioner's confidentiality and safety, certain evidence may be inaccessible to a victim because the abuser blocked access, and no liberty interests are implicated for alleged perpetrators. By contrast, commenters asserted, a ''rigorous burden of proof is appropriate when potentially barring applicants from asylum,'' as the NPRM did, because ''[t]he consequences of invoking the bar are dire, with the applicant's life and safety hanging in the balance.''

Commenters also disagreed that the exception for asylum applicants who demonstrate eligibility for a waiver under INA 237(a)(7)(A) (8 U.S.C. 1227(a)(7)(A)) sufficiently protects survivors deemed not to be the primary aggressors. Commenters noted that survivors may be unaware of their eligibility for a waiver, unaware that such a waiver exists, or too fearful to apply.

Commenters also claimed that the waiver application process turns an otherwise non-adversarial inquiry into a ''multi-factor, highly specific inquiry into culpability based on circumstances that may be very difficult for an asylum seeker to prove—especially if proceeding without counsel and with limited English proficiency.'' Commenters also questioned whether adjudicators could conduct such an inquiry and correctly apply the exception because they are removed from the immediate circumstances surrounding an incident. Accordingly, commenters alleged that the waiver fails to adequately protect survivors and, in some cases, inflicts harm.

Response: First, commenters are incorrect that the rule's conditioning of asylum eligibility on conduct violated INA 208(b)(2)(A) (8 U.S.C. 1158(b)(2)(A)) because that section requires a final judgment of conviction. As discussed above, this rule, like the proposed rule, designates the listed offenses as additional limitations on asylum eligibility pursuant to INA 208(b)(2)(C) (8 U.S.C. 1158(b)(2)(C)).[26] *See* 8 CFR 208.13(c)(6), 1208.13(c)(6). This section provides authority to the Attorney General and the Secretary to condition or limit asylum eligibility, consistent with the statute, but does not require any sort of conviction. Accordingly, the bar is consistent with the plain text of that section, and the Supreme Court cases cited by commenters are not specifically relevant.

The Departments disagree with the comment that conduct-based bars should be used only in ''very limited circumstances,'' not including domestic assault or battery, stalking, or child abuse. As explained in the NPRM, the Departments believe that domestic violence is ''particularly reprehensible because the perpetrator takes advantage of an 'especially vulnerable' victim.'' 84 FR at 69652 (quoting *Carillo* v. *Holder,* 781 F.3d 1155, 1159 (9th Cir. 2015)). Accordingly, the Departments emphasize that such conduct must not be tolerated in the United States, and the discretionary benefit of asylum, along with the numerous ancillary benefits that follow, will not be granted to aliens who engage in such acts. *See id.* Further, the statute already contemplates conduct-based bars in sections 208(b)(2)(A)(i), (iii)–(iv) of the Act (8 U.S.C. 1158(b)(2)(A)(i), (iii)–(iv)),[27] and the Departments believe it is

[26] The proposed rule preamble cited both the authority at section 208(b)(2)(B)(ii) of the Act (8 U.S.C. 1158(b)(2)(B)(ii)) to designate offenses as a particularly serious crime and the authority at section 208(b)(2)(C) of the Act (8 U.S.C. 1158(b)(2)(C)) to establish additional limitations on asylum eligibility in support of the inclusion of these domestic violence-related bars at 8 CFR 208.13(c)(6)(v), (vii), 1208.13(c)(6)(v), (vii). *See* 84 FR at 69651–53. However, as stated in the proposed rule, the authority at section 208(b)(2)(C) of the Act (8 U.S.C. 1158(b)(2)(C)) provides underlying authority for all these provisions. 84 FR at 69652 (noting that, even if all of the proposed domestic violence offenses would not qualify as particularly serious crimes, convictions for such offenses—as well as engaging in conduct involving domestic violence that does not result in a conviction—''should be a basis for ineligibility for asylum under section 208(b)(2)(C) of the INA''). The Departments acknowledge that the proposed rule stated that the Attorney General and the Secretary were, in part, ''[r]elying on the authority under section 208(b)(2)(B)(ii) of the INA.'' *Id.* at 69651. But the regulatory text of the new bar does not actually designate any additional offense as ''particularly serious.'' The Departments thus clarify that the current bars are an exercise of the authority granted by section 208(b)(2)(C), and that the discussion of the ''particularly serious crime'' bar merely helps illustrate how the new bars are ''consistent with'' the statutory asylum scheme. Further discussion of the interaction of the rule with the ''particularly serious crime'' bar is set out above in section II.C.2.a.i.

[27] These provisions provide as follows: (1) INA 208(b)(2)(A)(i) (8 U.S.C. 1158(b)(2)(A)(i)) (''the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion''); (2) INA 208(b)(2)(A)(iii) (8 U.S.C. 1158(b)(2)(A)(iii)) (''there are serious reasons for believing that the alien has committed a serious nonpolitical crime outside the

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appropriate to also enforce an asylum bar based on conduct involving domestic battery or extreme cruelty.

The rule does not violate the constitutional rights of aliens, nor does it offend constitutional principles referenced by the commenters. First, commenters incorrectly equated denial of a discretionary benefit to ''criminal charges.'' The Departments will not bring ''criminal charges'' against aliens in this context; rather, the Departments will deny asylum based on certain convictions and conduct, in some limited instances, as stated in the NPRM and authorized by statute. *See* 84 FR at 69640.

The Departments disagree that the rule undermines the criminal justice system and constitutional due process protections in either the civil or criminal context. As an initial matter, aliens have no liberty interest in the discretionary benefit of asylum. *See Yuen Jin* v. *Mukasey,* 538 F.3d 143, 156–57 (2d Cir. 2008); *see also Ticoalu* v. *Gonzales,* 472 F.3d 8, 11 (1st Cir. 2006) (citing *DaCosta* v. *Gonzales,* 449 F.3d 45, 49–50 (1st Cir. 2006)); *cf. Hernandez* v. *Sessions,* 884 F.3d 107, 112 (2d Cir. 2018) (stating, in the context of duress waivers to the material support bar, that ''aliens have no constitutionally-protected 'liberty or property interest' in such a discretionary grant of relief for which they are otherwise statutorily ineligible''); *Obleshchenko* v. *Ashcroft,* 392 F.3d 970, 971 (8th Cir. 2004) (finding that there is no right to effective assistance of counsel with regard to an asylum claim because an alien does not have a liberty interest in a statutorily created, discretionary form of relief, but distinguishing withholding of removal). In other words, ''[t]here is no constitutional right to asylum per se.'' *Mudric* v. *Mukasey,* 469 F.3d 94, 98 (3d Cir. 2006). Further, although aliens may choose to be represented by counsel, the government is not required to appoint counsel. INA 292 (8 U.S.C. 1362).

Second, the Departments reiterate that Congress authorized the Attorney General and the Secretary to, by regulation, limit and condition asylum eligibility under INA 208(b)(2)(C), (d)(5)(B) (8 U.S.C. 1158(b)(2)(C), (d)(5)(B)). The Departments exercise such authority in promulgating the provisions of the rule, 84 FR at 69652, that allow adjudicators to inquire into allegations of conduct to determine whether the conduct constitutes battery or extreme cruelty barring asylum, similar to current statutory provisions requiring inquiry into other conduct-based allegations that may bar asylum. *See* INA 208(b)(2)(A)(i) (8 U.S.C. 1158(b)(2)(A)(i)); *see also Meng* v. *Holder,* 770 F.3d 1071, 1076 (2d Cir. 2014) (considering evidence in the record to determine whether it supported the agency finding that an alien's conduct amounted to persecution, thus triggering the persecutor bar under INA 208(b)(2)(A)(i) (8 U.S.C. 1158(b)(2)(A)(i))). A similar inquiry is also conducted under INA 240A(b)(2)(A) (8 U.S.C. 1229b(b)(2)(A)) to determine immigration benefits for aliens who are battered or subjected to extreme cruelty. Hence, promulgating an additional conduct-based bar to asylum eligibility, even without a conviction, is consistent with and therefore not necessarily precluded by the INA.

The Departments disagree that the rule disproportionately penalizes innocent individuals, victims, and their spouses or children. First, the Departments emphasize the exceptions for aliens who have been battered or subjected to extreme cruelty and aliens who were not the primary perpetrators of violence in the relationship. *See* 8 CFR 208.13(c)(6)(v)(C), (vii)(F), 1208.13(c)(6)(v)(C), (vii)(F) (proposed). This exception protects qualified innocent individuals and their spouses or children from asylum ineligibility by providing that individuals whose crimes or conduct were based on ''grounds for deportability under section 237(a)(2)(E)(i) through (ii) of the Act [8 U.S.C. 1227(a)(2)(E)(i)–(ii)]'' would nevertheless not be rendered ineligible for asylum if such individuals ''would be described in section 237(a)(7)(A) of the Act [8 U.S.C. 1227(a)(7)(A)].'' *See* 8 CFR 208.13(c)(6)(v)(C), (vii)(F), 1208.13(c)(6)(v)(C), (vii)(F) (proposed). Section 237(a)(7)(A) of the Act (8 U.S.C. 1227(a)(7)(A)), in turn, describes individuals who: (1) Were battered or subject to extreme cruelty; (2) were not the primary perpetrator of violence in the relationship; and (3) whose convictions were predicated upon conduct where the individual acted in self-defense, violated a protection order intended to protect that individual, or where the crime either did not result in serious bodily injury or was connected to the individual having been battered or subjected to extreme cruelty.

The Departments disagree with commenters' concerns that the provided exceptions are insufficient. To the extent that the commenters are concerned that individuals might not be able to avail themselves of the exception because of a lack of awareness of the waiver or their eligibility for it, such concerns are unfounded. Just as aliens are currently informed of eligibility and other asylum requirements through the Act and regulations; the instructions to the I–589 application and the form itself; representatives or other legal assistance projects; or other sources, aliens will similarly be informed of the existence of this exception. The Departments encourage individuals to contact law enforcement if they experience domestic violence; however, potential resolutions to the sort of specific barriers referenced by the commenters are outside the scope of this rulemaking. It is the Departments' aim, however, that the exception to the bar would reduce such barriers.

In regard to commenters' concerns about cross arrests with no definite determinations made, the Departments note that the adjudicatory inquiry into whether acts constitute battery or extreme cruelty is in no way novel. *See, e.g.,* INA 240A(b)(2)(A) (8 U.S.C. 1229b(b)(2)(A)) (providing for similar adjudicatory inquiry in the context of cancellation of removal). The Departments are confident in adjudicators' continued ability to conduct such inquiries, which include properly applying exceptions for innocent individuals. The Departments acknowledge that survivors are oftentimes vulnerable individuals. The bar and related exception are specifically promulgated to ensure that aliens with convictions for or who engage in conduct involving domestic assault or battery are ineligible for asylum, thereby reducing subsequent effects on vulnerable individuals.

The Departments may predicate asylum eligibility based on certain convictions or conduct under the statutory authority that allows them to limit or condition asylum eligibility. *See* INA 208(b)(2)(C), (d)(5)(B) (8 U.S.C. 1158(b)(2)(C), (d)(5)(B)). Aliens may apply for immigration benefits for which they are eligible, and the INA affords various ancillary benefits in accordance with the specific relief granted. In other words, aliens are generally free to apply (or not to apply) for benefits, and then the relevant provisions of the statute are consistently applied. *See* 8 CFR 208.1(a)(1), 1208.1(a)(1). Accordingly, aliens may be ''similarly situated,'' as phrased by the commenters, but whether ''similarly situated'' aliens choose to apply for the same benefits under the INA is not a decision for the Departments to make.

The Departments emphasize that the sufficiency of alternative forms of protection or relief, such as U

United States prior to the arrival of the alien in the United States''); and (3) INA 208(b)(2)(A)(iv) (8 U.S.C. 1158(b)(2)(A)(iv)) (''there are reasonable grounds for regarding the alien as a danger to the security of the United States'').

nonimmigrant status and VAWA relief referenced by the commenters, varies in accordance with the unique facts in each case. For example, although some aliens may be unable to obtain the necessary law enforcement certification, many others are able to successfully meet all the necessary requirements. *See* 8 CFR 214.14. The Departments, however, reiterate that the new bar for convictions or conduct involving domestic assault or battery, stalking, or child abuse, contains an exception that is intended to ensure that innocent victims of violence are not rendered ineligible for asylum relief. *See* 8 CFR 208.13(c)(6)(v)(C), (vii)(F), 1208.13(c)(6)(v)(C), (vii)(F) (proposed). This exception demonstrates both the Departments' concern for domestic violence victims and their consideration of how best to address those victims' circumstances, and the Departments have concluded that—especially in light of countervailing considerations such as the need to protect the United States from the harms associated with domestic abusers—this exception is sufficient.

The Departments acknowledge the commenters' concerns regarding unintended consequences stemming from the rule. The Departments, however, reiterate that mere allegations alone would not automatically bar asylum eligibility. Rather, an adjudicator will consider the alleged conduct and make a determination on whether it amounts to battery or extreme cruelty, thereby triggering the bar to asylum eligibility. *See* 8 CFR 208.13(c)(6)(vii),1208.13(c)(6)(vii) (proposed); *see also* 84 FR at 69652. Similar considerations are currently utilized in other immigration contexts, including other asylum provisions (INA 208(b)(2)(A)(i) (8 U.S.C. 1158(b)(2)(A)(i)) and removability (INA 237(a)(1)(E) (8 U.S.C. 1227(a)(1)(E)). In conjunction with the exception at 8 CFR 208.13(c)(6)(v)(C), (vii)(F) and 1208.13(c)(6)(v)(C), (vii)(F) (proposed), the Departments believe this inquiry is properly used in this context as well.

Commenters' allegations that the bar is too vague or broad to cover only offenses that constitute ''particularly serious crimes'' are irrelevant because, although the Departments possess statutory authority under section 208(b)(2)(B)(ii) of the Act (8 U.S.C. 1158(b)(2)(B)(ii) to designate a ''particularly serious crime,'' the Departments are also authorized to establish additional limitations or conditions on asylum. INA 208(b)(2)(C), (d)(5)(B) (8 U.S.C. 1158(b)(2)(C), (d)(5)(B)). The only requirement is that these limitations or conditions must be consistent with section 208 of the Act (8 U.S.C. 1158). Nothing in section 208 of the Act (8 U.S.C. 1158) conflicts with this rule.

The Departments also disagree with commenters who alleged that the rule requires adjudicators to have expertise in all State jurisdictions. The rule requires adjudicators to engage in a fact-based inquiry, and that inquiry accounts for the differences in State law regarding criminal convictions for offenses related to domestic violence. *See* 84 FR at 69652. Further, even if adjudicators must interpret and apply law from various jurisdictions, the Departments are confident that adjudicators will properly do so, as they currently do in other immigration contexts. *See, e.g.,* INA 208(b)(2)(A)(i) (8 U.S.C. 1158(b)(2)(A)(i)) (other asylum provisions); INA 237(a)(1)(E) (8 U.S.C. 1227(a)(1)(E)) (removability).

The Departments disagree that the exception is ''insufficient'' or ''vague'' or ''place[s] a high burden on victims.'' The exception directly references and adapts the statutory requirements in INA 237(a)(7)(A) (8 U.S.C. 1227(a)(7)(A)). In the interest of consistency and protection afforded to victims since its enactment, the exceptions to this categorical bar align with those enacted by Congress.

The Departments decline to evaluate the commenters' various examples. A proper inquiry is fact-based in nature; absent the entirety of facts for each unique case, various examples cannot be adequately addressed. The BIA has deemed some domestic violence offenses as ''particularly serious crimes.'' *See* 84 FR at 69652 (providing such examples of BIA decisions). As explained in the proposed rule, that case-by-case approach fails to include all of the offenses enumerated in the rule, and it does not include conduct related to domestic violence. *Id.* Accordingly, the Departments believe this rule-based approach is preferable because it will facilitate fair and just adjudicatory results.

In addition, the Departments disagree with commenters that the bar is unnecessary. The Departments believe the bar and its exception establish important protections for vulnerable individuals, including those not at fault, and clarify the Departments' views on such reprehensible conduct. *See id.*

The rule does not conflict with or distort language in VAWA. The rule is solely applicable to eligibility for the discretionary benefit of asylum. The rule does not expound upon or specifically supplement VAWA. Rather, the rule adds categorical bars to asylum eligibility, clarifies the effect of certain criminal convictions—and, in one instance, abusive conduct that may not necessarily involve a criminal conviction—on asylum eligibility, and eliminates automatic reconsideration of discretionary denials of asylum. *See generally* 84 FR at 69640. The rule excludes from a grant of asylum and its many ancillary benefits aliens who have been convicted of certain offenses or engaged in certain conduct. Contrary to the commenters' remarks, the rule is not intended to exclude survivors of domestic violence; in fact, the preamble to the rule, 84 FR at 69652, provided an extensive explanation of the Departments' opposition to domestic violence, including an overview of various legislative and regulatory actions that seek to protect victims and to convey strong opposition to domestic violence. Moreover, the rule is fully consonant with other regulations, *see, e.g.,* 8 CFR 204.2(c)(1)(i)(E), designed to ensure that those who commit acts of domestic violence, even if they are not convicted, do not distort or undermine the immigration laws of the United States. Accordingly, although VAWA and the rule may not use the same approach, both are instrumental in the government's efforts to protect victims from domestic violence in the United States.

In that vein, the rule provides protection to victims of domestic violence by way of the exceptions to the bar in 8 CFR 208.13(c)(6)(v)(C), (vii)(F), 1208.13(c)(6)(v)(C), (vii)(F) (proposed). The rule also conveys the Departments' opposition to domestic violence by denying asylum eligibility to aliens convicted of or who have engaged in such conduct so that abusers may not stay in the United States. *See* 84 FR at 69652.

Addressing commenters' concerns that the ''life and safety'' of aliens were ''hanging in the balance,'' the Departments reiterate the alternative forms of relief or protection that may be available to applicants who are ineligible for asylum under the rulemaking—applicants may still apply for statutory withholding of removal or CAT protection. *See* 84 FR at 69642. Accordingly, the Departments disagree that a ''vigorous burden of proof'' is necessary in this context. On the contrary, asylum is a discretionary benefit in which the alien bears the burden of proof to demonstrate eligibility under the conditions and limitations Congress authorized the Departments to establish. *See* INA 208(b)(1)(A) (8 U.S.C. 1158(b)(1)(A)).

To clarify the exception in 8 CFR 208.13(c)(6)(v)(C), (vii)(F) and 1208.13(c)(6)(v)(C), (vii)(F) (proposed),

applicants need not be granted a waiver under INA 237(a)(7)(A) (8 U.S.C. 1227(a)(7)(A)) to qualify for the exception. Rather, applicants must only satisfy one of the following criteria contained in the Act to the satisfaction of an adjudicator: (1) The applicant was acting in self-defense; (2) the applicant was found to have violated a protection order intended to protect the applicant; or (3) the applicant committed, was arrested for, was convicted of, or pled guilty to committing a crime that did not result in serious bodily injury and where there was a connection between the crime and the applicant's having been battered or subjected to extreme cruelty. 8 CFR 208.13(c)(6)(v)(C), (vii)(F), 1208.13(c)(6)(v)(C), (vii)(F) (proposed); *see also* 84 FR at 69653. Together, the proposed rule and this final rule serve, in part, as notice to the public that such provisions exist—including the exception for applicants who are themselves victims. *See* 84 FR at 69640 (stating that this section of the **Federal Register** contains notices to the public of the proposed issuance of rules and regulations). Accordingly, just like other immigration benefits and relevant exceptions, aliens are on notice upon publication in the **Federal Register**.

Finally, the exceptions provided by 8 CFR 208.13(c)(6)(v)(C), (vii)(F) and 1208.13(c)(6)(v)(C), (vii)(F) do not create an adversarial process. These provisions mirror the text of the statute except that aliens only need to satisfy the criteria, not be actually granted an exception. In this way, the exceptions as stated in the rule are arguably less stringent than the statutory exception. Further, the Departments remain confident that adjudicators will continue to properly apply the exceptions, regardless of commenters' concerns of how far removed adjudicators may be from the immediate circumstances of the conduct at issue. The exceptions are not intended to mitigate harm already suffered by survivors; rather, it is the Departments' hope that the exceptions ensure that the conduct of applicants who are actually victims of domestic violence does not bar their asylum eligibility. Accordingly, the Departments strongly disagree that the exceptions will inflict harm on survivors, as commenters alleged.

g. Document Fraud Misdemeanors

Comment: Numerous commenters opposed implementing a categorical limitation on eligibility for asylum for individuals convicted of Federal, State, tribal, or local misdemeanor offenses related to document fraud, stating that it would result in denial of meritorious asylum claims. *See* 8 CFR 208.13(c)(6)(vi)(B)(1), 1208.13(c)(6)(vi)(B)(1) (proposed). Commenters stated that some asylum applicants have necessarily and justifiably used false documents to escape persecution. Commenters stated that the NPRM ignored common circumstances related to convictions involving document fraud, such as when individuals flee their countries of origin with no belongings and ''must rely on informal networks to navigate their new circumstances.'' Some commenters suggested that applicants' use of fraudulent documents in entering the United States can be linked to their financial means but did not offer further detail on that position. Commenters stated that it was ''arbitrary and irrational'' for the Departments to suggest that such conduct would render somebody unfit to remain in the United States or a threat to public safety.

Commenters also suggested that the proposed limitation contravened long-standing case law establishing that violations of the law arising from an asylum applicants' manner of flight should be just one of many factors to be considered in the exercise of discretion. *Matter of Pula,* 19 I&N Dec. at 474. Some commenters objected to the proposed limitation because it allegedly did not provide a sufficient exception for those who have unknowingly engaged in such conduct, such as those who have unknowingly obtained false documents from bad actors like unscrupulous notarios. Other commenters opposed the proposed limitation because it did not provide a sufficient exception for those who must use false documentation to flee persecution.

Some commenters recognized the NPRM's proposed exception to this limitation on asylum eligibility.[28] Commenters opined that the proposed exception was not sufficient, given the consequences for those who do not fit within the exception. Commenters stated that asylum seekers who obtain false documents when passing through a third country or who may be unable to prove that they fall within an exception would be adversely affected by the proposed limitation.

Some commenters stated that the proposed exception was unrealistic given circumstances that could prevent asylum seekers from immediately claiming a fear of persecution, such as mistrust of government officials, language barriers, or trauma-induced barriers.

At least one commenter noted that traffickers routinely provide victims with false documents for crossing borders and that trafficking victims may be unable to explain the circumstances of their documentation to law enforcement. The commenter also noted that traffickers regularly confiscate, hide, or destroy their victims' documents to exert control over their victims and that trafficking victims often lack documentation. The commenter opined that trafficking victims were thus particularly vulnerable to bad actors who falsely claim that they can prepare legal documentation.

Commenters stated that the NPRM did not properly consider that some asylum seekers would be required to, or inadvertently, use false documents in the United States while their proceedings were pending, for example, in order to drive or work. Commenters suggested that continued availability of asylum protection to low-wage immigrant workers could encourage them to ''step out of the shadows'' when faced with workplace exploitation, dangers, and discrimination. By contrast, commenters stated, a categorical limitation would further incentivize some employers to hire and exploit undocumented workers where employers use aliens' immigration status against them and force asylum seekers ''deeper into the dangerous informal economy.'' At least one commenter stated that DHS recently made it harder for asylum seekers with pending applications to survive without using fraudulent documents by proposing a rule that would extend the waiting period for asylum seekers to apply for work authorization from 180 days to one year.

At least one commenter suggested that the proposed limitation related to document-fraud offenses undermined an important policy objective to encourage truthful testimony by asylum seekers.

At least one commenter stated that there was a discrepancy between the Departments' reasoning that the use of fraudulent documents ''so strongly undermines government integrity that it would be inappropriate to allow an individual convicted of such an offense

[28] *See* 8 CFR 208.13(c)(6)(vi)(B)(1) and 1208.13(c)(6)(vi)(B)(1), which provide that a misdemeanor offense related to document fraud would bar eligibility for asylum unless the alien can establish (1) that the conviction resulted from circumstances showing that the document was presented before boarding a common carrier, (2) that the document related to the alien's eligibility to enter the United States, (3) that the alien used the document to depart a country in which the alien has claimed a fear of persecution, and (4) that the alien claimed a fear of persecution without delay upon presenting himself or herself to an immigration officer upon arrival at a United States port of entry.

to obtain the discretionary benefit of asylum'' and possible availability of adjustment of status for a document-fraud-related conviction if the conviction qualified as a petty offense or if the individual obtained a waiver of inadmissibility.

Response: The Departments have considered all comments and recommendations submitted regarding the bar to asylum eligibility for aliens with misdemeanor document fraud convictions. Despite commenters' concerns, the Departments continue to believe this exception is consistent with distinctions regarding certain document-related offenses as recognized by the BIA, *Matter of Pula,* 19 I&N Dec. at 474–75; existing statutes, *see* INA 274C(a)(6) and (d)(7) (8 U.S.C. 1324c(a)(6) and (d)(7)); and existing regulations, *see* 8 CFR 270.2(j) and 1270.2(j), as noted in the NPRM. *See* 84 FR at 69653; *cf. Matter of Kasinga,* 21 I&N Dec. 357, 368 (BIA 1996) (concluding that possession of a fraudulent passport was not a significant adverse factor where the applicant ''did not attempt to use the false passport to enter'' the United States, but instead ''told the immigration inspector the truth''). The Departments will not amend the bar as laid out in the proposed rule and will continue to rely on the justifications provided in the NPRM. *See* 84 FR at 69653.[29]

Further, offenses related to fraudulent documents that carry a potential sentence of at least one year are already aggravated felonies, and thus are disqualifying offenses for purposes of asylum. INA 101(a)(43)(P) (8 U.S.C. 1101(a)(43)(P)). Courts have recognized that proper identity documents are essential to the functioning of immigration proceedings. *See Noriega-Perez* v. *United States,* 179 F.3d 1166, 1173–74 (9th Cir. 1999). Furthermore, in passing the REAL ID Act of 2005, Public Law 109–13, 119 Stat. 231, Congress acknowledged the critical role that identity documents play in protecting national security and public safety.

Regarding the commenters' concerns for aliens who may use fraudulent documents as a means to flee persecution or other harms, the Departments reiterate the exception for this bar in the rule for aliens who can establish (1) that the conviction resulted from circumstances showing that the document was presented before boarding a common carrier, (2) that the document related to the alien's eligibility to enter the United States, (3) that the alien used the document to depart a country in which the alien has claimed a fear of persecution, and (4) that the alien claimed a fear of persecution without delay upon presenting himself or herself to an immigration officer upon arrival at a United States port of entry. 8 CFR 208.13(c)(6)(vi)(B)(1), 1208.13(c)(6)(vi)(B)(1).

The Departments agree with commenters that there are certain, limited circumstances under which an individual with a legitimate asylum claim might need to utilize fraudulent documents during his or her flight to the United States, and the Departments provided this exception to the bar to account for such circumstances. The Departments believe that the exception, as proposed in the NPRM, is sufficient to allow individuals who may have committed document-fraud offenses directly related to their legitimate claims of fear to apply for asylum. The Departments believe that this exception, which is consistent with the exception in INA 274C(d)(7), 8 U.S.C. 1324c(d)(7), allowing the Attorney General to waive civil money penalties for document fraud to an alien granted asylum or statutory withholding of removal, strikes the appropriate balance between recognizing the seriousness of document-fraud-related offenses, including the threat they pose to a functioning asylum system, and the very limited instances where a conviction for such an offense should not bar an applicant from eligibility for asylum.

The Departments disagree with concerns that aliens with viable asylum claims might not be able to either immediately disclose their fear of return at a port-of-entry or prove that they fall within an exception to the bar. DHS has, by regulation, established procedures for determining whether individuals who present themselves at the border have a credible fear of persecution or torture, 8 CFR 208.30, and officers who conduct the interviews are required by regulation to undergo ''special training in international human rights law, non-adversarial interview techniques, and other relevant national and international refugee laws and principles,'' 8 CFR 208.1(b). Asylum officers are required to determine that the alien is able to participate effectively in his or her interview before proceeding, 8 CFR 208.30(d)(1), (5), and verify that the alien has received information about the credible fear process, 8 CFR 208.30(d)(2). The alien may consult with others prior to his or her interview. 8 CFR 208.30(d)(4). Such regulations are intended to recognize and accommodate the sensitive nature of fear-based claims and to foster an environment in which aliens may express their claims to an immigration officer.

The Departments disagree with the commenters that this bar to asylum is inconsistent with case law, particularly *Matter of Pula. See* 19 I&N Dec. at 474–75. The Departments first note that *Matter of Pula* pertains to how adjudicators should weigh discretionary factors in asylum applications. *Id.* This rule, by contrast, sets forth additional limitations on eligibility for asylum, which are separate from the discretionary determination. Additionally, *Matter of Pula* stated that whether a fraudulent document offense should preclude a favorable finding of discretion depends on ''the seriousness of the fraud.'' *Id.* at 474. The Departments in this rule are clarifying that the disqualifying offenses, which as provided by the rule must have resulted in a misdemeanor conviction, are serious enough to preclude eligibility for asylum, and have provided an exception for those situations that the Departments have determined should not preclude eligibility.

The Departments further reject some comments as unjustified within the context of a law-abiding society. For example, criticizing the rule because it may discourage participation in criminal activity—*e.g.,* driving without a license—or other activity in violation of the law—*e.g.,* working without employment authorization—is tantamount to saying the Departments should encourage and reward unlawful behavior. The Departments decline to adopt such suggestions. More specifically, the Departments reject commenters' suggestions that the additional limitation should not apply to document-fraud-related offenses that stem from fraudulent driver's licenses or employment authorization. The Departments' position on this matter is both reasonable and justified. As explained in the NPRM, such offenses are serious, ''pos[ing] * * * a significant affront to government integrity'' and are particularly pernicious in the context of immigration law, where the use of fraudulent documents, ''especially involving the appropriation of someone else's identity, * * * strongly undermines government integrity.'' 84 FR at 69653. Commenters' concerns about how the rule might affect working conditions of aliens are beyond the scope of this rulemaking.

[29] The Departments also reject some comments as wholly unfounded. For example, there is no logical or factual indication that the rule, combined with a criminal conviction for document fraud necessary for the bar to apply, would subsequently cause an alien to commit another crime—*i.e.,* perjury—by testifying untruthfully while in immigration proceedings.

Congress has delegated its authority to the Departments to propose additional, *i.e.,* broader, limitations on the existing bars to asylum eligibility, so long as the additional limitations are consistent with the Act. INA 208(b)(2)(C) (8 U.S.C. 1158(b)(2)(C)). The Departments are acting pursuant to their authority to create additional limitations on asylum eligibility and are not designating additional offenses as particularly serious crimes pursuant to INA 208(b)(2)(B)(ii) (8 U.S.C. 1158(b)(2)(B)(ii)), as discussed above. Accordingly, the Departments do not address commenters' concerns that the disqualifying offenses are not or should not be particularly serious crimes.

The Departments disagree with commenters' assertions that the rule would unfairly affect trafficking victims because traffickers force them to use fraudulent documents when they are crossing the border. The Departments recognize the serious nature of such circumstances, but they believe that considerations regarding criminal culpability for document-fraud-related offenses would be best addressed during criminal proceedings.

Finally, regarding commenters' points about the effect of document-fraud-related convictions in the context of adjustment of status under INA 245(a) (8 U.S.C. 1255(a)), the Departments note that adjustment of status is separate from asylum, and the rule contemplates asylum only. *See* 84 FR at 69640 (stating that the Departments propose to amend their respective regulations governing the bars to ''asylum'' eligibility). The adjustment of status conditions and consequent benefits are different from asylum. *See Mahmood* v. *Sessions,* 849 F.3d 187, 195 (4th Cir. 2017) (observing that, although ''strong policies underlie'' both asylum and adjustment of status, ''[t]hese policies serve different purposes''). *Compare* INA 209(b) (8 U.S.C. 1159(b)) *and* 245(a) (8 U.S.C. 1255(a)), *with* INA 208 (8 U.S.C. 1158)). The Departments do note, however, that, because adjustment of status is a discretionary form of relief, an alien's document-fraud-related conviction that would bar the alien from asylum eligibility under this rule could also separately be the basis for a denial of adjustment of status. *See, e.g., Matter of Hashmi,* 24 I&N Dec. 785, 790 (BIA 2009) (instructing immigration judges to consider ''whether the respondent's application for adjustment merits a favorable exercise of discretion'' when considering whether to continue proceedings).

h. Unlawful Public Benefits Misdemeanors

Comment: Commenters opposed the NPRM's proposed limitation on asylum eligibility based on convictions for misdemeanor offenses involving the ''unlawful receipt of Federal public benefits, as defined in 8 U.S.C. 1611(c), from a Federal entity, or the receipt of similar public benefits from a State, tribal, or local entity, without lawful authority.'' *See* 8 CFR 208.13(c)(6)(vi)(B)(2), 1208.13(c)(6)(vi)(B)(2). Commenters stated that this proposed limitation would disproportionately impact low-income individuals and people of color. Commenters stated that complex evaluations involving assets, income, household composition, and changing circumstances, such as employment or housing, could easily result in overpayments and miscalculations of benefits by both case workers for recipients and recipients themselves. Commenters asserted that these calculations could be especially confusing and difficult for low-income persons who may have literacy challenges, low education levels, or limited English proficiency.

One commenter stated that this proposed limitation was overbroad because there is no requirement that any convictions related to the unlawful receipt of public benefits be linked to fraud or require intentionality.

Commenters asserted that unlawful receipt of public benefits is not a ''particularly serious crime.'' The commenters stated that the proposed limitation fails to differentiate between dangerous offenses and those committed out of desperation and observed that such offenses do not involve an element of intentional or threatened use of force. One commenter stated that the Departments' assertions that such offenses burden taxpayers and drain resources from lawful beneficiaries was not sufficient to render these offenses ''particularly serious crimes.'' Specifically, the commenter stated that this was inconsistent with the intent of the Act and the 1967 Protocol, as well as BIA precedent, citing the following: United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, [1968] 19 U.S.T. 6223, T.1.A.S. No. 6577, 606 U.N.T.S. 268 (''The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.''); *Delgado,* 648 F.3d at 1110 (Reinhardt, J., concurring in part and concurring in the judgment) (''The agency's past precedential decisions also help to illuminate the definition of a 'particularly serious crime.' Crimes that the Attorney General has determined to be 'particularly serious' as a categorical matter, regardless of the circumstances of an individual conviction, include felony menacing (by threatening with a deadly weapon), armed robbery, and burglary of a dwelling (during which the offender is armed with a deadly weapon or causes injury to another). Common to these crimes is the intentional use or threatened use of force, the implication being that the perpetrator is a violent person.'' (footnotes omitted)).

Commenters stated that the Departments greatly overstated the scope of this issue and failed to support their assertions that such crimes are of an ''inherently pernicious nature.'' *See* 84 FR at 69653. Commenters stated that, by contrast, ''data demonstrates that the incidents of these types of fraud crimes are minimal. For example, the incidence of fraud in the Supplemental Nutrition Assistance Program is estimated at 1.5% for all incidents of fraud, including individuals of all citizenship categories and including both fraud committed by agencies, retailers/shops and individuals.'' *See* Randy Alison Aussenberg, Cong. Research Serv., R45147, *Errors and Fraud in the Supplemental Nutrition Assistance Program (SNAP)* (2018), *https://fas.org/sgp/crs/misc/R45147.pdf.*

Response: The Departments have considered all of the comments received, and have chosen not to make any changes to the NPRM's regulatory language establishing an additional limitation on asylum eligibility for individuals who have been convicted of an offense related to public benefits. *See* 8 CFR 208.13(c)(6)(vi)(B)(2), 1208.13(c)(6)(vi)(B)(2).

The Departments disagree with commenters who believe that the rule would unfairly impact low-income individuals. By contrast, the rule is designed to limit asylum eligibility for those who criminally take advantage of benefits designed to assist low-income individuals. The Departments recognize commenters' concerns that individuals might be unaware of the complex systems that might result in miscalculation and overpayment of benefits; however, the Departments believe that it would be more appropriate for criminal culpability for such offenses to be determined during criminal proceedings.

In response to comments that such offenses are not particularly serious crimes, the Departments again note that the Departments' authority to set forth additional limitations and conditions on asylum eligibility requires only that such conditions and limitations be consistent with section 208 of the Act (8 U.S.C. 1158) and does not require that the offenses be particularly serious crimes or involve any calculation of dangerousness. *Compare* INA 208(b)(2)(C) (8 U.S.C. 1158(b)(2)(C)) (''The Attorney General may by regulation establish additional limitations and conditions, consistent with this section, under which an alien shall be ineligible for asylum under paragraph (1).''), *with* INA 208(b)(2)(B)(ii) (8 U.S.C. 1158(b)(2)(B)(ii)), *and* INA 208(b)(2)(A)(ii) (8 U.S.C. 1158(b)(2)(A)(ii)) (providing that ''[t]he Attorney General may designate by regulation offenses'' for which an alien would be considered ''a danger to the community of the United States'' by virtue of having been convicted of a ''particularly serious crime''). As discussed in the NPRM, limiting asylum eligibility for those who have been convicted of such offenses, which are of an ''inherently pernicious nature,'' is consistent with previous Government actions to prioritize enforcement of the immigration laws against such offenders. 84 FR at 69653.

Regardless of the relative frequency of public benefits fraud, the Departments have concluded that convictions for such crimes, however often they occur, should be disqualifying for eligibility for the discretionary benefit of asylum. For example, the Departments are encouraged by the data cited by commenters indicating that the rate of fraud in certain programs may be low, but low rates of fraud do not support countenancing the abuse of public benefits by the remainder of the programs' participants.

i. Controlled Substance Possession or Trafficking Misdemeanors [30]

Comment: Commenters also opposed the designation of misdemeanor possession or trafficking of a controlled substance or controlled-substance paraphernalia as categorical bars to asylum eligibility. *See* 8 CFR 208.13(c)(6)(vi)(B)(3), 1208.13(c)(6)(vi)(B)(3) (proposed). Commenters asserted that the proposed limitation would be unnecessary, overbroad, and racially discriminatory.

Commenters remarked that the proposed limitation was overbroad with respect to the convictions and conduct covered and was not tailored to bar only those who have engaged in ''serious'' conduct or otherwise posed a danger to the community. Commenters also stated that the proposed limitation was overbroad because it did not account for jurisdictions that had decriminalized certain drugs, like cannabis.

Commenters said that, given the stakes at issue in asylum claims, protection should not be predicated on an applicant's abstinence from drugs. Commenters also stated that this proposed limitation was particularly inappropriate ''at a time of such inconsistency in federal laws surrounding drug legalization.'' Commenters generally expressed concern about the Federal government's perpetuation of the ''war on drugs.''

Commenters stated that the proposed limitation would not make anybody safer but rather result in the denial of bona fide asylum claims. Commenters stated that the proposed limitation would ''go beyond any common sense meaning'' of the term ''particularly serious crime.'' Commenters were particularly concerned with the implications of this proposed limitation because it would eliminate the opportunity for applicants to present mitigating circumstances that, commenters stated, are commonly associated with such convictions, such as addiction, self-medication, and any subsequent treatment or rehabilitation. Commenters asserted that the proposed limitation would improperly expand bars to asylum eligibility based on laws where enforcement decisions are ''heavily tainted'' by racial profiling.

Commenters also expressed concern that the proposed limitation would unfairly punish asylum seekers who might be vulnerable to struggles with addiction as a coping mechanism after facing significant trauma, particularly in light of obstacles to accessing medical or psychological treatment. Commenters stated that the proposed limitation eliminated any possibility of a treatment- and compassion-based approach to addiction. Commenters stated that the Departments' position on this matter was at odds with national trends to ''move toward a harm reduction approach to combating drug and alcohol addiction.'' Some commenters noted that treatment of misdemeanor offenses relating to controlled substances, particularly with respect to offenses involving possession of marijuana or prescription drugs, was ''wildly disproportionate to the severity of these offenses.'' One commenter asserted that these offenses do not have an element of violence or dangerousness and stated that the ''only victims are the offenders themselves.''

One commenter remarked that the Departments relied on ''misleading evidence that does not create a link between dangerousness'' and the disqualifying offense. The commenter stated that widespread opioid abuse is ''rooted in over-prescription by healthcare providers based on the assurances of pharmaceutical companies'' and does not serve as a relevant justification for the additional limitation.

One commenter stated that courts and statutes, including the Supreme Court, have treated varying simple possession drug offenses differently. For example, the commenter read the Supreme Court's decision in *Lopez* v. *Gonzales,* 549 U.S. 47 (2006), to mean that simple possession of a controlled substance is not a ''drug trafficking crime unless it would be treated as a felony if prosecuted under federal law.'' The commenter also remarked that a single incident of simple possession of any controlled substance except for Flunitrazepam is not treated as a felony and is thus not considered an aggravated felony, *see* 21 U.S.C. 844; and that some second convictions for possession have been recognized as drug trafficking aggravated felonies, but not all, *see Carachuri-Rosendo* v. *Holder,* 560 U.S. 563, 566 (2010); *Berhe* v. *Gonzales,* 464 F.3d 74, 85–86 (1st Cir. 2006). The commenter asserted that the nuanced and varying assessments related to such offenses suggest ''they do not merit blanket treatment of the same severity.''

Some commenters objected to existing aggravated felony bars with respect to drug-related offenses in addition to the proposed limitation. Commenters stated that immigration judges should continue to be able to exercise discretion over those controlled-substance-related offenses that are not already subject to an existing bar to asylum. Commenters also generally objected to criminalizing possession of drugs for personal use, given the medical value and current inconsistent treatment among states, but no analysis was provided connecting these comments to the NPRM, specifically.

[30] In addition to the comments regarding the bar to asylum discussed in this section, multiple commenters shared their opinion that marijuana should be legalized, without reference to a particular provision of the proposed rule. The Departments note that broad questions of national drug policy, including the legalization of marijuana at the national or State level, are outside the scope of this rulemaking. Marijuana remains a controlled substance, with the resulting penalties that may flow from its possession, trafficking, or other activities involving it. *See* 21 CFR 1308.11 (Schedule I controlled substances).

Response: The Departments have considered all comments and recommendations submitted regarding the NPRM. The final rule does not alter the regulatory language set forth in the NPRM with respect to the limitation on misdemeanor offenses involving possession or trafficking of a controlled substance or controlled-substance paraphernalia. *See* 8 CFR 208.13(c)(6)(vi)(B)(3), 1208.13(c)(6)(vi)(B)(3).

Consistent with the INA's approach toward controlled substance offenses, for example in the removability context under INA 237(a)(2)(B)(i) (8 U.S.C. 1227(a)(2)(B)(i)), this rule does not penalize a single offense of marijuana possession for personal use of 30 grams or less. *See* 84 FR at 69654. However, as discussed in the NPRM, the Departments have determined that possessors and traffickers of controlled substances ''pose a direct threat to the public health and safety interests of the United States.'' *Id.* Accordingly, the Departments made a policy decision to protect against such threats by barring asylum to such possessors and traffickers, and Federal courts have agreed with such treatment in the past. *See Ayala-Chavez* v. *U.S. INS,* 944 F.2d 638, 641 (9th Cir. 1991) (''[T]he immigration laws clearly reflect strong Congressional policy against lenient treatment of drug offenders.'' (quoting *Blackwood* v. *INS,* 803 F.2d 1165, 1167 (11th Cir. 1988))).

The Departments note that aliens barred from asylum eligibility as a result of this provision may still be eligible for withholding of removal under the Act or CAT protection, provisions that would preclude return to a country where they experienced or fear torture or persecution. *See* 84 FR at 69642.

The Departments disagree with comments suggesting that the bar is overbroad and not appropriately tailored only to aliens who have engaged in serious conduct or pose a danger to the community. Similarly, the Departments strongly disagree with commenters who asserted that this additional limitation will not make communities safer. Despite commenters' arguments, the Departments reiterate that controlled substance offenses represent significant and dangerous offenses that are damaging to society as a whole. *See Matter of Y–L–,* 23 I&N Dec. 270, 275 (A.G. 2002) (noting that ''[t]he harmful effect to society from drug offenses has consistently been recognized by Congress in the clear distinctions and disparate statutory treatment it has drawn between drug offenses and other crimes''). The illicit use of controlled substances imposes substantial costs on society from loss of life, familial disruption, the costs of treatment or incarceration, lost economic productivity, and more. *Id.* at 275–76 (citing *Matter of U–M–,* 20 I&N Dec. 327, 330–31 (BIA 1991) (''This unfortunate situation has reached epidemic proportions and it tears the very fabric of American society.'')); 84 FR at 69654; *see also* Office of Nat'l Drug Control Policy, *National Drug Control Strategy* 11 (Feb. 2020), *https://www.whitehouse.gov/wp-content/uploads/2020/02/2020-NDCS.pdf* (explaining, in support of the national drug control strategy, the devastating effects of drug use and the necessity for treatment that includes ''continuing services and support structures over an extended period of time''). Increased controlled substance prevalence is often correlated with increased rates of violent crime and other criminal activities. *See* 84 FR at 69650 (explaining that perpetrators of crimes such as drug trafficking are ''displaying a disregard for basic societal structures in preference of criminal activities that place other members of the community * * * in danger'').

Even assuming, arguendo, the commenters are correct that such offenses do not reflect an alien's dangerousness to the same extent as those offenses that are formally designated ''particularly serious crimes,'' the Departments' authority to set forth additional limitations and conditions on asylum eligibility under section 208(b)(2)(C) of the Act (8 U.S.C. 1158(b)(2)(C)) requires only that such conditions and limitations be consistent with section 208 of the Act (8 U.S.C. 1158). *See* INA 208(b)(2)(C) (8 U.S.C. 1158(b)(2)(C)) (''The Attorney General may by regulation establish additional limitations and conditions, consistent with this section, under which an alien shall be ineligible for asylum under paragraph (1).''). Unlike the designation of particularly serious crimes, there is no requirement that the aliens subject to these additional conditions or limitations first meet a particular level of dangerousness. *Compare id., with* INA 208(b)(2)(B)(ii) (8 U.S.C. 1158(b)(2)(B)(ii)), *and* INA 208(b)(2)(A)(ii) (8 U.S.C. 1158(b)(2)(A)(ii)) (providing that ''[t]he Attorney General may designate by regulation offenses'' for which an alien would be considered ''a danger to the community of the United States'' by virtue of having been convicted of a ''particularly serious crime''). Instead, section 208(b)(2)(C) of the Act (8 U.S.C. 1158(b)(2)(C) confers broad discretion on the Attorney General and the Secretary to establish a wide range of conditions on asylum eligibility, and the designation of certain drug-related offenses as defined in the rule as an additional limitation on asylum eligibility is consistent with the rest of the statutory scheme. For example, Congress's inclusion of other crime-based bars to asylum eligibility demonstrates the intent to allow the Attorney General and Secretary to exercise the congressionally provided authority to designate additional types of criminal offenses or related behavior as bars to asylum eligibility. *See* INA 208(b)(2)(A)(ii), (iii) (particularly serious crime and serious nonpolitical crime) (8 U.S.C. 1158(b)(2)(A)(ii), (iii)). Further, as discussed at length in the NPRM, this additional limitation on asylum eligibility is consistent with the Act's treatment of controlled-substance offenses as offenses that may render aliens removable from or inadmissible to the United States. 84 FR at 69654.

4. Due Process and Fairness Considerations

Comment: The Departments received numerous comments asserting that the rule violates basic notions of fairness and due process. One commenter asserted that anything that makes the asylum process harder, which the NPRM does according to the commenter, is a denial of due process. Commenters claimed that the Departments' true goal in promulgating these rules is to reduce the protections offered by existing asylum laws and to erode ''any semblance of due process and justice for those seeking safety and refuge in this country.''

In addition to general objections regarding due process, commenters asserted various constitutional problems with the proposed rule. Citing *United States* v. *Davis,* 139 S. Ct. 2319, 2323 (2019), commenters specified that due process requires laws and regulations to ''give ordinary people fair warning about what the law demands of them.'' These commenters argued that the proposed rule fails to give affected individuals fair notice of which offenses will bar asylum. Commenters also noted that equal protection principles require the government to treat similarly situated people in the same manner but averred that the proposed rule, as applied, would result in similarly situated applicants being treated differently.

Commenters stated that requiring immigration adjudicators to deny a legal benefit, even a discretionary one, based on alleged and uncharged conduct is a clear violation of the presumption of innocence, which the commenters

argued is a fundamental tenet of our democracy.

Commenters alleged that immigration proceedings are not the proper venue for the sort of evidentiary considerations required by the rule. Commenters argued that asylum applicants will not have the opportunity to be confronted by evidence or to contest such evidence in a criminal court. These commenters noted that criminal courts afford defendants additional due process protections not found in immigration court, such as the right to counsel, the right to discovery of the evidence that will be presented, and robust evidentiary rules protecting against the use of unreliable evidence.

Similarly, commenters alleged that, due to the ''lack of robust evidentiary rules in immigration proceedings,'' many applicants would be unable to rebut negative evidence submitted against them, even if the evidence submitted is false. One commenter claimed, without more, that there is a high likelihood that such evidence is false. Commenters were concerned that unreliable evidence would be submitted in support of the application of the additional bars. Alternatively, commenters stated that immigration adjudicators might rely on evidence where a judicial court had already evaluated reliability and not credited the evidence based on a lack of reliability. In addition, commenters were concerned that the rule authorizes adjudicators to seek out unreliable evidence obtained in violation of due process to determine whether an applicant's conduct triggers the particularly serious crime bar.

Commenters were concerned that requiring applicants to disprove allegations of gang-related activity or domestic violence would result in re-litigation of convictions or litigation of conduct that fell outside the scope of prior convictions. Similarly, commenters were concerned that the rule violates due process because it requires adjudicators to consider an applicant's conduct, separate and apart from any criminal court decision, that may trigger a categorical bar to asylum. One commenter asserted that ''people seeking asylum should have the right to be considered innocent until proven guilty, and should not be denied asylum based on an accusation.'' Moreover, commenters alleged that this consideration extends to whether a vacated or modified conviction or sentence still constitutes a conviction or sentence triggering the bar to asylum.

Commenters alleged that adjudicators might improperly rely on uncorroborated allegations in arrest reports and shield the ensuing decision from judicial review by claiming discretion. Commenters stated that the rule lacks safeguards to prevent such erroneous decisions.

Commenters expressed concern that asylum applicants, especially detained applicants, would struggle to find evidence related to events that may have occurred years prior to the asylum application. One organization noted that the rule would be particularly challenging for detained respondents because they often lack representation and would be required to rebut circumstantial allegations with limited access to witnesses and evidence.

The Departments also received numerous comments stating that asylum hearings, which typically last three or fewer hours, provide insufficient time to permit both parties to present full arguments on these complex issues, as effectively required by the rule, thereby resulting in due process violations.

One commenter raised due process and constitutional concerns if the rule fails to provide proper notice to the alien. In that case, commenters alleged that the Sixth Amendment right to ''be accurately apprised by defense counsel of the immigration consequences of his guilty plea to criminal charges'' applies but that the rule fails to account for those consequences.

Response: The rule does not violate notions of fairness or due process. As an initial matter, asylum is a discretionary benefit, as demonstrated by the text of the statute, which states the Departments ''may'' grant asylum, INA 208(b)(1)(A) (8 U.S.C. 1158(b)(1)(A)), and which provides authority to the Attorney General and the Secretary to limit and condition, by regulation, asylum eligibility under INA 208(b)(2)(C), (d)(5)(B) (8 U.S.C. 1158(b)(2)(C), (d)(5)(B)). Courts have found that aliens have no cognizable due process interest in the discretionary benefit of asylum. *See Yuen Jin,* 538 F.3d at 156–57; *Ticoalu,* 472 F.3d at 11 (citing *DaCosta,* 449 F.3d at 49–50). In other words, ''[t]here is no constitutional right to asylum per se.'' *Mudric,* 469 F.3d at 98. Thus, how the Departments choose to exercise their authority to limit or condition asylum eligibility and an adjudicator's consideration of an applicant's conduct in relation to asylum eligibility do not implicate due process claims.

The rule does not ''reduce the protections offered by the asylum laws.'' In fact, the rule makes no changes to asylum benefits at all; rather, it changes who is eligible for such benefits. *See* 84 FR at 69640. Further, the rule is not intended to ''erode'' due process and justice for aliens seeking protection; instead, the rule revises asylum eligibility by adding categorical bars to asylum eligibility, clarifying the effect of certain criminal convictions and conduct on asylum eligibility, and removing automatic reconsideration of discretionary denials of asylum. *See* 84 FR at 69640. Although some of these changes may affect aliens seeking protection in the United States, these effects do not constitute a deprivation of due process or justice, and alternative forms of protection—withholding of removal under the Act along with withholding of removal or deferral of removal under the CAT regulations—remain available for qualifying aliens. *See* 84 FR at 69642.

Regarding commenters' concerns that the rule does not sufficiently provide notice to aliens regarding which offenses would bar asylum eligibility, the Departments first note that the publication of the NPRM and this final rule serves, in part, as notice to the public regarding which offenses bar asylum eligibility. *See* 5 U.S.C. 552. Courts have held that an agency's informal rulemaking pursuant to 5 U.S.C. 553 constitutes sufficient notice to the public if it ''fairly apprise[s] interested persons of the 'subjects and issues' involved in the rulemaking[.]'' *Air Transport Ass'n of America* v. *FAA,* 169 F.3d 1, 6 (D.C. Cir. 1999) (quoting *Small Refiner Lead Phase-Down Task Force* v. *EPA,* 705 F.2d 506, 547 (D.C. Cir. 1983)).

To the extent that commenters argued that the rule is insufficiently clear with regards to the substance of what offenses are disqualifying,[31] the Departments disagree. This rule clearly establishes which offenses bar asylum by listing such offenses in detail in the regulatory text at 8 CFR 208.13(c)(6)–(9) and 1208.13(c)(6)–(9). Unlike other statutory provisions that have been found unconstitutionally vague,[32] this rule clearly establishes grounds for mandatory denial of request for asylum. 8 CFR 208.13(c)(6)–(9), 1208.13(c)(6)–(9). The regulatory text adds paragraph (c)(7) to specifically define terms used

[31] *Cf. Dimaya,* 138 S. Ct. at 1225 (''Perhaps the most basic of due process's customary protections is the demand of fair notice.'').

[32] For example, the Court in *Dimaya,* 138 S. Ct. at 1222–23, held that the Federal criminal code provision at issue was unconstitutionally vague in part because it failed to provide definitions for or explain such terms as ''ordinary case'' and ''violent.'' On the other hand, the term ''crime involving moral turpitude'' has continuously been upheld as not unconstitutionally vague, despite repeated judicial criticism. *See, e.g., Islas-Veloz* v. *Whitaker,* 914 F.3d 1249, 1250 (9th Cir. 2019) (''the phrase 'crime involving moral turpitude' [is] not unconstitutionally vague'').

in 8 CFR 208.13 and 1208.13, and the regulatory text otherwise references applicable definitions for terms not found in paragraph (c)(7). *See, e.g.,* 8 CFR 1208.13(c)(6)(iv)(A) (defining driving while intoxicated or impaired ''as those terms are defined under the jurisdiction where the conviction occurred''). Further, just as the INA contains various criminal grounds for ineligibility without specified elements, *see generally* INA 101(a)(43) (8 U.S.C. 1101(a)(43)), here, the Departments have provided a detailed list of particular criminal offenses or related activities that would render an alien ineligible for asylum. Accordingly, despite the commenter's argument that the regulatory text fails to give ''fair warning'' of which offenses would bar asylum eligibility, the regulatory text is sufficiently clear to provide the public with the requisite notice. *See Davis,* 139 S. Ct. at 2323.

The Departments acknowledge the commenters' general equal protection concerns; however, without more detailed comments providing for the specific concerns of commenters, the Departments are unable to provide a complete response to these comments. The Departments note, however, that categorical bars to asylum apply equally to all asylum applicants and do not classify applicants on the basis of any protected characteristic, such as race or religion.

Immigration proceedings are civil in nature; thus constitutional protections for criminal defendants, including evidentiary rules, do not apply. *See INS* v. *Lopez-Mendoza,* 468 U.S. 1032, 1038 (1984); *Dallo* v. *INS,* 765 F.2d 581, 586 (6th Cir. 1985); *Baliza* v. *INS,* 709 F.2d 1231, 1233 (9th Cir. 1983); *Longoria-Castaneda* v. *INS,* 548 F.2d 233 (8th Cir. 1977). In addition, any determinations regarding evidence or other related procedural issues by a criminal court do not automatically apply in a subsequent immigration proceeding or asylum interview. The Departments emphasize that the NRPM did not propose and the final rule does not enact any changes to the immigration court or asylum interview rules of procedure or evidentiary consideration processes. Accordingly, adjudicators will continue to receive and consider ''material and relevant evidence,'' and it is the adjudicator who determines what evidence so qualifies. 8 CFR 1240.1(c). Immigration adjudicators regularly consider and receive evidence regarding criminal offenses or conduct in the context of immigration adjudications, including asylum applications, where such evidence has been frequently considered as part of the ''particularly serious crime'' determination or as part of the ultimate discretionary decision. *Cf. Matter of Jean,* 23 I&N Dec. 373, 385 (A.G. 2002) (holding that aliens convicted of violent or dangerous offenses generally do not merit asylum as a matter of discretion).

Many of the commenters' concerns rely on circumstances that are purely speculative or that are only indirectly implicated by the rule. For example, commenters' concerns regarding an alien's hypothetical inability to confront evidence require first that concerning evidence is at issue, that such evidence is false, and finally that the alien is unable (for reasons unspecified by commenters) to rebut such evidence. Likewise, commenters' concerns regarding evidence supporting the bars rest on the premise that such specific evidence is submitted in the future, that such evidence has not been tested, and that such evidence is thus unreliable. Regarding these concerns, the Departments are unable to comment on speculative examples.

In regard to commenters' concerns about the reliability determinations of evidence already made by judicial courts, the regulations require that immigration judges consider material and relevant evidence. *See* 8 CFR 1240.1(c). Immigration judges consider whether evidence is ''probative and whether its use is fundamentally fair so as not to deprive the alien of due process of law.'' *Ezeagwuna,* 325 F.3d at 405 (quoting *Bustos-Torres,* 898 F.2d at 1055). The rule does not undermine or revise that standard; thus, commenters' concerns are unwarranted.

In general, commenters' concerns are no different than existing concerns regarding the reliability of evidence submitted by aliens in asylum cases, which is generally rooted in hearsay, frequently cannot be confronted or rebutted, and is typically uncorroborated except by other hearsay evidence. *See, e.g., Angov* v. *Lynch,* 788 F.3d 893, 901 (9th Cir. 2015) (''The specific facts supporting a petitioner's asylum claim—when, where, why and by whom he was allegedly persecuted—are peculiarly within the petitioner's grasp. By definition, they will have happened at some time in the past—often many years ago—in a foreign country. In order for [DHS] to present evidence 'refuting or in any way contradicting' petitioner's testimony, it would have to conduct a costly and often fruitless investigation abroad, trying to prove a negative—that the incidents petitioner alleges did not happen.'' (quoting *Abovian* v. *INS,* 257 F.3d 971, 976 (9th Cir. 2001) (Kozinski, J., dissenting from denial of petition for rehearing en banc))); *Mitondo* v. *Mukasey,* 523 F.3d 784, 788 (7th Cir. 2008) (''Most claims of persecution can be neither confirmed nor refuted by documentary evidence. Even when it is certain that a particular incident occurred, there may be doubt about whether a given alien was among the victims. Then the alien's oral narration must stand or fall on its own terms. Yet many aliens, who want to remain in the United States for economic or social reasons unrelated to persecution, try to deceive immigration officials.''). Asylum adjudicators are well experienced at separating reliable from unreliable evidence, regardless of its provenance, and this rule neither inhibits their ability to do so nor changes the process for assessing evidence.

Further, as discussed in the preamble to the proposed rule, the rule contemplates the consideration of all ''reliable'' evidence and authorizes adjudicators to assess all ''reliable'' evidence. 84 FR at 69649 and 69652. The rule does not encourage adjudicators to ''seek out unreliable evidence,'' as commenters alleged. Accordingly, the Departments disagree with commenters that adjudicators will improperly rely on information in arrest reports that the adjudicators have determined is unreliable, and the Departments further disagree that adjudicators would seek to protect such decisions by claiming discretion.

As explained in section II.C.2.a.i, the rule establishes limits and conditions on asylum eligibility; it does not add offenses to the ''particularly serious crime'' bar. *See* 8 CFR 208.13(c)(6), 1208.13(c)(6) (both using prefatory language that reads ''[a]dditional limitations on eligibility for asylum''). To the extent that commenters' concerns relate specifically to the ''particularly serious crime'' bar, the Departments decline to respond because those concerns are outside the scope of this rulemaking.

Regarding commenters' concerns that the domestic violence and gang-related bars to asylum eligibility would violate due process due to the requirement that the adjudication re-litigate the offense or consider conduct separate and apart from a criminal conviction, the Departments first note that there has never been a prohibition on the consideration of conduct when determining the immigration consequences of an offense or action.[33]

[33] To the extent the issues raised by commenters relate to the domestic violence provision of the rule that is not based on a criminal conviction, the Departments note that regulations have considered

Further, the consideration of conduct in this manner matches certain bars to admissibility or bases of deportability under the INA. *See, e.g.,* INA 212(a)(2)(C)(i) (8 U.S.C. 1182(a)(2)(C)(i)) (instructing that an alien who the relevant official ''knows or has reason to believe * * * is or has been an illicit trafficker in any controlled substance'' is inadmissible); INA 212(a)(2)(H) (8 U.S.C. 1182(a)(2)(H)) (instructing that an alien who the relevant official ''knows or has reason to believe is or has been * * * a trafficker in severe forms of trafficking in persons'' is inadmissible); INA 237(a)(2)(F) (8 U.S.C. 1227(a)(2)(F)) (instructing that an alien described in section 212(a)(2)(H) of the Act (8 U.S.C. 1182(a)(2)(H)) is deportable); *see also, e.g., Lopez-Molina* v. *Ashcroft,* 368 F.3d 1206, 1207–08 & n.1 (9th Cir. 2004) (explaining that the immigration judge found the respondent removable due to a reason to believe he was a controlled substance trafficker on account of a prior arrest report and information surrounding his conviction for misprision of a felony). In addition, the consideration of the alien's conduct in these circumstances is consistent with the consideration of conduct when reviewing a circumstance-specific ground of removability or deportability. *See Nijhawan,* 55 U.S. at 38.

Further, as discussed above, the rule does not violate due process because asylum is a discretionary benefit that does not implicate a liberty interest. *See Yuen Jin,* 538 F.3d at 156–57 (collecting cases); *Ticoalu,* 472 F.3d at 11 (citing *DaCosta,* 449 F.3d at 49–50); *cf. Hernandez,* 884 F.3d at 112 (stating, in the context of duress waivers to the material support bar, that ''aliens have no constitutionally-protected 'liberty or property interest' in such a discretionary grant of relief for which they are otherwise statutorily ineligible''); *Obleshchenko,* 392 F.3d at 971 (finding that an alien has no right to effective assistance of counsel with regard to an asylum claim because there is no liberty interest in a statutorily created, discretionary form of relief, but distinguishing withholding of removal). In addition, aliens may provide argument and evidence that they are not subject to an asylum bar. *See* 8 CFR 1240.8(d) (providing that the alien bears the burden of proof to show that a basis for mandatory denial does not apply); *see also* 84 FR at 69642.

Finally, commenters' Sixth Amendment concerns, including the presumption that a person is ''innocent until proven guilty'' are inapposite. The protections afforded by that amendment apply to criminal defendants, and asylum applicants in immigration proceedings are not criminal defendants. *See, e.g., Ambati* v. *Reno,* 233 F.3d 1054, 1061 (7th Cir. 2000) (''Deportation hearings are civil proceedings, and asylum-seekers, therefore, have no Sixth Amendment right to counsel.''); *Lavoie* v. *Immigration and Naturalization Service,* 418 F.2d 732, 734 (9th Cir. 1969) (''[D]eportation proceedings are civil and not criminal, in nature, and [] the rules * * * requiring the presence of counsel during interrogation, and other Sixth Amendment safeguards, are not applicable to such proceedings.''); *Lyon* v. *U.S. Immigr. and Customs Enf't,* 171 F. Supp. 3d 961, 975 (N.D. Cal 2016) (''[T]he Ninth Circuit has never so held, and the Court is reluctant to so interpret the INA absent any indication that Congress intended to import full Sixth Amendment standards into the INA.'').

The Departments maintain that they have correctly concluded that convictions pursuant to expunged or vacated orders or modified sentences remain effective for immigration purposes if the underlying reason for expungement, vacatur, or modification was for ''rehabilitation or immigration hardship.'' *Matter of Thomas and Thompson,* 27 I&N Dec. at 680; *see also* 84 FR at 69655. Courts also support this principle, stating that it is ''entirely consistent with Congress's intent * * * [to] focus[ ] on the original attachment of guilt (which only a vacatur based on some procedural or substantive defect would call into question)'' and to ''impose[ ] uniformity on the enforcement of immigration laws.'' *Saleh,* 495 F.3d at 24.

Next, contrary to commenters' concerns, this rule does not violate principles such as being ''innocent until proven guilty.'' Convictions and sentences are not re-litigated during immigration proceedings. Rather, convictions and sentences at issue in immigration proceedings have already been determined in a separate hearing, consistent with due process, and ''[l]ater alterations to that sentence that do not correct legal defects[ ] do not change the underlying gravity of the alien's action.'' *Matter of Thomas and Thompson,* 27 I&N Dec. at 683. Congress determined that immigration consequences should attach to an alien's original conviction and sentencing, pursuant to section 101(a)(48) of the Act (8 U.S.C. 1101(a)(48)). *See id.* Thus, the Departments do not deprive an alien of due process or presume guilt when an alien's conviction or sentence, if expunged, vacated or modified for rehabilitation or immigration purposes, remains effective for immigration proceedings, including asylum adjudications, because such an expungement, vacatur, or modification does not call into question whether the underlying criminal proceedings themselves complied with due process.

The Departments once again reiterate their statutory authority to limit and condition asylum eligibility consistent with the statute. *See* INA 208(b)(2)(C), (d)(5)(B) (8 U.S.C. 1158(b)(2)(C), (d)(5)(B)). In accordance with that authority, the Departments promulgated the NPRM and believe that the provisions of this final rule are sufficient without commenters' recommended safeguards.

Finally, issues involving evidence gathering are beyond the scope of this rulemaking. For issues regarding representation, *see* section II.C.6.h. The Departments disagree that hearings lack sufficient time for both parties to present arguments. *See* Office of the Chief Immigration Judge, *Immigration Court Practice Manual,* 68–69 (Mar. 17, 2020), *https://www.justice.gov/eoir/page/file/1258536/download* (noting that, at a master calendar hearing, a respondent should be prepared ''to estimate (in hours) the amount of time needed to present the case at the individual calendar hearing''). Moreover, if parties believe additional time is needed, the regulations provide a mechanism for them to seek additional time through a motion for continuance. *See* 8 CFR 1003.29.

5. Insufficient Alternative Protection From Removal

Comment: The Departments received numerous comments alleging that withholding of removal under the Act and protection under the CAT regulations are insufficient alternative forms of protection for individuals barred from asylum pursuant to the proposed rule. Overall, commenters believed that refugees ''should not be required to settle for these lesser forms of relief.'' Commenters averred that the availability of these forms of protection does not justify the serious harm caused by the proposed rule's ''overly harsh and broad limits on asylum.'' Specifically, statutory withholding of removal and protection under the CAT regulations are much narrower in scope and duration than asylum and require applicants to establish a higher burden of proof. One commenter noted that, even if an applicant was able to meet the higher burden of proof for statutory withholding of removal or protection

similar conduct in the context of immigration law for nearly 25 years with no recorded challenges to the provisions of 8 CFR 204.2(c)(1)(i)(E) as a violation of due process.

under the CAT regulations, the individual would not then be accorded the benefits required by the Refugee Convention.

Commenters cited a number of limitations imposed on recipients of these forms of protection to demonstrate why they are insufficient alternatives to asylum. For example, commenters expressed concern regarding the prohibition on international travel for recipients of statutory withholding of removal and CAT protection. Commenters noted that, unlike recipients of asylum, these individuals are not provided travel documents. At the same time, because these individuals have been ordered removed but that removal has been withheld or deferred, any international travel would be considered a ''self-deportation,'' foreclosing any future return to the United States. Commenters stated that this conflicts with the Refugee Convention, which requires that contracting states issue travel documents for international travel to refugees lawfully staying in their territory.

Commenters also claimed the proposed rule contravenes the Refugee Convention by failing to ensure ''that the unity of the refugee's family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country.'' Commenters alleged that individuals who are granted statutory withholding of removal or protection under the CAT regulations would be unable to reunite with family in the United States because these forms of relief do not allow the recipient to petition for derivative beneficiaries. Due to this, commenters stated that the proposed rule instituted another formal policy of family separation that permanently separate spouses and children from their family members.

Commenters also stated that the proposed rule would lead to additional forms of family separation because spouses and minor children who traveled with the primary asylum seeker would still need to establish individual eligibility for statutory withholding of removal or protection under the CAT regulations because there is no derivative application available in such circumstances. Also, commenters expressed concern that, without the ability to petition for additional family members, the proposed rule would force family members who remain in danger abroad to make the journey to the United States alone, likely endangering children who might be forced to make the journey as unaccompanied minors.

As another example of the lesser benefits of statutory withholding of removal and protection under the CAT regulations, commenters noted that recipients of withholding of removal must apply annually for work authorization. Commenters explained that individuals not only have to pay for these work authorization applications, but also face delays in adjudication of work authorization applications, which often results in the loss of legal authorization to work.

Similarly, commenters noted that recipients of statutory withholding of removal or protection under the CAT regulations may lose access to Federal public benefits, including ''supplemental security income, food stamps, Medicaid, and cash assistance.'' Commenters expressed concern that, although recipients of withholding of removal may be eligible for a period of seven years to receive Federal means-tested public benefits, after seven years, the presumption is that the alien would have adjusted status. However, because recipients of withholding of removal are not provided a pathway to lawful permanent residency, commenters expressed concern that vulnerable individuals such as those who are disabled or elderly would be at risk of losing those public benefits.

Commenters also noted that recipients of statutory withholding of removal and protection under the CAT regulations remain in a tenuous position because they are not granted lawful status to remain in the United States indefinitely. Commenters averred that this contravenes the Refugee Convention by failing to ''as far as possible facilitate the assimilation and naturalization of refugees.'' Recipients of statutory withholding of removal or protection under the CAT regulations may have their status terminated at any time based on a change in the conditions of their home country. Commenters explained that, because these individuals have no access to permanent residence or citizenship, they may be required to check in with immigration officials periodically. Commenters claimed that, at these check-ins, individuals may be required to undergo removal to a third country to which the individual has no connection.

Because of the constant prospect of deportation or removal, commenters stated that recipients of withholding or CAT protection are in a constant state of uncertainty. This uncertainty, commenters alleged, is particularly harmful to asylum seekers who have experienced severe human rights abuses. Commenters argued that certainty of a safe place to live forever is one of the most important aspects of the treaties establishing the refugee system. Commenters claimed that uncertainty and limbo discourage recipients from establishing connections to the United States, which in turn generates community instability. Commenters alleged that a lack of community stability will result in increased criminal activity as individuals are less incentivized to invest in the community or keep the community safe. Additionally, this uncertainty may reduce the incentive for individuals to invest in their community by, for example, opening businesses, hiring others, or paying taxes.

Commenters were concerned that increasing the population of people who are ineligible to receive asylum may create a cohort of individuals who will later need a ''legislative fix'' to adjust their status and grant them full rights as citizens.

Finally, commenters noted that both statutory withholding of removal and protection under the CAT regulations require a higher burden of proof than asylum. Commenters explained that asylum requires only that the applicant demonstrate at least a 10 percent chance of being persecuted if removed. Withholding of removal, either under the Act or under the CAT regulations, however, requires the applicant to demonstrate that it is more likely than not that he or she would be persecuted or tortured if returned—*i.e.,* he or she must show a more than fifty percent chance of being persecuted or tortured if removed. Commenters noted that, because of this higher burden of proof, an applicant may have a valid and strong asylum claim but be unable to meet the burden for statutory withholding of removal or protection under the CAT regulations. As a result, commenters alleged that an individual may be returned to a country where he or she would face persecution or even death.

Commenters averred that the Departments failed to provide an assessment of how many individuals subject to the new categorical bars could meet the higher burdens required for statutory withholding of removal and protection under the CAT regulations.

Response: The Departments maintain that statutory withholding of removal under the Act and protection under the CAT regulations are sufficient alternatives for individuals who are barred from asylum by one of the new bars. As stated, asylum is a discretionary form of relief subject to regulation and limitations by the Attorney General and the Secretary. *See*

INA 208(b)(2)(C) (8 U.S.C. 1158(b)(2)(C)). Significantly, the United States implemented the non-refoulement provisions of Article 33(1) of the Refugee Convention and Article 3 of the CAT through the withholding of removal provision at section 241(b)(3) of the Act (8 U.S.C. 1231(b)(3)), and the CAT regulations, rather than through the asylum provisions at section 208 of the Act (8 U.S.C. 1158). *See Cardoza-Fonseca,* 480 U.S. at 429, 440–41; *see also* 8 CFR 208.16 through 208.1; 1208.16 through 1208.18.

As recognized by commenters, asylum recipients are granted additional benefits not granted to recipients of statutory withholding of removal or CAT protection. Although the Attorney General and the Secretary are authorized to place limitations on those who receive asylum, it is Congress that delineates the attendant benefits to receiving relief or protection under the INA. *See, e.g.,* INA 208(c)(1)(A), (C) (8 U.S.C. 1158(c)(1)(A), (C)) (asylees cannot be removed and can travel abroad without prior consent); INA 208(b)(3) (8 U.S.C. 1158(b)(3)) (allowing derivative asylum for asylee's spouse and unmarried children); INA 209(b) (8 U.S.C. 1159(b)) (allowing the Attorney General or the Secretary to adjust the status of an asylee to that of a lawful permanent resident). Commenters identified various benefits that would be denied to individuals who receive statutory withholding of removal or protection under the CAT regulations as opposed to asylum. Congress chose not to provide the identified immigration benefits to recipients of statutory withholding of removal under the Act or protection under the CAT regulations. Congress, of course, may always revisit its decision; however, that is not the proper role of the Executive Branch.

Moreover, the United States is not required under U.S. law to provide the benefits identified by commenters to all individuals who seek asylum. For example, the valuable benefit of permanent legal status is not required under the United States' international treaty obligations.

In addition, recipients of statutory withholding of removal are eligible for numerous public benefits. Specifically, recipients of statutory withholding are eligible for Supplemental Security Income (''SSI''), the Supplemental Nutrition Assistance Program (''SNAP,'' also known as food stamps), and Medicaid for the first seven years after their applications are granted,[34] and for Temporary Assistance to Needy Families (''TANF'') during the first five years after their applications are granted.[35] Although asylees are eligible for additional benefits administered by HHS and ORR, the Departments believe that it is reasonable to exercise their discretion under U.S. law to limit these benefits to asylum recipients who do not have or who have not been found to have engaged in the sort of conduct identified in the bars to asylum eligibility being implemented in this rule because doing so incentivizes lawful behavior.

Commenters' assertions that statutory withholding of removal and protection under the CAT regulations essentially trap individuals in the United States is misplaced. Although an individual who has been granted these forms of protection is not guaranteed return to the United States if he or she leaves the country, these forms of protection do not prevent individuals from traveling outside the United States. *See Cazun,* 856 F.3d at 257 n.16.

To the extent commenters raised concerns that recipients of statutory withholding and CAT protection must apply annually for work authorization, the United States is permitted to place restrictions on work authorization. As required by Article 17 of the Refugee Convention, the United States must accord refugees ''the most favourable treatment accorded to nationals of a foreign country in the same circumstances.'' Individuals who have received a grant of withholding of removal or protection under the CAT regulations are not in the same position as an individual who has been granted lawful permanent resident status. Rather, these individuals have been ordered removed and had their removal withheld or deferred pursuant to a grant of withholding of removal or protection under the CAT regulations. The United States has opted to grant these individuals work authorization, despite their lack of permanent lawful status. However, because these individuals are not accorded permanent lawful status, the United States has determined that they must submit a yearly renewal for that work authorization.

Significantly, although the burden of proof to establish statutory withholding of removal or protection under the CAT regulations is higher than to establish asylum, this burden remains in compliance with the Protocol and Refugee Convention, which require that ''[n]o Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion,'' and Article 3 of the CAT, which similarly requires that ''[n]o State Party shall expel, return * * * or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.'' As explained by the Supreme Court with respect to statutory withholding of removal, the use of the term ''would'' be threatened as opposed to ''might'' or ''could'' indicates that a likelihood of persecution is required. *Stevic,* 467 U.S. at 422. Citing congressional intent to bring the laws of the United States into compliance with the Protocol, the Court concluded that Congress intended withholding of removal to require a higher burden of proof and that the higher burden complied with Article 33 of the Refugee Convention. *Id.* at 425–30. Similarly, the ''burden of proof for an alien seeking CAT protection is higher than the burden for showing eligibility for asylum.'' *Lapaix* v. *U.S. Att'y Gen.,* 605 F.3d 1138, 1145 (11th Cir. 2010). As with statutory withholding of removal and the risk of persecution, the burden of proof for CAT protection and the risk of torture is ''more likely than not.'' *Compare* 8 CFR 1208.16(b)(2) (statutory withholding), *with* 1208.16(c)(2) (CAT protection).[36]

In response to commenters who asserted that the Departments failed to provide an assessment of how many individuals subject to the new categorical bars could meet the higher burdens required for statutory withholding of removal and protection under the CAT regulations, the Departments note that such an assessment would not be feasible. The Departments do not maintain data on the number of asylum applicants with criminal convictions or, more specifically, with criminal convictions or pertinent criminal conduct that would be subject to the bars added by this rule. Without this data, the

[34] 8 U.S.C. 1612(a)(1), (a)(2)(A)(iii), (a)(3) (SSI & SNAP); 8 U.S.C. 1612(b)(1), (b)(2)(A)(i)(III), (b)(3)(C) (Medicaid).

[35] 8 U.S.C. 1612(b)(1), (b)(2)(A)(ii)(III), (b)(3)(A)–(B) (TANF and Social Security Block Grant); 8 U.S.C. 1622(a), (b)(1)(C); 8 U.S.C. 1621(c) (state public assistance).

[36] The burden associated with the CAT regulations is consistent with congressional intent. As the Third Circuit has noted, the U.S. Senate gave its advice and consent to ratification of the CAT subject to several reservations, understandings, and declarations, including that the ''United States understands the phrase 'where there are substantial grounds for believing that he would be in danger of being subjected to torture,' as used in Article 3 of the Convention, to mean 'if it is more likely than not that he would be tortured.' '' *Auguste,* 395 F.3d at 132.

Departments cannot reliably estimate the population affected by this rule. In addition, even with these statistics, it is impossible to accurately predict in advance whether immigration judges would grant these individuals statutory withholding of removal or protection under the CAT regulations due to the fact-bound nature of such claims, the various factors that must be established for each claim (*e.g.,* credibility), independent nuances regarding the claim, evidence submitted, and myriad other factors.

6. Policy Concerns

a. Unfair, Cruel Effects on Asylum Seekers

Comment: Commenters opposed the rule because, among many reasons, they alleged that it imposes unfair, cruel effects on aliens who would otherwise be eligible for asylum. Commenters alleged that the rule constitutes an ''unnecessary, harsh, and unlawful gutting of [ ] asylum protections.'' Commenters also alleged that the rule disadvantages asylum seekers because, in comparison to other forms of relief, no waiver of inadmissibility is available to waive misdemeanor convictions, rendering asylum ''disproportionately and counterintuitively more difficult to obtain for some of the most vulnerable people.'' Many commenters were also concerned that the rule denies protection to people who most need it and whom the asylum system was designed to protect. For those people, commenters stated, asylum is their ''only pathway to safety and protection.''

Many commenters expressed opposition to the rule by claiming that the rule will exclude bona fide refugees from asylum eligibility. Relatedly, commenters also opposed the rule because they alleged that it prevents aliens from presenting meritorious, legitimate claims. Overall, most commenters asserted that the consequence of asylum ineligibility was ''disproportionately harsh.'' In support, commenters provided various examples of offenses that would, in their view, unjustly render an alien ineligible for asylum under the rule: An alien in Florida who stole $301 worth of groceries; an alien with two convictions for DUI, regardless of whether the alien seeks treatment for alcohol addiction or the circumstances of the convictions; an alien defensively seeking asylum who has been convicted of a document fraud offense related to his or her immigration status; or a mother convicted for bringing her own child across the southern border seeking safety. Commenters alleged that aliens seeking asylum are typically fleeing persecution or death, so ineligibility based on such minor infractions constitutes ''punishment that clearly does not fit the crime.'' As stated by one commenter, ''Congress designed our current laws to provide a safe haven for asylum seekers and their immediate family members who are still in danger abroad. If an asylum claim is denied, those individuals may be killed, tortured, or subjected to grave harm after being deported.''

Commenters also opposed the rule by claiming that it bars asylum for aliens ''simply accused'' of engaging in battery or extreme cruelty; commenters believed it to be unfair that the rule could bar asylum based on conduct without a conviction.[37] Commenters opposed barring asylum relief based on ''mere allegations'' without any ''adjudication of guilt.'' One commenter stated that the rule exceeds the scope of the Act because, the commenter claimed, the INA allows asylum bars to be based only on convictions for particularly serious crimes.

Many commenters expressed opposition to a wide range of issues related to asylum seekers. One commenter expressed concern with the treatment of immigrants, stating that mistreatment ''increases blood pressure, diabetes, and risks for acute crises like heart attacks[,] which harm immigrant communities and negatively impact our healthcare system.'' Another commenter expressed opposition to the United States' allocation of resources, stating that the redirection of tax cuts and expanded military budgets could help to assist asylum seekers. Others more broadly expressed general opposition to family separation without relating that concern to this rule.

Response: The Departments disagree that the rule ''guts'' asylum protections or that the rule affects otherwise eligible asylum applicants in an unfair or otherwise cruel manner. First, as discussed elsewhere, asylum is a discretionary form of relief. *See* INA 208(b)(1)(A) (8 U.S.C. 1158(b)(1)(A)). Accordingly, aliens who apply for asylum must establish that they are statutorily eligible for asylum and merit a favorable exercise of discretion. *See id.;* INA 240(c)(4)(A) (8 U.S.C. 8 U.S.C. 1229a(c)(4)(A)); *see also Matter of A-B–,* 27 I&N Dec. 316, 345 n.12 (A.G. 2018), *abrogated on other grounds by Grace* v. *Whitaker,* 344 F. Supp. 3d 96, 140 (D.D.C. 2018), *aff'd in part, Grace* v. *Barr,* 965 F.3d 883 (D.C. Cir. 2020). Over time, Congress, the Attorney General, and the Secretary have established various categories of aliens who are barred from asylum and have established additional limitations and conditions on asylum eligibility in keeping with the Departments' congressionally provided authority. *See* INA 208(b)(2)(C), (d)(5)(B) (8 U.S.C. 1158(b)(2)(C), (d)(5)(B)); *see also* 84 FR at 69641.

Rather than ''gut'' asylum protections, the rule narrows asylum eligibility by adding categorical bars for aliens who have engaged in certain criminal conduct that the Departments have determined constitutes a disregard for the societal values of the United States; clarifies the effect of criminal convictions on asylum eligibility; and removes reconsideration of discretionary denials of asylum. *See* 84 FR at 69640. The Departments establish these changes as additional limitations and conditions on asylum eligibility, pursuant to their statutory authority in sections 208(b)(2)(C) and (d)(5)(B) (8 U.S.C. 1158(b)(2)(C), (d)(5)(B)).

Further, the Departments promulgate this rule to streamline determinations for asylum eligibility so that those who qualify for and demonstrate that they warrant a favorable exercise of discretion might be granted asylum and enjoy its ancillary benefits in a more timely fashion. Given the rule's clarified conditions and limitations on asylum eligibility, the Departments anticipate more timely adjudications for two reasons. First, non-meritorious claims will more quickly be resolved because the rule eliminates the current system of case-by-case adjudications and application of the categorical approach with respect to aggravated felonies, thereby freeing up time and resources that can be subsequently allocated towards adjudication of meritorious asylum claims. Second, the Departments believe that, because fewer people would be eligible for asylum, fewer applications may be filed overall, thereby reducing the total number of asylum applications requiring adjudication. As a result, the Departments could allocate their time and resources to asylum applications that are more likely to be meritorious. In this way, the rule does not eliminate protection for those who need it most or the benefits available to asylees; instead, it may actually allow for those people to more quickly receive protection.

In response to commenters who claim that the rule prevents aliens from seeking asylum who otherwise have meritorious claims, the Departments

[37] Further discussions of comments specifically regarding allegations of gang-related activity and domestic violence are contained in sections II.C.3.d and II.C.3.f, respectively.

emphasize that the rule changes asylum eligibility. Accordingly, despite commenters' assertions, an alien who is ineligible under the provisions of this rule would not, in fact, have a meritorious claim.

The Departments do not believe that the examples of misdemeanors that commenters provided in response to the request for public feedback about whether the proposed rule was over-inclusive warrant altering the scope of the proposed rule. Regarding certain referenced examples, the Departments strongly disagree that the rule employs too harsh a consequence or that the ''punishment does not fit the crime.'' The bars articulated in this rule indicate the Departments' refusal to harbor individuals who have committed conduct that the Departments have determined is undesirable. This is not a punishment. For example, the Departments strongly oppose driving under the influence and disagree that two DUI convictions, regardless of the circumstances or harm caused to others, do not warrant ineligibility for asylum. As previously stated, driving under the influence represents a blatant disregard for the laws of the United States. Further, the Departments disagree that document fraud does not warrant ineligibility for asylum, as it undermines the integrity of our national security and the rule of law. Overall, the Departments disagree that such examples demonstrate that revision of the rule is warranted.

The Departments further disagree that the rule disadvantages asylum seekers by failing to provide a waiver of inadmissibility for misdemeanor convictions. No such waiver is required by statute in the asylum eligibility context. Further, the Departments reiterate that alternative forms of relief or protection may still be available for aliens who are ineligible for asylum under the rule. *See* 84 FR at 69658 (explaining that an alien will still be eligible to apply for statutory withholding of removal or protection under regulations implementing U.S. obligations under Article 3 of the CAT); *see also* INA 241(b)(3) (8 U.S.C. 1231(b)(3)); 8 CFR 208.16 through 208.18; 1208.16 through 1208.18; *cf. Negusie* v. *Holder,* 555 U.S. 511, 527–28 (2009) (Scalia, J. and Alito, J., concurring) (noting that, if asylum is denied under the persecutor bar to an alien who was subject to coercion, that alien ''might anyway be entitled to protection under the Convention Against Torture''). Accordingly, aliens who are ineligible for asylum under the rule will not ''automatically'' be returned to countries where they fear persecution or torture, contrary to commenters' assertions.

The Departments emphasize that the rule changes the asylum eligibility regulations, but it does not affect the regulatory provisions for refugee processing under 8 CFR parts 207, 209, 1207, and 1209. Further, it does not categorically exclude ''bona fide refugees'' from the United States.

The INA does not preclude conduct-based bars. In fact, the statute already contemplates conduct-based bars in sections 208(b)(2)(A)(i), (iii)–(v) of the Act (8 U.S.C. 1158(b)(2)(A)(i), (iii)–(v)). Thus, commenters' concerns that the rule exceeds the scope of the statute are unwarranted, and the Departments choose, pursuant to statutory authority, to condition and limit asylum eligibility using conduct-based bars.

Relating to commenters' general humanitarian concerns for asylum seekers, such concerns are outside of the scope of this rulemaking, and the Departments decline to address them. Whether the current statutory framework appropriately addresses all aspects of the problems faced by aliens seeking asylum is a matter for Congress; here, the Departments merely exercise their authority under the discretion afforded to them by the existing statutes.

b. Incorrect Assumptions Regarding Criminal Convictions

Comment: Commenters alleged that the Departments promulgated the proposed rule based on incorrect assumptions regarding criminal convictions. Generally, commenters asserted that a conviction, without more, is both an unreliable predictor of future danger and an unreliable indicator of past criminal conduct. As an example, commenters stated that an alien may plead guilty to certain crimes to avoid the threat of a more severe sentence.

Commenters also asserted that not every noncitizen convicted of a crime punishable by more than one year in prison constitutes a danger to the community, which relates to the more general proposition advanced by commenters that the length of a sentence does not necessarily correlate with the consequential nature of the crime. One commenter mentioned that innocence and biased enforcement concerns underlie convictions and that there is a ''growing understanding domestically that a criminal conviction is a poor metric for assessing current public safety risk.'' Another commenter disagreed with the Departments' use of ''public safety'' as a justified reason for restricting liberty—in this case, liberty of asylum seekers.

Commenters claimed that the Departments provided no evidence underlying these assumptions. Further, commenters alleged that the proposed rule is arbitrary and capricious in violation of the Administrative Procedure Act (''APA'') because of these faulty assumptions.

Response: The Departments disagree that this rule was based on incorrect assumptions. The Departments have concluded that convictions with longer sentences tend to be associated with more consequential crimes and that offenders who commit such crimes are generally more likely to be dangerous to the community, and less deserving of the benefit of asylum, than offenders who commit crimes punishable by shorter sentences. *See* 84 FR at 69646. This determination is supported throughout the nation's criminal law framework. For example, for sentencing for Federal crimes, criminal history serves as a ''proxy'' for the need to protect the public from the defendant's future crimes. *See United States* v. *Hayes,* 762 F.3d 1300, 1314 n.8 (11th Cir. 2008); *see also* U.S. Sentencing Guidelines Manual § 4A1.2 cmt. Background (U.S. Sentencing Comm'n 2018). Further, in numerous Federal statutes and the Model Penal Code, crimes with a possible sentence exceeding one year constitute ''felonies'' regardless of the assumptions and implications referenced by the commenters. *See, e.g.,* 84 FR at 69646 (providing 5 U.S.C. 7313(b); Model Penal Code § 1.04(2); and 1 Wharton's Criminal Law § 19 & n.23 (15th ed.) as exemplary authorities that define ''felony,'' in part, by considering whether the sentence may exceed one year). Accordingly, and pursuant to their statutory authority, the Departments have determined that similarly conditioning asylum eligibility on criminal convictions with possible sentences of more than one year is proper and reasonable because such convictions are general indicators of social harm and conduct that the Departments have deemed undesirable.

Regarding commenters' claims that the proposed rule is arbitrary and capricious because it is based on faulty assumptions, the Departments respond in section II.D.1, which addresses comments related to the APA and other regulatory requirements.

c. Disregards Criminal Activity Linked to Trauma

Comment: Many commenters expressed opposition to the rule by alleging that it disregards the reality that criminal activity is oftentimes linked to trauma experienced by asylum seekers

in their countries of origin or on their journey to safety. Citing statistics and evidence regarding the vulnerability of asylum seekers and the high likelihood that they have experienced various forms of trauma related to the circumstances from which they are trying to escape and a lack of affordable healthcare, commenters asserted that asylum seekers are at a higher risk of self-medicating with drugs or alcohol, which in turn would increase the likelihood for asylum seekers to be involved in the criminal justice system and, as a result of the rule, ineligible for asylum. Commenters stated that aliens with substance use disorders, drug-related convictions, and other related addictions should be provided with ''treatment and compassion'' and not barred from asylum eligibility. A commenter stated that the rule renders aliens who have experienced persecution and subsequent trauma ''at greater risk of being returned to a country where they will only be further tortured and harmed.''

Commenters claimed that denying aliens who have experienced such trauma the opportunity to present countervailing factors regarding their subsequent or associated criminal activity was ''simply cruel.'' Commenters alleged that the rule ignores the fact that these aliens likely struggle with post-traumatic stress disorder, other untreated mental health problems such as anxiety or depression, substance use disorders or addictions, self-medication, poverty, and over-policing. Accordingly, commenters stated that the rule would ''further marginalize asylum seekers already struggling with trauma and discrimination'' and exclude ''those convicted of offenses that are coincident to their flight from persecution.''

Some commenters emphasized the trauma experienced by children prior to arriving in the United States and in ORR custody. Those commenters also emphasized that many children are then convicted and tried as adults for crimes stemming from that trauma, which, under the NPRM, would bar them from asylum. The commenters stated that such children, if given appropriate treatment, support, and services, are able to recover rather than remain in the juvenile or criminal justice systems. Accordingly, commenters disagreed with the NPRM's approach of categorically barring such individuals and preventing them from presenting context and mitigating evidence for their crimes.

Response: The Departments acknowledge the trauma aliens may face but note that aliens barred from asylum eligibility may still be eligible for alternative measures of protection precluding their return to a country where they experienced torture or persecution resulting in trauma. *See* 84 FR at 69642. The Departments, however, disagree that the possibility of personal trauma or other strife is sufficient to overcome the dangerousness or harms to society posed by the offenders subject to the sorts of bars to asylum implemented by the rule because, as discussed in the proposed rule, possessors and traffickers of controlled substances ''pose a direct threat to the public health and safety interests of the United States.'' 84 FR at 69654; *accord Ayala-Chavez,* 944 F.2d at 641 (''[T]he immigration laws clearly reflect strong Congressional policy against lenient treatment of drug offenders.'' (quoting *Blackwood,* 803 F.2d at 1167)). Also, commenters' suggestions regarding treatment, support, and services for children who have experienced trauma are outside the scope of this rulemaking.

Finally, the Departments note that, consistent with the INA's approach to controlled substance offenses, for example in the removability context under INA 237(a)(2)(B)(i) (8 U.S.C. 1227(a)(2)(B)(i)), the rule does not penalize a single offense of marijuana possession for personal use of 30 grams or less. *See* 84 FR at 69654. The Departments have concluded that allowing this limited exception to application of the new bar appropriately balances the competing policy objectives of protecting the United States from the harms associated with drug trafficking and possession, on the one hand, and the goal of not imposing unduly harsh penalties on persons subject to the new bars, on the other.

d. Problems With Existing Asylum System

Comment: Commenters opposed the NPRM because they alleged that the current overall asylum system is too harsh. Specifically, commenters stated that the current bars to asylum are too harsh and overly broad, given that all serious crimes are already considered as part of the discretionary analysis and that asylum seekers are already heavily vetted and scrutinized. Accordingly, commenters stated that the asylum restrictions should be narrowed rather than expanded.

Specifically, commenters asserted that the current ''harsh system'' places a high evidentiary burden on applicants to establish eligibility and disregards the danger they may face if they are sent back to their countries.[38] Commenters claimed that conditions in Mexico, where many asylum seekers are sent, are dangerous, and that asylum seekers are killed or experience other harms. In addition, commenters referenced numerous other barriers to asylum—the complex ''web'' of laws and regulations that asylum seekers must navigate, sometimes from jail or without counsel, and other recent policies such as the MPP, *see* DHS, *Policy Guidance for Implementation for the Migrant Protection Protocols* (Jan. 25, 2019), *https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf,* and the ''third-country transit bar,'' *see* Asylum Eligibility and Procedural Modifications, 84 FR 33829 (July 16, 2019).

Further, commenters asserted that the current criminal bars to asylum eligibility are too broad, emphasizing, for example, that the term ''aggravated felony,'' which is a ''particularly serious crime'' that renders the applicant ineligible for asylum, has come to encompass ''hundreds of offenses, many of them neither a felony nor aggravated, including petty offenses and misdemeanors * * *. 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.''

Commenters also explained that immigration judges currently have full discretion to deny asylum to any alien who is not categorically barred from relief but who has been convicted of criminal conduct. Accordingly, commenters asserted that the existing system is sufficient to ensure that relief is denied to those who may be dangerous to a community, while at the same time providing latitude for adjudicators to consider unique challenges that asylum seekers face resulting from the harm they have faced. In light of these facts, commenters opposed adding more bars and encouraged the Departments to instead narrow the bars.

Response: Commenters' concerns regarding the entire asylum system, including the asserted complex ''web'' of asylum laws and regulations, are outside the scope of this rulemaking. The rule adds categorical bars to asylum

[38] Commenters also mentioned numerous other alleged barriers to asylum unrelated to the NPRM, including the required time between an application's submission and the attached photo's taking, English-only application forms, and additional concerns. The Departments acknowledge the general concerns with the asylum system, but because these concerns do not relate to particular provisions of the NPRM, the Departments do not address them further.

eligibility; clarifies the effect of criminal convictions and, in one instance, criminal conduct, on asylum eligibility; and removes automatic reconsideration of discretionary denials of asylum. *See* 84 FR at 69640. The Departments do not otherwise propose to amend the asylum system established by Congress and implemented by the Departments through rulemaking and policy over the years.

The Departments note here, and the proposed rule acknowledged, in part, *see, e.g.,* 84 FR at 69645–46, that, although immigration judge discretion, BIA review, and scrutiny of asylum applicants could achieve results similar to some of the proposed provisions, the rule streamlines the system to increase efficiency. By eliminating the current system of case-by-case adjudications and application of the categorical approach with respect to aggravated felonies, the Departments anticipate that adjudication of asylum claims will be a much quicker process. In addition, the Departments believe that, given the clarified conditions and limitations on asylum eligibility, fewer non-meritorious or frivolous asylum claims may be filed overall, with the result that the Departments' adjudication resources would be allocated, from the beginning, to claims that are more likely to have merit. Overall, the Departments maintain that a rule-based approach to accomplish that goal is preferable. *See* 84 FR at 69646.

The Departments reiterate that asylum is a discretionary benefit; the Departments work in coordination to establish requirements, limits, and conditions, which may include evidentiary burdens. *See* INA 208(b)(2)(C), (d)(5)(B) (8 U.S.C. 1158(b)(2)(C), (d)(5)(B)). Contrary to the commenters' assertions that the rule disregards the dangers faced by aliens, the rule noted alternative forms of protection for which aliens may apply, even if they are subject to an asylum bar. *See* 84 FR at 69642. Nevertheless, many commenters' concerns referencing allegedly dangerous conditions in Mexico, the effects of the MPP, and the third-country transit bar are also outside the scope of this rulemaking.

The Departments disagree with commenters' assertions that the asylum bars should be narrowed. Given efficiency interests, the Departments posit that expanded categorical bars will streamline the asylum system, with the result that asylum benefits may be granted more quickly to eligible aliens.

e. Inefficiencies in Immigration Proceedings

Comment: Commenters opposed the rule because they alleged that various provisions would result in inefficiencies and exacerbate an already inefficient, backlogged, and under-staffed immigration system.

First, commenters stated that 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,'' would lead to inefficiencies. Many commenters stated that the rule effectively requires adjudicators to ''engage in mini-trials into issues already adjudicated by the criminal law system based on evidence that may not have been properly tested for its veracity in the criminal process,'' thereby decreasing efficiency. Further, commenters stated that adjudicators will have to ''conduct a separate factual inquiry into the basis for a criminal conviction or allegations of criminal conduct to determine whether the individual is eligible for asylum,'' instead of relying on adjudications from the criminal legal system.

Other commenters stated that the rule is especially inefficient in the case of family members' asylum eligibility. Commenters alleged that, under the proposed rule, family members' claims will be adjudicated separately and potentially before different adjudicators. Given that family members' claims are oftentimes interrelated and children are less able to sufficiently explain asylum claims, commenters concluded that the rule, especially as it relates to family claims, further increases inefficiencies in the system.

Commenters also stated that these ramifications directly contradict one of the rule's stated justifications of increased efficiency and alleged that the rule increased the time and expense necessary to process asylum claims. One commenter alleged that this will decrease the ability of asylum seekers to access healthcare, food, and housing. That commenter also averred that asylum seekers will likely have to request to reschedule interviews, which will introduce further delay, because the rule's filing deadlines restrict applicants' ability to provide supplementary evidence. Further, commenters alleged that the Departments failed to provide information or research to explain how the rule would increase efficiencies in the system.

Many commenters asserted that the rule will require a highly nuanced, resource-intensive inquiry that will prolong asylum proceedings and ''invariably lead to erroneous determinations'' or disparate results, with the consequence that appeals will increase and consume further Departmental resources.

Response: The Departments disagree with the commenters' assertions regarding inefficiencies.

First, adjudicators currently conduct a factual inquiry similar to the inquiry contemplated by the new bars in other immigration contexts. *See* 84 FR at 69652 (providing, as examples, the removability context in INA 237(a)(1)(E) (8 U.S.C. 1227(a)(1)(E)) and consideration of the persecutor bar in INA 208(b)(2)(A)(i) (8 U.S.C. 1158(b)(2)(A)(i))). Thus, adjudicators are adequately trained and equipped to conduct such analyses.

Second, the Departments emphasize that this rule is just one tool for increasing efficiencies in the immigration adjudications process and for correcting what the Departments view as problematic rules regarding asylum eligibility. This rule is not intended to correct all inefficiencies or to be a complete panacea, and DOJ has implemented numerous initiatives recently to address inefficiencies where appropriate. *See, e.g.,* EOIR, *Policy Memorandum 20–07: Case Management and Docketing Practices* (Jan. 31, 2020), *https://www.justice.gov/eoir/page/file/1242501/download* (implementing efficient docketing practices); EOIR, *Policy Memorandum 19–11: ''No Dark Courtrooms''* (Mar. 31, 2019), *https://www.justice.gov/eoir/file/1149286/download* (providing policies to reduce and minimize the impact of unused courtrooms and docket times to address the caseload and backlog); EOIR, *Policy Memorandum 19–05: Guidance Regarding the Adjudication of Asylum Applications Consistent with INA § 208(d)(5)(A)(iii)* (Nov. 19, 2018), *https://www.justice.gov/eoir/page/file/1112581/download* (providing policy guidance to effectuate the statutory directive to complete asylum adjudications within 180 days of filing, absent extraordinary circumstances); *see also* DOJ, *Memorandum for the Executive Office for Immigration Review: Renewing Our Commitment to the Timely and Efficient Adjudication of Immigration Cases to Serve the National Interest* (Dec. 5, 2017), *https://www.justice.gov/opa/press-release/file/1015996/download* (reiterating EOIR's commitment to efficient adjudication).

Although the Departments agree that the current system for adjudicating asylum applications frequently fails to meet the statutory deadline of completing such cases within 180 days

absent exceptional circumstances, INA 208(d)(5)(A)(iii) (8 U.S.C. 1158(d)(5)(A)(iii)) the Departments believe this rulemaking will improve efficiency. The Departments direct commenters to the proposed rule at 84 FR at 69645–46 for an extensive explanation of inefficiencies addressed through this rulemaking, which provides adequate ''information and research'' describing how the rule will increase efficiencies. Notably, courts have often recognized that rule-based approaches promote more efficient administration than wholly discretionary, case-by-case determinations. *See Lopez* v. *Davis,* 531 U.S. 230, 244 (2001) (observing that ''a single rulemaking proceeding'' may allow an agency to more ''fairly and efficiently'' address an issue than would ''case-by-case decisionmaking'' (quotation marks omitted)); *Marin-Rodriguez* v. *Holder,* 612 F.3d 591, 593 (7th Cir. 2010) (''An agency may exercise discretion categorically, by regulation, and is not limited to making discretionary decisions one case at a time under open-ended standards.''); *cf. Baylor Cty. Hosp. Dist.* v. *Price,* 850 F.3d 257, 263 (5th Cir. 2017) (''DHHS opted for a bright-line rule after considering its lack of agency resources to make case-by-case judgments'' because ''the statutory text had to be articulated properly and in an administratively efficient way.''). The Departments acknowledge the backlog in asylum applications, *see* EOIR, *Adjudication Statistics: Total Asylum Applications* (July 14, 2020), *https://www.justice.gov/eoir/page/file/1106366/download,* and the Departments, as a matter of policy, choose to address this backlog and resulting inefficiencies in part through this rulemaking.

The backlogged asylum system presents challenges; however, the Departments disagree with commenters regarding how best to address the backlog. The Departments disagree that the rule will prolong proceedings and lead to erroneous determinations, thus allegedly prompting more appeals. On the contrary, the Departments have concluded that the rule will increase efficiencies by eliminating the current system of case-by-case adjudications and application of the categorical approach with respect to aggravated felonies as they apply to asylum adjudications. *See* 84 FR at 69646–47. The Departments have determined that this rule-based approach is preferable, partly because, given the specific context of asylum eligibility, it will result in consistent treatment of asylum seekers with respect to criminal convictions. *See id.*

Finally, concerns regarding access to healthcare, food, and housing, are outside the scope of this rulemaking.

f. Disparate Impact on Certain Persons

Comment: Many commenters opposed the rule because they claimed it will harm or disparately affect asylum applicants whom commenters deem the most vulnerable people in society. Commenters explained that, although asylum seekers and refugees are generally vulnerable, the rule further implicates other vulnerable groups, such as LGBTQ individuals; victims of trafficking; communities of color, especially youth, and other minority ethnic groups; individuals who have experienced trauma, coercion, abuse, or assault; people with mental illness, especially those lacking adequate mental health services, such as children in ORR custody; people struggling with addictions and related convictions, regardless of whether they have sought treatment; parents who cross the border with children to seek safety; individuals convicted of document fraud who unknowingly use fraudulent documents or unscrupulous services to procure immigration documents; victims of domestic or intimate violence; people from Central America and the ''Global South''; and low-income people. Commenters were concerned that the rule categorically bars these populations without consideration of mitigating factors, thereby potentially resulting in the return of such people to countries and communities where they initially experienced discrimination, bias, trauma, and violence. In a related vein, commenters were concerned that these populations are more prone to be convicted of minor offenses that will, under the rule, preclude them from asylum relief. For example, one commenter speculated that a trafficking victim who leaves a child alone at home while on a brief trip to a store could be convicted of ''endangering the welfare of a child'' and then barred from asylum.

Commenters especially emphasized concerns regarding the effect of the rule on two groups: LGBTQ individuals, especially transgender women; and trafficking victims.[39] Regarding LGBTQ individuals, multiple commenters asserted that the rule constitutes a ''unique threat'' because those individuals have likely faced:

> a high degree of violence and disenfranchisement from economic and political life in their home countries. * * * Members of these communities also experience isolation from their kinship and national networks following their migration. This isolation, compounded by the continuing discrimination towards the LGBTQ population at large, leave[s] many in the LGBTQ immigrant community vulnerable to trafficking, domestic violence, and substance abuse, in addition to discriminatory policing practices.

One commenter explained that some LGBTQ individuals are charged with a variety of crimes in connection with their private, consensual conduct because of differences in discriminatory laws regarding this population around the world.

For trafficking victims, commenters explained that the rule bars them from asylum when they are only involuntarily part of a trafficking scheme and will likely face subsequent retaliation and other harms from their traffickers. Commenters were especially concerned that the rule denies asylum benefits to people who desperately need and will greatly benefit from them. Further, commenters asserted that alternative forms of relief are oftentimes insufficient for trafficking victims. For example, commenters explained that trafficking victims who have been removed are not eligible for T nonimmigrant status. Similarly, commenters explained that trafficking victims who are forced by their traffickers to commit other crimes may then be ineligible for other forms of relief under certain crime bars. Commenters also explained that trafficking victims typically receive intervention and other support services only after coming into contact with law enforcement; thus, this rule would preclude them from such resources.

Commenters explained that, not only are these people more prone to experiencing harms if they are barred from asylum, but also these people are more prone to initially experience harms that subsequently result in their involvement in the criminal justice system, which would, under this rule, bar them from asylum. For these reasons, commenters opposed the rule.

Response: To the extent that commenters ask the Departments to establish unique protections for these referenced groups, such protections are outside the scope of this particular rulemaking. Congress has chosen to provide special protections for certain groups, such as unaccompanied alien children, and Congress could choose to

[39] Commenters also expressed concerns for communities of color. These concerns, however, are addressed in section II.C.3.d because commenters' concerns on this point were primarily connected to concerns regarding the gang-related offenses included in the rule.

similarly extend protections to LGBTQ persons or other groups. Without such congressional action, however, the Departments are merely implementing the statutory framework as it currently exists. Further, to the extent that the commenters posit that the noted groups are more prone to engage in criminal conduct implicated by the rule—*e.g.,* fraud, DUI, human smuggling, gang activity, drug-related crimes—the Departments have no evidence that such groups are more likely to commit such crimes than any other groups of asylum applicants, and commenters did not provide evidence that would suggest otherwise. Thus, the Departments reject the assertion that the rule would have a disparate impact on discrete groups, absent evidence such groups are more likely to engage in criminal behavior addressed by the rule.

The rule includes several provisions that act, in part, to preclude returning vulnerable persons, including LGBTQ individuals and trafficking victims, to countries where they may have experienced or fear, as referenced by the commenters, discrimination, bias, trauma, and violence. As an initial matter, regardless of asylum eligibility, vulnerable persons may be eligible for statutory withholding of removal and protection under the CAT regulations. *See* 84 FR at 69642. Next, the rule includes an exception to the bar based on domestic assault or battery, stalking, or child abuse. *See* 8 CFR 208.13(c)(6)(v)(C), (vii)(F), 1208.13(c)(6)(v)(C), (vii)(F). The exception mirrors the provisions in the statute at INA 237(a)(7)(A) (8 U.S.C. 1227(a)(7)(A)) (removability context), but has one significant difference. In the removability context, applicants claiming this exception must satisfy the statutory criteria and be granted a discretionary waiver. Under the rule, however, applicants claiming the exception must only satisfy the criteria; no waiver is required. *See* 84 FR at 69653. This exception exists so that proper considerations can be taken of the vulnerability of domestic violence victims. The Departments believe this exception strikes the proper balance between providing protections for domestic violence victims while advancing the goals of reducing the incidence of domestic violence and protecting the United States from the sorts of conduct that would subject offenders to the new bars.

Commenters' concerns regarding vulnerable individuals' increased likelihood of convictions for minor offenses for certain vulnerable groups relate to the larger criminal justice system and accordingly fall outside the scope of this rulemaking. *See* section II.C.6.k for further discussion. Moreover, as noted above, the Departments have no evidence—and commenters provided none—that the groups identified by commenters are more prone to engage in criminal conduct implicated by the rule that would increase the likelihood of a conviction for, *e.g.,* fraud, DUI, human smuggling, gang activity, or drug-related crimes.

Next, this rule expands asylum ineligibility based on offenses committed in the United States, not abroad. *See* 84 FR at 69647 n.5. Thus, the rule does not expand asylum ineligibility for trafficking victims forced to commit crimes abroad or LGBTQ individuals whose private, consensual acts are criminalized abroad. Indeed, case law has long recognized that some criminal prosecutions abroad, if pretextual, can, for example, form the basis of a protection claim. *See, e.g., Fisher* v. *INS,* 79 F.3d 955, 962 (9th Cir. 1996) (noting ''two exceptions to the general rule that prosecution does not amount to persecution—disproportionately severe punishment and pretextual prosecution''); *Matter of S–P–,* 21 I&N Dec. 486, 492 (BIA 1996) (noting that ''prosecution for an offense may be a pretext for punishing an individual'' on account of a protected ground). The rule does not alter such case law.

g. Adjudicator Discretion

Comment: Many commenters opposed the rule out of concern that it strips adjudicators of discretion. First, commenters stated that it is crucial that adjudicators consider countervailing factors ''to determine whether the circumstances merit such a harsh penalty.'' Another commenter explained that ''[d]iscretion allows an adjudicator to consider a person's entire experience, including those factors that led to criminal behavior as well as the steps towards rehabilitation that individuals have taken.'' Commenters claimed that effective use of discretion is crucial in these circumstances: ''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.'' Thus, commenters alleged that the rule's removal of that discretion is punitive and unnecessary. One commenter stated that the purpose of the NPRM seems to be to remove all discretion from adjudicators to consider each case on a case-by-case basis. Another commenter underscored the importance of adjudicators retaining discretion to make individualized determinations because Congress established asylum as a discretionary form of relief.

One commenter alleged that the rule diminishes due process protections, stating that, ''by preventing the use of discretion in such cases[,] the proposed rules have a chilling effect on due process. Ensuring adjudicators have discretion to grant asylum under such circumstances allows asylum seekers to have a fair day in court and guards against further injustice resulting from errors that might have occurred in the criminal legal system.''

Commenters also alleged that the proposed rule incorrectly raises the burden of proof to establish that a favorable grant of discretion is warranted so that it is equivalent to the burden required to establish a well-founded fear of persecution. These commenters averred that this is problematic in the face of contrary case law that requires a more cautious, restrained view of the Attorney General's and the Secretary's discretion and that cautions against permitting the Departments unchecked power and unrestrained discretion in making asylum determinations. Commenters first cited *Matter of Pula,* 19 I&N Dec. at 474, arguing that it encouraged a restrained view of discretion because the Board asserted that ''the danger of persecution should generally outweigh all but the most egregious of adverse factors.'' Commenters averred that the Supreme Court cautioned against unlimited discretion in *Moncrieffe,* 569 U.S. at 200–01, by holding that the government must follow the categorical approach. Similarly, commenters cited *Delgado,* 648 F.3d at 1097, to support this proposition because the Ninth Circuit ''first assert[ed] its jurisdiction to review the Attorney General's discretionary authority'' and overruled an earlier decision that the jurisdiction-stripping provision at 8 U.S.C. 1252 barred the court's judicial review.

On the other hand, in the context of convictions or conduct related to domestic violence, battery, or extreme cruelty, commenters also opposed the amount of discretion afforded to adjudicators because the rule allegedly provides no clear guidance for the adjudicator's inquiry, analysis, and resulting determination. For example, commenters asserted that it is unclear what constitutes ''reliable evidence'' under the rule. Commenters were concerned that this would result in inconsistent decisions or diminished due process. Further, commenters were also concerned because determinations under the rule would be discretionary

and therefore non-appealable in most cases.

Response: Congress has authorized the Attorney General and the Secretary to, by regulation, limit and condition asylum eligibility consistent with the statute. INA 208(b)(2)(C), (d)(5)(B) (8 U.S.C. 1158(b)(2)(C), (d)(5)(B)). Through this rule, the Departments exercise such authority by establishing categorical bars to asylum that constitute such limits and conditions. The Departments disagree that adjudicators must be afforded discretion to consider mitigating factors in determining asylum eligibility in all circumstances. Given the challenges faced by the agencies and the operative functioning of current categorical bars, *see* INA 208(b)(2)(A) (8 U.S.C. 1158(b)(2)(A)), the Departments add the new categorical bars, in part, to improve the efficient processing of asylum claims. The regulatory changes are not punitive or intended to revoke all discretion from adjudicators, as commenters alleged; rather, the Departments promulgate this rule to facilitate and streamline processing of asylum claims. *See e.g.,* 84 FR at 69646–47, 69657.

The rule does not diminish due process. As discussed above, the discretionary benefit of asylum is not a liberty or property interest subject to due process protections. *See Yuen Jin,* 538 F.3d at 156–57; *Ticoalu,* 472 F.3d at 11 (citing *DaCosta,* 449 F.3d at 49–50). In other words, ''[t]here is no constitutional right to asylum per se.'' *Mudric,* 469 F.3d at 98. The Departments disagree that affording discretion to adjudicators in lieu of promulgating the additional bars is a preferable way to process asylum applications. Moreover, nothing in this rule prevents individuals from appealing the immigration judge's determination. *See* 8 CFR 1003.38 (appeals with the BIA). Further, as explained in section II.C.6.k, resolving errors in the criminal justice system is beyond the scope of this rulemaking.

The Departments reiterate their authority to limit and condition asylum eligibility consistent with the statute. *See* INA 208(b)(2)(C), (d)(5)(B) (8 U.S.C. 1158(b)(2)(C), (d)(5)(B)). Accordingly, the Departments may promulgate bars that govern determinations regarding asylum eligibility. In light of this authority, the Departments also disagree with commenters that the rule provides adjudicators with insufficient guidance for the sound exercise of their judgment in determining eligibility for asylum. For example, the proposed rule provides clarity surrounding determinations whether a conviction is a felony by applying the relevant jurisdiction's definition; also, it provides detailed guidance on vacated or expunged convictions, and modified convictions and sentences. 84 FR at 69646, 69654–55. Immigration judges and asylum officers currently exercise discretion to determine whether an asylum seeker merits relief for a wide range of reasons, many of which are not similarly set out or defined in the Act or by regulation. *See, e.g., Matter of A–B–,* 27 I&N Dec. 316 at 345 n.12 (outlining factors for consideration in discretionary asylum determinations). The Departments accordingly do not believe that the new bars require immigration judges or asylum officers to exercise significantly more discretion than those judges or officers already do.

Further, the Departments note that providing more exacting guidance, as some commenters suggested, would impede the very nature of legal discretion, as demonstrated by its definition: ''[f]reedom in the exercise of judgment,'' or ''the power of free decision-making.'' Black's Law Dictionary (11th ed. 2019); *see also* ''Discretion,'' Merriam-Webster, *https://www.merriam-webster.com/dictionary/discretion* (last updated Feb. 15, 2020) (defining ''discretion'' as the ''power of free decision or latitude of choice within certain legal bounds''). Doing so would thus aggravate the problems that some commenters perceived in the rule's alleged lack of sufficient flexibility.

Next, nothing in the final rule changes the standard of proof as regards an individual's ability to demonstrate that he or she warrants a positive grant of discretion. As an initial matter, citing a standard of proof for discretion is a misnomer. Rather, the determination of whether an alien warrants a discretionary grant of asylum is an analysis that requires reviewing the circumstances of the case. In determining whether the alien warrants a discretionary grant of asylum, the immigration judge considers a number of factors and considerations. *See Matter of Pula,* 19 I&N Dec. at 473–74 (outlining how adjudicators should weigh discretionary factors in applications for asylum). By contrast, the final rule sets forth additional limitations on eligibility for asylum, which are separate from the discretionary determination. As a result, the final rule does not create a standard of proof for establishing that an alien warrants a discretionary grant of asylum.

Similarly, the Departments disagree with commenters' assertions that the final rule violates Supreme Court and court of appeals precedent regarding the amount of discretion granted to the Attorney General and the Secretary. As explained, Congress, in IIRIRA, vested the Attorney General with broad authority to establish conditions or limitations on asylum. *See* 110 Stat. at 3009–692. Congress also vested the Attorney General with the authority to establish by regulation ''any other conditions or limitations on the consideration of an application for asylum,'' so long as those limitations are ''not inconsistent with this chapter.'' INA 208(d)(5)(B) (8 U.S.C. 1158(d)(5)(B)). This broad authority is not undercut by the cases cited by commenters. Neither *Moncrieffe* nor *Delgado* presumes to limit the Attorney General's discretion to place limits on asylum. Rather, *Moncrieffe* addressed whether a conviction for possession of a small amount of marijuana with intent to distribute qualified as an aggravated felony. 569 U.S. at 206. Similarly, the *Delgado* court held that it had authority to review certain discretionary determinations made by the Attorney General when not explicitly identified in the INA. 648 F.3d at 1100. However, this inquiry was based on statutory interpretation to determine whether the court had jurisdiction to review a BIA decision. Apart from disagreeing with the Department's legal arguments on appeal, neither of these two decisions purported, even in dicta, to place additional limitations on the Attorney General's ability to consider whether to grant asylum as a matter of discretion.

h. Issues With Representation

Comment: Commenters opposed the NPRM because they alleged that it made the asylum system more arduous for asylum seekers, especially children, to navigate alone. One commenter claimed that 86 percent of detainees lack access to counsel. Overall, commenters were concerned that the rule's changes disadvantage asylum seekers by making it more difficult for them to proceed without representation and for organizations, in turn, to provide representation and assistance to aliens.

Commenters pointed out that asylum seekers lack the benefit of appointed counsel, which is especially significant for pro se aliens affected by the rule, particularly in regard to gathering evidence and developing responses to refute the ''extremely broad grounds'' for the denial of asylum.

Commenters also alleged that it will be more difficult for organizations to represent and assist aliens in accordance with the rule's provisions. Commenters stated that backlogs at USCIS are detrimental to organizations and the aliens they represent because

aliens may wait years for a decision on their applications, while organizations have limited resources to assist immigrants and must seek to prioritize spending for emergency situations.

Commenters also stated that the system is already complicated; further complicating it with additional barriers will require much time, funding, and effort by immigration advocates. Finally, commenters stated that an asserted ''lack of predictability'' in application of the rule would ''create a substantial burden on immigration legal services providers, who [would] be unable to advise their clients as to their asylum eligibility, a long-term and stable form of protection from persecution.''

Response: The commenters' particular concerns regarding representation in immigration proceedings or during asylum adjudications are outside the scope of this rulemaking. The rule does not involve securing or facilitating representation, and Congress has already directed that aliens have a right to counsel in removal proceedings but at no expense to the government. INA 292 (8 U.S.C. 1362). Moreover, 87 percent of asylum applicants in pending asylum cases have representation, and there is nothing in the rule that would cause a reduction in that representation rate. *See* EOIR, *Adjudication Statistics: Representation Rate* (Apr. 15, 2020), *https://www.justice.gov/eoir/page/file/1062991/download.*

In addition, the Departments continue to maintain resources designed to assist aliens in proceedings find representation or otherwise help themselves in their proceedings. *See* EOIR, *Find Legal Representation, https://www.justice.gov/eoir/find-legal-representation* (last updated Nov. 29, 2016). Further, the Office of Legal Access Programs within EOIR works to increase access to information and raise the level of representation for individuals in immigration proceedings. *See* EOIR, *Office of Legal Access Programs, https://www.justice.gov/eoir/office-of-legal-access-programs* (last updated Feb. 19, 2020).

In regard to commenters' concerns regarding the backlog at USCIS, the rule facilitates a more streamlined approach by eliminating inefficiencies. *See, e.g.,* 84 FR at 69647, 69656–57. For example, the rule's established definition for ''felony'' will create greater uniformity by accounting for ''possible variations in how different jurisdictions may label the same offense'' and avoid anomalies in the asylum context ''that arise from the definition of 'aggravated felonies.''' *Id.* at 69647. Significantly, that definition eliminates the need for adjudicators and courts alike to engage in the categorical approach for aggravated felonies. *See id.* These improvements to the asylum system will increase predictability, therefore rendering representation less complicated and potentially requiring less funding by immigration advocates.

The Departments emphasize that the rule does not create an entirely new system. As with any other change to the regulations, the Departments anticipate that immigration advocates and organizations will adjust and adapt their strategies to continue to provide effective representation for their selected clients.

i. Against American Ideals

Comment: Commenters opposed the rule because they alleged that it conflicts with American ideals. Commenters remarked that the rule conflicts with the United States' tradition and moral obligation of providing a ''haven for persons fleeing oppression'' and a ''beacon of hope'' for vulnerable people, and that it violates principles that people should have freedom and equal rights under the law ''regardless of skin color or birthplace.'' Many commenters characterized these concerns as humanitarian, religious, and American ideals of showing compassion, fairness, and respect for human rights. Another commenter claimed that the rule ''eviscerated the spirit and overall purpose of the U.S. asylum system by categorically refusing protection to large groups of vulnerable people who are neither a danger to the public nor a threat to U.S. national security interests, and who have no other safe and reasonable option for protection.''

Other commenters expressed opposition by claiming that the rule would diminish the United States' role as a world leader, hurt the country's international reputation, and undermine foreign policy interests abroad. One commenter stated that the rule would diminish the ''country's historical role as a defender of human rights.''

Response: The rule does not conflict with American traditions or moral obligations related to caring for vulnerable people. On the contrary, the rule streamlines the asylum system to improve the consistency and predictability of the adjudication of claims, thereby enabling applicants who qualify for asylum eligibility to swiftly access the benefits that follow a grant of asylum. Those benefits include, among many, preclusion from removal, a path to lawful permanent resident status and citizenship, work authorization, the possibility of derivative lawful status for certain family members, and access to certain financial assistance from the Federal government. *See R–S–C,* 869 F.3d at 1180; INA 208(c)(1)(A), (C) (8 U.S.C. 1158(c)(1)(A), (C)); INA 208(c)(1)(B), (d)(2) (8 U.S.C. 1158(c)(1)(B), (d)(2)); *see also* 84 FR at 69641. The availability of these benefits demonstrates American ideals of compassion realized through the asylum system.

Aliens with certain criminal convictions demonstrate a disregard for the societal values of the United States and may constitute a danger to the community or threaten national security. The Departments have concluded that limiting asylum eligibility for these aliens furthers American ideals of the rule of law and a commitment to public safety. Although such aliens are not eligible for asylum under the rule, they may still be eligible for withholding of removal under the Act (INA 241(b)(3) (8 U.S.C. 1231(b)(3)); 8 CFR 1208.16(b)), or protection under the CAT regulations (8 CFR 1208.16(c)). These forms of protection limit removal to a country where the alien is more likely than not to be persecuted based on protected grounds or tortured, thereby affording protection to aliens, even if they are ineligible for asylum.

The Departments do not agree that the rule diminishes the United States' international reputation for caring for the less fortunate. On the contrary, the Departments believe the rule strengthens the United States' ability to care for those who truly deserve the discretionary benefit of asylum and may take full advantage of the numerous benefits that follow.

j. Bad Motives

Comment: Commenters opposed the NPRM because they alleged that the Departments published it with racist motives. Commenters stated that the rule was published ''out of animus to asylum seekers and [with] a desire to undermine the asylum system through an end-run around Congress'' because the rule would ''necessarily ensnare asylum seekers of color who have experienced racial profiling and a criminal legal system fraught with structural challenges and incentives to plead guilty to some crimes, particularly misdemeanors.'' One commenter specifically stated the rule was based upon a ''dark legacy'' of bias against Latin American countries and violated the Equal Protection Clause of the Fourteenth Amendment.

One commenter stated that ''the [A]dministration has targeted low-income, immigrant communities of color to further their white supremacist

agenda of maintaining a white majority in the United States.'' Other commenters alleged that DHS and ICE have relied on racist policing techniques to identify gang activity, which rarely result in criminal convictions.

Commenters also opposed the rule because they alleged that it is an attempt to ''drastically limit asylum eligibility,'' ''exclude refugees from stability and security,'' and make the United States more ''hostile'' towards immigrants. In other words, commenters alleged that the rule ''represent[ed] a thinly veiled attempt to prevent otherwise eligible asylum seekers from lawfully seeking refuge in the United States.'' Commenters referenced public documents allegedly revealing the Administration's efforts to utilize smuggling prosecutions against parents and caregivers as part of its overall strategy to deter families from seeking asylum. Commenters were concerned that the rule threatens to ''magnify the harm caused by these reckless policies by further compromising the ability of those seeking safety on the southern border to access the asylum system.''

Response: The rule is not racially motivated, nor did racial animus or a ''legacy of bias'' play a role in the rule. Rather, the rule categorically precludes from asylum eligibility certain aliens based on the aliens' various criminal convictions and, in one limited instance, criminal conduct, because the Departments believe that the current case-by-case adjudicatory approach yields inconsistent results that are both ineffective to protect communities from danger and inefficient in regard to overall case processing. *See* 84 FR at 69640.

To the extent that the rule disproportionately affects any group referenced by the commenters, the rule was not intentionally drafted to discriminate against any group. The provisions of the rule apply equally to all asylum applicants without regard to any applicant's ethnic or national background, or any other personal characteristics separate and apart from the criminal or conduct history laid out in the rule. Accordingly, the rule does not violate the Equal Protection Clause of the Fourteenth Amendment. *See Washington* v. *Davis,* 426 U.S. 229, 242 (1976) (''[W]e have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations.'' (citation omitted)); *cf. United States* v. *Smith,* 818 F.2d 687, 691 (9th Cir. 1987) (''We begin our review of this challenge by holding that persons convicted of crimes are not a suspect class.'').

As explained in the proposed rule, Congress expressly authorized the Attorney General and the Secretary to establish conditions or limitations for the consideration of asylum applications under INA 208(b)(2)(C), (d)(5)(B) (8 U.S.C. 1158(b)(2)(C), (d)(5)(B)) that are not inconsistent with the statute. *See* 84 FR at 69643. The Departments promulgate this final rule in accordance with those statutory sections, and in doing so, have promulgated a rule that is equally applicable to all races. The Departments strongly disavow any allegation of white supremacy.

The Departments reiterate that the rule does not encourage or facilitate hostility towards immigrants. Instead, the rule categorically precludes from asylum eligibility certain aliens based on criminal convictions, and, in one limited instance, criminal conduct, because the Departments believe the current case-by-case adjudicatory approach yields inconsistent results that are both ineffective to protect the American public from danger and inefficient in regard to overall case processing. The rule retains the current general statutory asylum system, *see* 84 FR at 69640, with the result that applicants for asylum must prove that they are (1) statutorily eligible for asylum, and (2) merit a favorable exercise of discretion. INA 208(b)(1)(A), 240(c)(4)(A) (8 U.S.C. 1158(b)(1)(A) 1229a(c)(4)(A)); *see also Matter of A–B–,* 27 I&N Dec. at 345 n.12. That framework continues to be equally applicable to persons of all races.

The rule does not affect regulatory provisions regarding refugee processing under 8 CFR parts 207, 209, 1207, and 1209, and it does not categorically exclude refugees from the United States or facilitate hostility towards immigrants. The Departments disavow allegations that the government used smuggling prosecutions against parents and caregivers specifically to deter families from seeking asylum. Rather, the Departments anticipate that the rule will better facilitate efficient processing of asylum applications by introducing a more streamlined approach, thus helping families who qualify for asylum and demonstrate their applications merit a favorable decision.

k. Problems With the Criminal Justice System

Comment: Commenters opposed the proposed rule because they alleged that it implicates a criminal justice system that suffers from structural challenges such as racial profiling, unjust outcomes, barriers to equal justice, and incentives to plead guilty, especially in the context of misdemeanors.

Related to commenters' concerns regarding racism in the NPRM,[40] commenters explained their concern that the NPRM imports racial disparities prevalent in the criminal justice system into the immigration system, stating, ''[a]sylum seekers of color, like all communities of color in the United States, are already disproportionately targeted and punished by the criminal justice system.'' Particularly, commenters stated that both undocumented and documented non-white immigrants are arrested, convicted of drug crimes, given longer sentences, and deported more frequently than their white counterparts. Further, commenters stated that LGBTQ aliens are more prone to experiencing violence from police.

One commenter opposed the NPRM, stating that it would exacerbate problems in our criminal justice system, such as increased incarceration, deportations, and racial profiling, which would, in turn, exacerbate health concerns for individuals and communities.

Response: The final rule amends the Departments' respective regulations governing bars to asylum eligibility. The rule clarifies the effect of criminal convictions and, in one instance, criminal conduct, in the asylum context and removes regulations governing automatic reconsideration of discretionary denials of asylum applications. *See* 84 FR at 69640. Accordingly, commenters' concerns regarding structural challenges to the criminal justice system are outside the scope of this rulemaking. The rule does not seek or intend to address actual or alleged injustices of the criminal justice system as a whole, as referenced by the commenters, including racial profiling, disparities based on race and sexual orientation, unjust outcomes, barriers to equal justice, incentives to plead guilty, and health concerns following alleged increases in incarceration, deportations, and racial profiling.

[40] *See* section II.C.6.j for further discussion.

l. Automatic Review of Discretionary Denials

Comment: Many commenters expressed strong opposition to the rule because it eliminates automatic review of discretionary denials. Commenters were concerned that language barriers and lack of financial resources may prevent applicants with meritorious claims from adequately presenting their cases. According to commenters, ''[m]aintaining reconsiderations of discretionary denials of asylum is therefore absolutely critical to ensuring that immigrant survivors who are eligible for asylum have another opportunity to defend and prove their right to obtain asylum protections.''

Response: The Departments disagree that reconsideration of discretionary denials of asylum is necessary and find that commenters' concerns regarding removal of these provisions are unwarranted. First, the current regulations providing for automatic reconsideration of discretionary denials at 8 CFR 208.16(e) and 1208.16(e) are inefficient, unclear, and unnecessary. *See* 84 FR at 69656. Federal courts have expressed similar sentiment as they approach related litigation. *See Shantu* v. *Lynch,* 654 F. App'x 608, 613–14 (4th Cir. 2016) (discussing unresolved anomalies of the regulations regarding reconsideration of discretionary denials); *see also* 84 FR at 69656–57.

Further, there are currently multiple avenues through which an asylum applicant may challenge a discretionary denial, with the result that removing the regulations providing for reconsideration (8 CFR 208.16(e) and 1208.16(e)) does not effectively render asylum eligibility determinations final. *See* 84 FR at 69657. First, under 8 CFR 1003.23(b)(1), an immigration judge may reconsider a decision upon his or her own motion.[41] Second, also under 8 CFR 1003.23(b)(1), an alien may file a motion to reconsider with the immigration judge. Third, under 8 CFR 1003.38, an alien may file an appeal with the BIA. The Departments have concluded that these alternatives sufficiently preserve the alien's ability to obtain review of the immigration judge's discretionary asylum decision, while removing the confusing, inefficient, and unnecessary automatic review provisions at 8 CFR 208.16(e) and 1208.16(e).

7. Recommendations

Comment: Commenters provided numerous recommendations to the Departments.

First, several commenters suggested that the Departments provide annual bias training to all immigration judges and prosecutors.

Next, two commenters recommended that the sentencing guidelines as provided in the Washington Adult Sentencing Guidelines Manual be incorporated into the NPRM to provide clarity and guidance to immigration judges.

Another commenter asserted that international human rights law obligations required the Departments to

> (1) put in place and allocate resources to the identification and assessment of protection needs; and (2) establish mechanisms for entry and stay of migrants who are considered to have protection needs prohibiting their return under international human rights law, including non-refoulement, as well as the rights to health, family life, best interests of the child, and torture rehabilitation.

A commenter suggested the Departments should incorporate recent innovative criminal justice reforms. For example, the commenter pointed to special drug trafficking courts that ''recognize the need for discretion in the determination of criminal culpability'' and suggested that the Departments should create specialized asylum eligibility courts.

Another commenter emphasized the effects of climate change, claiming that the United States should be ''creating new categories of asylum given the predictions on climate change migrants and the latest UN human rights ruling declaring governments cannot deport people back to countries if their lives are in danger due to climate change.''

One commenter recommended that the Departments continue to hire more immigration judges and asylum officers and to retain discretion with immigration adjudicators to make determinations on a case-by-case basis rather than expand the categorical bars.

Some commenters emphasized the general need for comprehensive, compassionate immigration reform. One commenter specifically urged the Departments to support the New Way Forward Act, which, according to the commenter, ''rolls back harmful immigration laws [because] it proposes immigration reform measures that dismantle abuses of our system and our asylum seeking community.''

Some commenters urged the Departments to take a more ''welcoming'' approach, citing the positive effects of diversity and economic advantages.

Another commenter, despite opposing the NPRM, provided several recommendations regarding the domestic violence crime bar and primary perpetrator exception should the Departments publish the rule as final. First, the commenter recommended that all immigration adjudicators should receive specialized training developed with input from stakeholders regarding domestic violence and the unique vulnerabilities faced by immigrants. Second, the commenter recommended that an automatic supervisory review should follow any determination that an applicant does not meet an exception to an asylum bar. Third, the commenter recommended that adjudicators should be required to provide written explanations of (1) the factual findings, weighed against the evidence, if a determination is made that an applicant does not meet an exception to the asylum bar and (2) their initial decisions to apply the bar, including what '''serious reasons' existed for believing that the applicant engaged in acts of domestic violence or extreme cruelty.'' Fourth, when applicants do not meet the exception, the commenter recommended that adjudicators identify what evidence, if any, was provided by the alleged primary perpetrator, how it was weighed, and what the adjudicator did to determine whether it was false or fabricated. Fifth, the commenter requested that agencies regularly engage with stakeholders to assess the impact of the bar and the exception on survivors.

Several commenters urged the Departments to dedicate their efforts to ensuring that individuals fleeing violence would be granted full asylum protections. One commenter suggested that the bars to asylum be narrowed by eliminating the bar related to convictions in other countries.

Some commenters suggested that families, especially children, be allowed to apply for asylum together, rather than require each person to file a separate application.

Response: The Departments note the commenters' recommendations.

Some commenters' suggestions involved issues or topics outside the scope of the rule, such as the suggestions that immigration judges should be provided certain types of training or to allow for additional flexibilities for family-based versus individual asylum applications. The

[41] On August 26, 2020, the Department of Justice proposed restricting the ability of an immigration judge to reconsider a decision upon his or her own motion. Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, 85 FR 52491, 52504–06 (Aug. 26, 2020). That rule has not yet been finalized, but even if the proposal is adopted in the final rule, asylum applicants would still remain able to file a motion to reconsider or an appeal in order to challenge an immigration judge's discretionary denial in these circumstances.

Departments may consider these recommendations in the event of additional rulemakings, but do not take any further action in response to these out-of-scope suggestions at this point.

Other commenters' suggestions involved topics outside the authority of the Departments, such as suggestions that there should be new asylum-related protections due to concerns surrounding climate change or that legislative changes to the immigration laws should be enacted. If Congress enacts these or other changes to the immigration laws, the Departments' regulations will reflect such changes in future rules. However, this rule is designed to implement the immigration laws currently in force.

Regarding the remaining suggestions related to the provisions of this rule, the Departments decline to adopt the recommendations or make changes to the proposed rule except as set out below in section III. Overall, the Departments find that the commenters' recommendations would frustrate the rule's purpose by slowing and prolonging the adjudicatory process, thereby undermining the goal of more efficiently processing asylum claims. Further, the Departments have determined, as discussed above, that the included offenses are significant offenses that warrant rendering aliens described by the rule ineligible for asylum.

For example, the Departments decline to adopt one commenter's requests to automatically require supervisory review of an asylum officer's decision to apply a bar, or to require the asylum officer or immigration judge to issue a written decision explaining the application of the bars. The Departments believe that the existing processes for issuing decisions and providing review of asylum determinations give sufficient protections to applicants. *See, e.g.,* 8 CFR 208.14(c)(1) (explaining that, for a removable alien, when an asylum officer cannot grant an asylum application, the officer shall refer the application for adjudication in removal proceedings by an immigration judge); 8 CFR 1003.3(a)(1) (providing for appeals of immigration judge decisions to the BIA); 8 CFR 1003.37(a) (explaining that a ''decision of the Immigration Judge may be rendered orally or in writing,'' and that, if the decision is oral, it shall be ''stated by the Immigration Judge in the presence of the parties'' and a memorandum ''summarizing the oral decision shall be served on the parties''). Requiring additional steps beyond these long-standing processes would only create inefficiencies that this rule seeks to avoid. For example, this rule removes the automatic review of a discretionary denial of asylum specifically because ''mandating that the decision maker reevaluate the very issue just decided is an inefficient practice that * * * grants insufficient deference to the original fact finding and exercise of discretion.'' 84 FR at 69657.

The Departments also decline to incorporate a commenter's suggestion to include the Washington Adult Sentencing Guidelines Manual into the rule, as the Departments believe the rule provides sufficient guidance to adjudicators without adding a specific state's criminal law manual, which would only add confusion to the immigration adjudication process.

D. Comments Regarding Regulatory Requirements

1. Administrative Procedure Act

Comment: Commenters raised concerns that this rule violated the APA's requirements, as set forth in 5 U.S.C. 553(b) through (d). First, commenters stated that the 30-day comment period was not sufficient for such a significant rule and that, at a minimum, the comment period should have been 60 days. Commenters cited the complexity of the legal and policy issues raised by the rule, the impact of the rule on asylum-seekers, and the potential implications of the rule regarding the United States' compliance with international and domestic asylum law. In support, commenters referenced Executive Orders 12866 and 13563, both of which recommend a ''meaningful opportunity to comment'' with a comment period of not less than 60 days ''in most cases.'' They also noted that the comment period for this rule ran through the winter holiday season, with multiple Federal holidays.

Commenters also stated that the rule was arbitrary and capricious under the APA because the Departments did not provide sufficient evidence to support such significant changes. For example, commenters noted the lack of statistics regarding the number of asylum seekers that would be affected by the rule and expressed concerned that the Departments were relying on conclusory statements in support of the rule.

Commenters further stated that the reasons given for the rule were insufficient and, therefore, arbitrary and capricious. For example, commenters took issue with the Departments' explanation that the additional categories of criminal bars were necessary to address the ''inefficient'' and ''unpredictable'' case-by-case adjudication process. Instead, commenters stated that the case-by-case process ensured that the adjudicator takes into account all of the relevant factors in making a determination.

Commenters had specific concerns with the rule's provision that all felony convictions constitute a particularly serious crime. Commenters stated that the rule provided no evidence to support the provision, and that a criminal record in and of itself does not reliably predict future dangerousness. Further, the provision does not address persons who accept plea deals to avoid lengthy potential sentences; who have rehabilitated since the conviction; or who have committed a crime that does not involve a danger to the community or circumstances when a Federal, State, or local judge has concluded that no danger exists by, for example, imposing a noncustodial sentence.

Commenters stated that the rule was arbitrary and capricious because it is inconsistent with the statute, *see* INA 208(b)(2)(A)(ii) (8 U.S.C. 1158(b)(2)(A)(ii)), which requires a separate showing from the particularly serious crime determination that the alien constitutes a danger to the community.

Commenters also raised concerns with the ''reason to believe'' standard for gang-related crime determinations. The commenters asserted that the standard relied on ineffective, inaccurate, and discriminatory practices and was therefore arbitrary and capricious.

Response: The Departments believe the 30-day comment period was sufficient to allow for a meaningful public input, as evidenced by the significant number of public comments received, including almost 80 detailed comments from interested organizations. The APA does not require a specific comment period length. *See* 5 U.S.C. 553(b)–(c). Similarly, although Executive Orders 12866 and 13563 recommend a comment period of at least 60 days, such a period is not required. Federal courts have presumed 30 days to be a reasonable comment period length. For example, the D.C. Circuit recently stated that, ''[w]hen substantial rule changes are proposed, a 30-day comment period is generally the shortest time period sufficient for interested persons to meaningfully review a proposed rule and provide informed comment.'' *Nat'l Lifeline Ass'n* v. *Fed. Commc'ns Comm'n,* 921 F.3d 1102, 1117 (D.C. Cir. 2019) (citing *Petry* v. *Block,* 737 F.2d 1193, 1201 (D.C. Cir. 1984)). Litigation has mainly focused on the reasonableness of comment periods shorter than 30 days, often in the face of exigent circumstances, and the Departments are unaware of any case

law holding that a 30-day comment period was insufficient. *See, e.g., N. Carolina Growers' Ass'n, Inc.* v. *United Farm Workers,* 702 F.3d 755, 770 (4th Cir. 2012) (analyzing the sufficiency of a 10-day comment period); *Omnipoint Corp.* v. *FCC,* 78 F.3d 620, 629–30 (D.C. Cir. 1996) (15-day comment period); *Northwest Airlines, Inc.* v. *Goldschmidt,* 645 F.2d 1309, 1321 (8th Cir. 1981) (7-day comment period).

The Departments also believe that the 30-day comment period was preferable to a longer comment period since this rule involves public safety concerns. *Cf. Haw. Helicopter Operators Ass'n* v. *FAA,* 51 F.3d 212, 214 (9th Cir. 1995) (noting that the Federal Aviation Administration had good cause to not engage in notice-and-comment rulemaking because the rule was needed to protect public safety as demonstrated by numerous then-recent helicopter crashes). By proceeding with a 30-day comment period rather than a 60-day period, the Departments are able to more quickly finalize and implement this rule, which prevents persons with certain criminal histories, such as domestic violence or gang-related crimes, from receiving asylum and potentially residing or prolonging their presence in the United States on that basis during the pendency of the asylum process.

Regarding commenters' APA concerns about the statistical analysis in this rule, the Departments reiterate that they are unable to provide precise data on the number of persons affected by the rule because the Departments do not maintain data on the number of asylum applicants with criminal convictions or, more specifically, with criminal convictions and pertinent criminal conduct, that would be subject to the bars added by this rule. An attempt to quantify the population affected would risk providing the public with inaccurate data that at best would be unhelpful. As a general matter, the rule will likely result in fewer asylum grants annually, but the Departments do not believe that further analysis—in the absence of any reliable data—is warranted. *See Stilwell* v. *Office of Thrift Supervision,* 569 F.3d 514, 519 (D.C. Cir. 2009) (''The APA imposes no general obligation on agencies to produce empirical evidence. Rather, an agency has to justify its rule with a reasoned explanation.''); *see also id.* (upholding an agency's decision to rely on its ''long experience'' and ''considered judgment,'' rather than statistical analyses, in promulgating a rule).

Likewise, the Departments disagree with commenters that the NPRM did not sufficiently explain the reasons for adding additional per se criminal bars. As explained in the NPRM, immigration judges and the BIA have had difficulty applying the ''particularly serious crime'' bar and, therefore, the Departments believe additional standalone criminal bars will provide a clear and efficient process for adjudicating asylum applications involving criminal convictions. *See* 84 FR at 69646. The Attorney General and the Secretary have not issued regulations identifying additional categories of convictions that qualify as particularly serious crimes, which has in turn resulted in adjudicators and the courts analyzing on a case-by-case basis whether individual criminal statutes qualify as particularly serious crimes. However, this statute-by-statute determination has not provided adjudicators with sufficient guidance in making ''particularly serious crime'' determinations due to the individualized nature of the BIA's determinations. *See id.* By adding these standalone criminal bars, the rule helps ensure that immigration adjudicators will be able to apply clear standards outside of applying the particularly serious crime bar. In regards to commenters' concerns about the blanket felony conviction bar, the Departments chose to include a bar for all felony convictions because it provides a clear standard to apply in adjudicating the effect to be given to criminal offenses as part of asylum determinations.

Adjudicators will be able to efficiently determine the effect of criminal convictions without resort to complex legal determinations as to the immigration effects of a specific criminal statute. The Departments are aware that the particular personal circumstances and facts of each case are unique; however, the Departments believe that the clarity and consistency of a per se rule outweigh any benefits of a case-by-case approach.

Further, adding a bar to asylum eligibility for all felony convictions recognizes the significance of felony convictions. For example, Congress recognized the relationship between felonies and the seriousness of criminal offenses when it explicitly defined ''aggravated felony'' to include numerous offenses requiring a term of imprisonment of at least one year. *See* INA 101(a)(43)(F), (G), (J), (P), (R), (S) (8 U.S.C. 1101(a)(43)(F), (G), (J), (P), (R), (S)). Similarly, Congress focused on the importance of felonies in the Armed Career Criminal Act, a sentencing enhancement statute for persons who have been convicted of three violent felonies, which requires the predicate offenses to be punishable by imprisonment for terms exceeding one year. *See* 18 U.S.C. 924(e)(2)(B).

The Departments also disagree that the use of the ''reason to believe'' standard for gang-related crime determinations is arbitrary and capricious. The ''reason to believe'' standard is used in multiple subsections of section 212 of the Act (8 U.S.C. 1182) in making inadmissibility determinations, and the Federal circuit courts have had no issues reviewing immigration judges' ''reason to believe'' inadmissibility determinations. *See, e.g., Chavez-Reyes* v. *Holder,* 741 F.3d 1, 3–4 (9th Cir. 2014) (reviewing ''reason to believe'' determination for substantial evidence); *Lopez-Molina,* 368 F.3d at 1211 (same). There is no reason that the Departments cannot apply this same standard when determining whether a criminal conviction involves gang activity.

In addition, the Departments disagree with commenters that the use of the ''reason to believe'' standard would enable adjudicators to rely on inaccurate, ineffective, or discriminatory evidence when making determinations regarding gang-related crimes. As discussed above, immigration judges are already charged with considering material and relevant evidence. 8 CFR 1240.1(c). To make this determination, immigration judges consider whether evidence is ''probative and whether its use is fundamentally fair so as not to deprive the alien of due process of law.'' *Ezeagwuna,* 325 F.3d at 405 (quoting *Bustos-Torres,* 898 F.2d at 1055). Nothing in the rule undermines or withdraws from this standard. If an alien believes that an adjudicator has relied on inaccurate, ineffective, or discriminatory evidence in making this determination, such decision would be subject to further review.

Finally, the Departments clarify that this rule creates additional standalone criminal bars to asylum and does not alter the definitions of the ''particularly serious crime'' bar. As a result, this rule does not create any inconsistencies with the ''particularly serious crime'' bar statutory language regarding dangerousness, which, the Departments note, does not require a separate finding of dangerousness. *See* INA 208(b)(2)(A)(ii) (8 U.S.C. 1158(b)(2)(A)(ii)); *see also, e.g., Matter of R–A–M–,* 25 I&N Dec. 657, 662 (BIA 2012) (explaining that, for purposes of the ''particularly serious crime'' bar, ''it is not necessary to make a separate determination whether the alien is a danger to the community'').

2. Executive Order 12866 (Regulatory Planning and Review), Executive Order 13563 (Improving Regulation and Regulatory Review), and Executive Order 13771 (Reducing Regulation and Controlling Regulatory Costs)

Comment: Commenters raised concerns that the Departments' cost-benefit analysis presented no evidence that potential benefits from the rule exceed the potential costs. For example, commenters explained that the Departments' primary stated reason for adopting new categorical bars was that the exercise of discretion has created inefficiency and inconsistency. However, commenters stated that the Departments' cost-benefit estimates failed to account for new assessments regarding numerous questions of law and fact that the rule would require. Accordingly, commenters argued that the Departments' cost-benefit analysis was unreliable.

Further, commenters stated that the agencies did not comply with Executive Orders 12866, 13563, and 13771, which require agencies to quantify potential costs to the fullest extent possible. Commenters explained that the Departments noted that the rule would likely result in fewer asylum grants annually but failed to quantify or evaluate the impact of the decrease and did not provide any evidence or indication that an attempt was made at quantifying this impact. Commenters explained that the Departments are required to use the best methods available to estimate regulatory costs and benefits, even if those estimates cannot be precise. Commenters also noted that the Departments did not attempt to provide a high and low estimate for the rule's potential impacts despite such an estimation being common practice in rulemaking.

Commenters noted that public comments on this rule and other recent asylum-related rulemakings provided the Departments with data regarding the impacts of asylum denials. Commenters gave examples of potential costs that the Departments failed to consider, including, for example, costs from the differences in benefits for individuals who may obtain only lesser protection in the form of statutory withholding of removal or protection under the CAT regulations; costs from the detention and deportation of individuals who would otherwise have meritorious asylum claims; economic and non-economic costs to asylum-seekers' families; costs to businesses that currently employ or are patronized by asylum-seekers; costs from the torture and killings of deported asylum-seekers; and intangible costs from the diminution of respect for U.S. treaty obligations and diminution of respect for human life and the safety of asylum-seekers, among others. As a result, commenters stated that the Departments did not support their conclusion that ''the expected costs of this proposed rule are likely to be de minimis.''

Response: The Departments disagree that the rule will create additional adjudicatory burdens that will outweigh the rule's benefits. The purpose of the rule is to limit asylum eligibility for persons with certain criminal convictions, which in turn will lessen the burdens on the overtaxed asylum system. There are currently more than one million pending cases at the immigration courts, with significant year over year increases, despite a near doubling of the number of immigration judges over the past decade and the completion of historic numbers of cases. *See* EOIR, *Adjudication Statistics: Pending Cases* (July 14, 2020), *https://www.justice.gov/eoir/page/file/1242166/download;* EOIR, *Adjudication Statistics: Immigration Judge (IJ) Hiring* (June 2020), *https://www.justice.gov/eoir/page/file/1242156/download;* EOIR, *Adjudication Statistics: New Cases and Total Completions* (July 14, 2020), *https://www.justice.gov/eoir/page/file/1060841/download*). Of these pending cases, over 575,000 include an asylum application.

These new bars will help achieve the goal of alleviating the burden on the immigration system while retaining the existing framework for asylum adjudications. As stated in the NPRM, this rule does not change the role of an immigration judge or asylum officer in adjudicating asylum applications; immigration judges and asylum officers currently consider an applicant's criminal history to determine the associated immigration consequences, if any, and whether the applicant warrants asylum as a matter of discretion. *See* 84 FR at 69657–58. These additional bars will be considered under that existing framework and, therefore, the Departments do not anticipate additional costs to the adjudication process.

In addition, the Departments believe the rule complies with the cost-benefit analysis required by Executive Orders 12866, 13563, and 13771. Executive Order 12866 requires the Departments to quantify costs ''to the fullest extent that these can be usefully estimated.'' *See* E.O. 12866, 58 FR 51735, 51735, sec. 1(a) (Sept. 30, 1993). As explained in the NPRM, the Departments do not maintain data on the number of asylum applicants with criminal convictions or, more specifically, with criminal convictions and pertinent criminal conduct, that would be subject to the bars added by this rule. Without this data, the Departments cannot reliably estimate the population effected by this rule, outside of identifying the group likely affected by the rule: Asylum applicants with criminal convictions and pertinent criminal conduct, barred under this rule, and asylum applicants denied asylum solely as a matter of discretion that will no longer receive automatic review of such decisions.

Based on this identified population, commenters provided a number of potential ancillary costs to the likely increase in asylum denials under these additional bars, which the Departments have reviewed. As explained in the NPRM, a main effect of the likely increase in asylum denials is a potential increase in grants of statutory withholding of removal or protection under the CAT regulations. 84 FR at 69658. These forms of protection do not provide the same benefits as asylum, including the ability to gain permanent status in the United States, obtain derivative status for family members, or travel outside the country. Such non-monetary costs are difficult to quantify, but the Departments believe that the similarly difficult-to-quantify benefits associated with the rule—such as a reduction in the risks associated with dangerous aliens and an increase in adjudicative efficiency—outweigh these costs.

Commenters also cited other potential costs, such as the effects that the bars could have on businesses employing or patronized by asylum applicants. However, such projections were general, tenuous, and unsupported by data, and the Departments are unaware of any reliable data parsing business income attributable to individuals affected by this rule—*i.e.,* asylum applicants who have been convicted of or engaged in certain types of criminal behavior—as opposed to non-criminal asylum applicants, asylees, refugees, aliens granted statutory withholding of removal or protection under the CAT, or other groups of aliens in general. Moreover, because aliens may still obtain work authorization if granted withholding of removal or protection under the CAT, 8 CFR 274a.12(a)(10), this rule would not necessarily foreclose employment or patronage opportunities for aliens subject to its parameters. Finally, even if there were identifiable economic costs for these aliens, the Departments believe that the benefits associated with limiting asylum eligibility based on certain criminal conduct would outweigh them because

of (1) the rule's likely impact in improving adjudicatory efficiency, and (2) the intangible benefits associated with promotion of the rule of law. *See* E.O. 12866, 58 FR at 51734 (directing agencies to account for ''qualitative'' benefits that are ''difficult to quantify,'' but which are ''essential to consider''). The Departments further disagree with commenters' assertions that these bars will have a negative intangible cost on the United States' interests or international standing, as Congress expressly conferred on the Attorney General and the Secretary the authority to provide these additional asylum limitations, which—as explained in the NPRM—are consistent with U.S. treaty obligations. *See* INA 208(b)(2)(C) (8 U.S.C. 1158(b)(2)(C)); 84 FR at 69644.

III. Provisions of the Final Rule

The Departments have considered and responded to the comments received in response to the NPRM. In accordance with the authorities discussed above in section I.A, the Departments are now issuing this final rule to finalize the NPRM. The final rule adopts the provisions of the NPRM as final, with the following minor edits for clarity, for the reasons discussed above in section II in response to the comments received.[42]

A. 8 CFR 208.13(c)(6)(ii)

As drafted in the NPRM, 8 CFR 208.13(c)(6)(ii) would have included a reference to ''the Secretary:'' ''The alien has been convicted [of a crime] that the Secretary knows or has reason to believe * * * .'' For internal consistency within 8 CFR 208.13(c)(6)(ii) and for specificity, the Departments are replacing this reference to ''the Secretary'' with ''the asylum officer,'' the officials in DHS who adjudicate asylum applications.

B. 8 CFR 1208.13(c)(6)(ii)

Regulations in chapter V of 8 CFR govern proceedings before EOIR and not before DHS. The Departments, however, mistakenly listed both the Attorney General and the Secretary in 8 CFR 1208.13(c)(6)(ii) as drafted in the NPRM: ''The alien has been convicted [of a crime] that the Attorney General or Secretary knows or has reason to believe * * * .'' This final rule removes the reference to the Secretary so that 8 CFR 208.13(c)(6)(ii), governing DHS, references the Secretary, and 8 CFR 1208.13(c)(6)(ii) references only officials within DOJ. It further changes ''Attorney General'' to ''immigration judge'' for internal consistency within the rest of 8 CFR 1208.13.

C. 8 CFR 1208.13(c)(6)(v)(B)

This rule amends the cross-reference in 8 CFR 1208.13(c)(6)(v)(B) so that it reads ''under paragraph (c)(6)(v)(A)'' instead of ''under paragraph (c)(6)(v)'' as published in the NPRM. This change provides clarity and matches the same cross-reference in 8 CFR 208.13(c)(6)(v)(B)–(C) and 8 CFR 1208.13(c)(6)(v)(C).

In addition, this rule changes ''adjudicator'' to ''immigration judge'' for specificity and clarity. This matches the specific reference to ''asylum officer,'' who is the relevant adjudicating entity for DHS, in 8 CFR 208.13(c)(6)(v)(B).

D. 8 CFR 1208.13(c)(7)(v)

As with the change discussed above to 8 CFR 1208.13(c)(6)(v)(B), this rule corrects the reference to the ''asylum officer'' to read ''immigration judge'' in 8 CFR 1208.13(c)(7)(v). The immigration judge is the relevant adjudicator for DOJ's regulations.

E. 8 CFR 1208.13(c)(9)

As with the change discussed above regarding 8 CFR 1208.13(c)(6)(v)(B), this rule removes ''or other adjudicator'' from the proposed text for 8 CFR 1208.13(c)(9). This change provides clarity because the immigration judge is the relevant adjudicator for DOJ's regulations and matches the specific reference to only an ''asylum officer'' in 8 CFR 208.13(c)(9).

F. 8 CFR 208.13(c)(6)(vii) and 8 CFR 1208.13(c)(6)(vii)

This rule amends the same language in both 8 CFR 208.13(c)(6)(vii) and 8 CFR 1208.13(c)(6)(vii) so that the provisions instruct that an alien will be barred from asylum if the immigration judge or asylum officer ''knows or has reason to believe'' that the alien has engaged on or after the effective date in certain acts of battery or extreme cruelty. Previously, these provisions provided ''[t]here are serious reasons for believing'' the alien has engaged in such conduct. In other words, the Departments have replaced the ''serious reasons for believing'' standard in proposed 8 CFR 208.13(c)(6)(vii) and proposed 1208.13(c)(6)(vii) with a ''knows or has reason to believe'' standard.

This change is intended to prevent confusion and ensure the rule's consistency, both within the new provisions it adds to 8 CFR and with the INA more generally. As discussed above, the ''reason to believe'' standard is used in multiple subsections of section 212 of the Act (8 U.S.C. 1182) in making inadmissibility determinations. *See, e.g.,* INA 212(a)(2)(C)(i) (8 U.S.C. 1182(a)(2)(C)(i)) (providing that an alien who ''the consular officer or the Attorney General knows or has reason to believe'' is an illicit trafficker of controlled substances is inadmissible). The Federal circuit courts have had no issues reviewing immigration judges' ''reason to believe'' inadmissibility determinations. *See, e.g., Chavez-Reyes,* 741 F.3d at 3–4 (reviewing ''reason to believe'' determination for substantial evidence); *Lopez-Molina,* 368 F.3d at 1211 (same). Further, without this change, the rule may have created additional unintended questions regarding what sort of reasons to believe are sufficient to qualify as ''serious'' reasons. Although the Departments are modifying the language in the final rule to reduce the likelihood of confusion, they reiterate that the language in 8 CFR 208.13(c)(6)(vii) and 8 CFR 1208.13(c)(6)(vii) is intended to be analogous to similar provisions in 8 CFR 204.2.

IV. Regulatory Requirements

A. Regulatory Flexibility Act

The Departments have reviewed this proposed rule in accordance with the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) and have determined that this rule will not have a significant economic impact on a substantial number of small entities. The rule would not regulate ''small entities'' as that term is defined in 5 U.S.C. 601(6). Only individuals, rather than entities, are eligible to apply for asylum, and only individuals are eligible to apply for asylum or are otherwise placed in immigration proceedings.

B. Administrative Procedure Act

This final rule is being published with a 30-day effective date as required by the Administrative Procedure Act. 5 U.S.C. 553(d).

C. Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995. *See* 2 U.S.C. 1532(a).

[42] In addition, the final rule makes clarifying grammatical edits to the punctuation of the proposed rule, such as by replacing semicolons with periods where relevant.

D. Congressional Review Act

The Office of Information and Regulatory Affairs has determined that this rule is not a major rule as defined by section 804 of the Congressional Review Act. 5 U.S.C. 804(2). This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

E. Executive Order 12866 (Regulatory Planning and Review), Executive Order 13563 (Improving Regulation and Regulatory Review), and Executive Order 13771 (Reducing Regulation and Controlling Regulatory Costs)

The Office of Information and Regulatory Affairs, Office of Management and Budget (''OMB''), has designated this rule a ''significant regulatory action'' under section 3(f)(4) of Executive Order 12866, but not an economically significant regulatory action. Accordingly, the rule has been submitted to OMB for review. The Departments certify that this rule has been drafted in accordance with the principles of Executive Order 12866, section 1(b); Executive Order 13563; and Executive Order 13771.

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health, and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of using the best available methods to quantify costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Similarly, Executive Order 13771 requires agencies to manage both the public and private costs of regulatory actions.

Because this final rule does not make substantive changes from the NPRM that would impact the rule's expected costs and benefits, the Departments have performed the same analysis as set out in the NPRM. 84 FR at 69657–59.

This rule provides seven additional mandatory bars to eligibility for asylum pursuant to the Attorney General's and the Secretary's authorities under sections 208(b)(2)(C) and 208(d)(5) of the INA (8 U.S.C. 1182(b)(2)(C) and 1182(d)(5)).[43] This rule adds bars on eligibility for aliens who commit certain offenses in the United States after entering the country. Those bars would apply to aliens who are convicted of, or engage in criminal conduct, as appropriate, with respect to: (1) A felony under Federal, State, tribal, or local law; (2) an offense under section 274(a)(1)(A) or (a)(2) of the Act (8 U.S.C. 1324(a)(1)(A) or 1324(a)(2)) (Alien Smuggling or Harboring); (3) an offense under section 276 of the Act (8 U.S.C. 1326) (Illegal Reentry); (4) a Federal, State, tribal, or local crime involving criminal street gang activity; (5) certain Federal, State, tribal, or local offenses concerning the operation of a motor vehicle while under the influence of an intoxicant; (6) a Federal, State, tribal, or local domestic violence offense; and (7) certain misdemeanors under Federal, State, tribal, or local law for offenses related to false identification; the unlawful receipt of public benefits from a Federal, State, tribal, or local entity; or the possession or trafficking of a controlled substance or controlled-substance paraphernalia.

The seven bars are in addition to the existing mandatory bars relating to the persecution of others, convictions for particularly serious crimes, commission of serious nonpolitical crimes, security threats, terrorist activity, and firm resettlement in another country that are currently contained in the INA and its implementing regulations. *See* INA 208(b)(2) (8 U.S.C. 1158(b)(2)); 8 CFR 208.13, 1208.13. Under the current statutory and regulatory framework, asylum officers and immigration judges consider the applicability of mandatory bars to the relief of asylum in every proceeding involving an alien who has submitted a Form I–589 application for asylum. Although this rule expands the mandatory bars to asylum, it does not change the nature or scope of the role of an immigration judge or an asylum officer during proceedings for consideration of asylum applications. Immigration judges and asylum officers are already trained to consider both an alien's previous conduct and criminal record to determine whether any immigration consequences result, and this rule does not propose any adjudications that are more challenging than those that are already conducted. For example, immigration judges already consider the documentation of an alien's criminal record that is filed by the alien, the alien's representative, or the DHS representative in order to determine whether one of the mandatory bars applies and whether the alien warrants asylum as a matter of discretion. Because the new bars all relate to an alien's criminal convictions or other criminal conduct, adjudicators will conduct the same analysis to determine the applicability of the bars proposed by the rule.[44] The Departments do not expect the additional mandatory bars to increase the adjudication time for immigration court proceedings involving asylum applications.

The expansion of the mandatory bars for asylum would likely result in fewer asylum grants annually;[45] however, because asylum applications are inherently fact-specific, and because there may be multiple bases for denying an asylum application, neither DOJ nor DHS can quantify precisely the expected decrease. An alien who would be barred from asylum as a result of the rule may still be eligible to apply for the protection of withholding of removal under section 241(b)(3) of the INA (8 U.S.C. 1231(b)(3)) or withholding of removal or deferral of removal under regulations implementing U.S. obligations under Article 3 of the CAT. *See* INA 241(b)(3) (8 U.S.C. 1231(b)(3));

[43] As discussed further below, this rule will not otherwise impact the ability of an alien who is denied asylum to receive the protection of withholding of removal under the Act or withholding of removal or deferral of removal under the CAT.

[44] The Departments note that one of the new bars, regarding whether the alien has ''engaged'' in certain acts of battery or extreme cruelty, does not necessarily require a criminal conviction or criminal conduct. The Departments believe that a criminal arrest or conviction is the most likely evidence to be filed with the immigration court related to this bar, but even in cases where no such evidence is available, the analysis by immigration judges related to this bar is not an expansion from the current analysis immigration judges employ in determining whether conduct rises to level of ''extreme cruelty'' under 8 CFR 204.2(c)(1)(vi) in other contexts during removal proceedings. *See, e.g., Bedoya-Melendez* v. *U.S. Atty. Gen.,* 680 F.3d 1321, 1326–28 (11th Cir. 2012) (demonstrating that, although there is a circuit split as to whether the ''extreme cruelty'' analysis is discretionary, all circuits look to conduct and not convictions in conducting the ''extreme cruelty'' analysis); *Stepanovic* v. *Filip,* 554 F.3d 673, 680 (7th Cir. 2009) (explaining that, in analyzing whether conduct rises to the level of ''extreme cruelty,'' the immigration judge ''must determine the facts of a particular case, make a judgment call as to whether those facts constitute cruelty, and, if so, whether the cruelty rises to such a level that it can rightly be described as extreme''). In addition, adjudicators have experience reviewing questions of an alien's conduct in other contexts during the course of removal proceedings. *See* INA 212(a)(2)(C) (8 U.S.C. 1182(a)(2)(C)) (providing that an alien is inadmissible if ''the Attorney General knows or has reason to believe'' that the alien is an illicit trafficker of a controlled substance, regardless of whether the alien has a controlled substance-related conviction).

[45] In Fiscal Year (''FY'') 2018, DOJ's immigration courts granted over 13,000 applications for asylum. *See* EOIR, *Adjudication Statistics: Asylum Decision Rates,* (July 14, 2020), *https://www.justice.gov/eoir/page/file/1248491/download.*

8 CFR 208.16 through 208.18; 1208.16 through 1208.18. For those aliens barred from asylum under this rule who would otherwise be positively adjudicated for asylum, it is possible they would qualify for withholding (provided a bar to withholding did not apply separate and apart from this rule) or deferral of removal.[46] To the extent this rule has any impacts, they would almost exclusively fall on that population.[47]

The full extent of the impacts on this population is unclear and would depend on the specific circumstances and personal characteristics of each alien, and neither DHS nor DOJ collects such data at such a level of granularity. Both asylum applicants and those who receive withholding of removal or protection under CAT may obtain work authorization in the United States. Although asylees may apply for lawful permanent resident status and later citizenship, they are not required to do so, and some do not. Further, although asylees may bring certain family members to the United States, not all asylees have family members or family members who wish to leave their home countries. Moreover, family members of aliens granted withholding of removal may have valid asylum claims in their own right, which would provide them with a potential path to the United States as well. The only clear impact is that aliens granted withholding of removal generally may not travel outside the United States without executing their underlying order of removal and, thus, may not be allowed to return to the United States; however, even in that situation—depending on the destination of their travel—they may have a prima facie case for another grant of withholding of removal should they attempt to reenter. In short, there is no precise quantification available for the impact, if any, of this rule beyond the general notion that it will likely result in fewer grants of asylum on the whole.

Applications for withholding of removal typically require a similar amount of in-court time to complete as an asylum application due to a similar nucleus of facts. 8 CFR 1208.3(b) (an asylum application is deemed to be an application for withholding of removal). In addition, this rule does not affect the eligibility of applicants for the employment authorization documents available to recipients of those protections and during the pendency of the consideration of the application in accordance with the current regulations and agency procedures. *See* 8 CFR 274a.12(c)(8), (c)(18), 208.7, 1208.7.

This rule removes the provision at 8 CFR 208.16(e) and 1208.16(e) regarding automatic reconsideration of discretionary denials of asylum. This change has no impact on DHS adjudicative operations because DHS does not adjudicate withholding requests. DOJ estimates that immigration judges nationwide must apply 8 CFR 1208.16(e) in approximately 800 cases per year on average.[48] The removal of the requirement to reconsider a discretionary denial will increase immigration court efficiencies and reduce any cost from the increased adjudication time by no longer requiring a second review of the same application by the same immigration judge. This impact, however, would likely be minor because of the small number of affected cases, and because affected aliens have other means to seek reconsideration of a discretionary denial of asylum. Accordingly, DOJ has concluded that removal of paragraphs 8 CFR 208.16(e) and 1208.16(e) would not increase the costs of EOIR's operations, and would, if anything, result in a small increase in efficiency. Removal of 8 CFR 208.16(e) and 1208.16(e) may have a marginal cost for aliens in immigration court proceedings by removing one avenue for an alien who would otherwise be denied asylum as a matter of discretion to be granted that relief. However, of the average of 800 aliens situated as such each year during the last 10 years, an average of fewer than 150, or 0.4 percent, of the average 38,000 total asylum completions[49] each year filed an appeal in their case, so the affected population is very small, and the overall impact would be nominal at most.[50] Moreover, such aliens would retain the ability to file a motion to reconsider in such a situation and, thus, would not actually lose the opportunity for reconsideration of a discretionary denial.

For the reasons explained above, the expected costs of this rule are likely to be *de minimis.* This rule is accordingly exempt from Executive Order 13771. *See* OMB, *Guidance Implementing Executive Order 13771, titled* ''*Reducing Regulation and Controlling Regulatory Costs*'' (2017), *https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/M-17-21-OMB.pdf.*

F. Executive Order 13132 (Federalism)

This rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

G. Executive Order 12988 (Civil Justice Reform)

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

H. Paperwork Reduction Act

This rule does not propose new or revisions to existing ''collection[s] of information'' as that term is defined under the Paperwork Reduction Act of 1995, Public Law 104–13, 44 U.S.C. 3501 *et seq.,* and its implementing regulations, 5 CFR part 1320.

I. Signature

The Acting Secretary of Homeland Security, Chad F. Wolf, having reviewed and approved this document, has delegated the authority to electronically sign this document to Chad R. Mizelle, who is the Senior Official Performing the Duties of the General Counsel for DHS, for purposes of publication in the **Federal Register**.

List of Subjects

8 CFR Part 208

Administrative practice and procedure, Aliens, Immigration, Reporting and recordkeeping requirements.

8 CFR Part 1208

Administrative practice and procedure, Aliens, Immigration, Reporting and recordkeeping requirements.

[46] Because asylum applications may be denied for multiple reasons and because the proposed bars do not have exact analogues in existing immigration law, there is no precise data on how many otherwise grantable asylum applications would be denied using these bars and, thus, there is no way to calculate precisely how many aliens would be granted withholding. Further, because the immigration judge would have to adjudicate the application in either case, there is no cost to DOJ.

[47] In FY 2018, DOJ's immigration courts completed 45,923 cases with an application for asylum on file. For the first three quarters of FY 2018, 622 applicants were denied asylum but granted withholding.

[48] This approximation is based on the number of initial case completions with an asylum application on file that had a denial of asylum but a grant of withholding during FYs 2009 through the third quarter of 2018.

[49] Thirty-eight thousand is the average of completions of cases with an asylum application on file from FY 2008 through FY 2018. Completions consist of both initial case completions and subsequent case completions.

[50] Because each case may have multiple bases for appeal and appeal bases are not tracked to specific levels of granularity, it is not possible to quantify precisely how many appeals were successful on this particular issue.

DEPARTMENT OF HOMELAND SECURITY

Accordingly, for the reasons set forth in the preamble and pursuant to the authority vested in the Acting Secretary of Homeland Security, part 208 of title 8 of the Code of Federal Regulations is amended as follows:

PART 208—PROCEDURES FOR ASYLUM AND WITHHOLDING OF REMOVAL

■ 1. The authority citation for part 208 continues to read as fol1ows:

Authority: 8 U.S.C. 1101, 1103, 1158, 1226, 1252, 1282; Title VII of Pub. L. 110–229, 8 CFR part 2; Pub. L. 115–218.

■ 2. Amend § 208.13 by adding paragraphs (c)(6) through (9) to read as follows:

§ 208.13 Establishing asylum eligibility.

* * * * *

(c) * * *

(6) *Additional limitations on eligibility for asylum.* For applications filed on or after November 20, 2020, an alien shall be found ineligible for asylum if:

(i) The alien has been convicted on or after such date of an offense arising under sections 274(a)(1)(A), 274(a)(2), or 276 of the Act;

(ii) The alien has been convicted on or after such date of a Federal, State, tribal, or local crime that the asylum officer knows or has reason to believe was committed in support, promotion, or furtherance of the activity of a criminal street gang as that term is defined either under the jurisdiction where the conviction occurred or in section 521(a) of title 18;

(iii) The alien has been convicted on or after such date of an offense for driving while intoxicated or impaired as those terms are defined under the jurisdiction where the conviction occurred (including a conviction for driving while under the influence of or impaired by alcohol or drugs) without regard to whether the conviction is classified as a misdemeanor or felony under Federal, State, tribal, or local law, in which such impaired driving was a cause of serious bodily injury or death of another person;

(iv)(A) The alien has been convicted on or after such date of a second or subsequent offense for driving while intoxicated or impaired as those terms are defined under the jurisdiction where the conviction occurred (including a conviction for driving while under the influence of or impaired by alcohol or drugs) without regard to whether the conviction is classified as a misdemeanor or felony under Federal, State, tribal, or local law;

(B) A finding under paragraph (c)(6)(iv)(A) of this section does not require the asylum officer to find the first conviction for driving while intoxicated or impaired (including a conviction for driving while under the influence of or impaired by alcohol or drugs) as a predicate offense. The asylum officer need only make a factual determination that the alien was previously convicted for driving while intoxicated or impaired as those terms are defined under the jurisdiction where the convictions occurred (including a conviction for driving while under the influence of or impaired by alcohol or drugs).

(v)(A) The alien has been convicted on or after such date of a crime that involves conduct amounting to a crime of stalking; or a crime of child abuse, child neglect, or child abandonment; or that involves conduct amounting to a domestic assault or battery offense, including a misdemeanor crime of domestic violence, as described in section 922(g)(9) of title 18, a misdemeanor crime of domestic violence as described in section 921(a)(33) of title 18, a crime of domestic violence as described in section 12291(a)(8) of title 34, or any crime based on conduct in which the alien harassed, coerced, intimidated, voluntarily or recklessly used (or threatened to use) force or violence against, or inflicted physical injury or physical pain, however slight, upon a person, and committed by:

(*1*) An alien who is a current or former spouse of the person;

(*2*) An alien with whom the person shares a child in common;

(*3*) An alien who is cohabiting with or has cohabited with the person as a spouse;

(*4*) An alien similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs; or

(*5*) Any other alien against a person who is protected from that alien's acts under the domestic or family violence laws of the United States or any State, tribal government, or unit of local government.

(B) In making a determination under paragraph (c)(6)(v)(A) of this section, including in determining the existence of a domestic relationship between the alien and the victim, the underlying conduct of the crime may be considered and the asylum officer is not limited to facts found by the criminal court or provided in the underlying record of conviction.

(C) An alien who was convicted of offenses described in paragraph (c)(6)(v)(A) of this section is not subject to ineligibility for asylum on that basis if the alien would be described in section 237(a)(7)(A) of the Act were the crimes or conduct considered grounds for deportability under section 237(a)(2)(E)(i) through (ii) of the Act.

(vi) The alien has been convicted on or after such date of—

(A) Any felony under Federal, State, tribal, or local law;

(B) Any misdemeanor offense under Federal, State, tribal, or local law involving:

(*1*) The possession or use of an identification document, authentication feature, or false identification document without lawful authority, unless the alien can establish that the conviction resulted from circumstances showing that the document was presented before boarding a common carrier, that the document related to the alien's eligibility to enter the United States, that the alien used the document to depart a country in which the alien has claimed a fear of persecution, and that the alien claimed a fear of persecution without delay upon presenting himself or herself to an immigration officer upon arrival at a United States port of entry;

(*2*) The receipt of Federal public benefits, as defined in 8 U.S.C. 1611(c), from a Federal entity, or the receipt of similar public benefits from a State, tribal, or local entity, without lawful authority; or

(*3*) Possession or trafficking of a controlled substance or controlled-substance paraphernalia, other than a single offense involving possession for one's own use of 30 grams or less of marijuana.

(vii) The asylum officer knows or has reason to believe that the alien has engaged on or after such date in acts of battery or extreme cruelty as defined in 8 CFR 204.2(c)(1)(vi), upon a person, and committed by:

(A) An alien who is a current or former spouse of the person;

(B) An alien with whom the person shares a child in common;

(C) An alien who is cohabiting with or has cohabited with the person as a spouse;

(D) An alien similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs; or

(E) Any other alien against a person who is protected from that alien's acts under the domestic or family violence laws of the United States or any State, tribal government, or unit of local

government, even if the acts did not result in a criminal conviction;

(F) Except that an alien who was convicted of offenses or engaged in conduct described in paragraph (c)(6)(vii) of this section is not subject to ineligibility for asylum on that basis if the alien would be described in section 237(a)(7)(A) of the Act were the crimes or conduct considered grounds for deportability under section 237(a)(2)(E)(i)–(ii) of the Act.

(7) For purposes of paragraph (c)(6) of this section:

(i) The term ''felony'' means any crime defined as a felony by the relevant jurisdiction (Federal, State, tribal, or local) of conviction, or any crime punishable by more than one year of imprisonment.

(ii) The term ''misdemeanor'' means any crime defined as a misdemeanor by the relevant jurisdiction (Federal, State, tribal, or local) of conviction, or any crime not punishable by more than one year of imprisonment.

(iii) Whether any activity or conviction also may constitute a basis for removability under the Act is immaterial to a determination of asylum eligibility.

(iv) All references to a criminal offense or criminal conviction shall be deemed to include any attempt, conspiracy, or solicitation to commit the offense or any other inchoate form of the offense.

(v) No order vacating a conviction, modifying a sentence, clarifying a sentence, or otherwise altering a conviction or sentence, shall have any effect unless the asylum officer determines that—

(A) The court issuing the order had jurisdiction and authority to do so; and

(B) The order was not entered for rehabilitative purposes or for purposes of ameliorating the immigration consequences of the conviction or sentence.

(8) For purposes of paragraph (c)(7)(v)(B) of this section, the order shall be presumed to be for the purpose of ameliorating immigration consequences if:

(i) The order was entered after the initiation of any proceeding to remove the alien from the United States; or

(ii) The alien moved for the order more than one year after the date of the original order of conviction or sentencing.

(9) An asylum officer is authorized to look beyond the face of any order purporting to vacate a conviction, modify a sentence, or clarify a sentence to determine whether the requirements of paragraph (c)(7)(v) of this section have been met in order to determine whether such order should be given any effect under this section.

§ 208.16 [Amended]

■ 3. Amend § 208.16 by removing and reserving paragraph (e).

Department of Justice

Accordingly, for the reasons set forth in the preamble, the Attorney General amends 8 CFR part 1208 as follows:

PART 1208—PROCEDURES FOR ASYLUM AND WITHHOLDING OF REMOVAL

■ 4. The authority citation for part 1208 continues to read as fol1ows:

Authority: 8 U.S.C. 1101, 1103, 1158, 1226, 1252, 1282; Title VII of Public Law 110–229; Pub. L. 115–218.

■ 5. Amend § 1208.13 by adding paragraphs (c)(6) through (9) to read as follows:

§ 1208.13 Establishing asylum eligibility.

* * * * *

(c) * * *

(6) *Additional limitations on eligibility for asylum.* For applications filed on or after November 20, 2020, an alien shall be found ineligible for asylum if:

(i) The alien has been convicted on or after such date of an offense arising under sections 274(a)(1)(A), 274(a)(2), or 276 of the Act;

(ii) The alien has been convicted on or after such date of a Federal, State, tribal, or local crime that the immigration judge knows or has reason to believe was committed in support, promotion, or furtherance of the activity of a criminal street gang as that term is defined either under the jurisdiction where the conviction occurred or in section 521(a) of title 18;

(iii) The alien has been convicted on or after such date of an offense for driving while intoxicated or impaired as those terms are defined under the jurisdiction where the conviction occurred (including a conviction for driving while under the influence of or impaired by alcohol or drugs) without regard to whether the conviction is classified as a misdemeanor or felony under Federal, State, tribal, or local law, in which such impaired driving was a cause of serious bodily injury or death of another person;

(iv)(A) The alien has been convicted on or after such date of a second or subsequent offense for driving while intoxicated or impaired as those terms are defined under the jurisdiction where the conviction occurred (including a conviction for driving while under the influence of or impaired by alcohol or drugs) without regard to whether the conviction is classified as a misdemeanor or felony under Federal, State, tribal, or local law;

(B) A finding under paragraph (c)(6)(iv)(A) of this section does not require the immigration judge to find the first conviction for driving while intoxicated or impaired (including a conviction for driving while under the influence of or impaired by alcohol or drugs) as a predicate offense. The immigration judge need only make a factual determination that the alien was previously convicted for driving while intoxicated or impaired as those terms are defined under the jurisdiction where the convictions occurred (including a conviction for driving while under the influence of or impaired by alcohol or drugs).

(v)(A) The alien has been convicted on or after such date of a crime that involves conduct amounting to a crime of stalking; or a crime of child abuse, child neglect, or child abandonment; or that involves conduct amounting to a domestic assault or battery offense, including a misdemeanor crime of domestic violence, as described in section 922(g)(9) of title 18, a misdemeanor crime of domestic violence as described in section 921(a)(33) of title 18, a crime of domestic violence as described in section 12291(a)(8) of title 34, or any crime based on conduct in which the alien harassed, coerced, intimidated, voluntarily or recklessly used (or threatened to use) force or violence against, or inflicted physical injury or physical pain, however slight, upon a person, and committed by:

(*1*) An alien who is a current or former spouse of the person;

(*2*) An alien with whom the person shares a child in common;

(*3*) An alien who is cohabiting with or has cohabited with the person as a spouse;

(*4*) An alien similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs; or

(*5*) Any other alien against a person who is protected from that alien's acts under the domestic or family violence laws of the United States or any State, tribal government, or unit of local government.

(B) In making a determination under paragraph (c)(6)(v)(A) of this section, including in determining the existence of a domestic relationship between the alien and the victim, the underlying conduct of the crime may be considered and the immigration judge is not limited to facts found by the criminal court or

provided in the underlying record of conviction.

(C) An alien who was convicted of offenses described in paragraph (c)(6)(v)(A) of this section is not subject to ineligibility for asylum on that basis if the alien would be described in section 237(a)(7)(A) of the Act were the crimes or conduct considered grounds for deportability under section 237(a)(2)(E)(i) through (ii) of the Act.

(vi) The alien has been convicted on or after such date of—

(A) Any felony under Federal, State, tribal, or local law;

(B) Any misdemeanor offense under Federal, State, tribal, or local law involving:

(*1*) The possession or use of an identification document, authentication feature, or false identification document without lawful authority, unless the alien can establish that the conviction resulted from circumstances showing that the document was presented before boarding a common carrier, that the document related to the alien's eligibility to enter the United States, that the alien used the document to depart a country in which the alien has claimed a fear of persecution, and that the alien claimed a fear of persecution without delay upon presenting himself or herself to an immigration officer upon arrival at a United States port of entry;

(*2*) The receipt of Federal public benefits, as defined in 8 U.S.C. 1611(c), from a Federal entity, or the receipt of similar public benefits from a State, tribal, or local entity, without lawful authority; or

(*3*) Possession or trafficking of a controlled substance or controlled-substance paraphernalia, other than a single offense involving possession for one's own use of 30 grams or less of marijuana.

(vii) The immigration judge knows or has reason to believe that the alien has engaged on or after such date in acts of battery or extreme cruelty as defined in 8 CFR 204.2(c)(1)(vi), upon a person, and committed by:

(A) An alien who is a current or former spouse of the person;

(B) An alien with whom the person shares a child in common;

(C) An alien who is cohabiting with or has cohabited with the person as a spouse;

(D) An alien similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs; or

(E) Any other alien against a person who is protected from that alien's acts under the domestic or family violence laws of the United States or any State, tribal government, or unit of local government, even if the acts did not result in a criminal conviction;

(F) Except that an alien who was convicted of offenses or engaged in conduct described in paragraph (c)(6)(vii) of this section is not subject to ineligibility for asylum on that basis if the alien would be described in section 237(a)(7)(A) of the Act were the crimes or conduct considered grounds for deportability under section 237(a)(2)(E)(i)–(ii) of the Act.

(7) For purposes of paragraph (c)(6) of this section:

(i) The term ''felony'' means any crime defined as a felony by the relevant jurisdiction (Federal, State, tribal, or local) of conviction, or any crime punishable by more than one year of imprisonment.

(ii) The term ''misdemeanor'' means any crime defined as a misdemeanor by the relevant jurisdiction (Federal, State, tribal, or local) of conviction, or any crime not punishable by more than one year of imprisonment.

(iii) Whether any activity or conviction also may constitute a basis for removability under the Act is immaterial to a determination of asylum eligibility.

(iv) All references to a criminal offense or criminal conviction shall be deemed to include any attempt, conspiracy, or solicitation to commit the offense or any other inchoate form of the offense.

(v) No order vacating a conviction, modifying a sentence, clarifying a sentence, or otherwise altering a conviction or sentence, shall have any effect unless the immigration judge determines that—

(A) The court issuing the order had jurisdiction and authority to do so; and

(B) The order was not entered for rehabilitative purposes or for purposes of ameliorating the immigration consequences of the conviction or sentence.

(8) For purposes of paragraph (c)(7)(v)(B) of this section, the order shall be presumed to be for the purpose of ameliorating immigration consequences if:

(i) The order was entered after the initiation of any proceeding to remove the alien from the United States; or

(ii) The alien moved for the order more than one year after the date of the original order of conviction or sentencing.

(9) An immigration judge is authorized to look beyond the face of any order purporting to vacate a conviction, modify a sentence, or clarify a sentence to determine whether the requirements of paragraph (c)(7)(v) of this section have been met in order to determine whether such order should be given any effect under this section.

§ 1208.16 [Amended]

■ 6. Amend § 1208.16 by removing and reserving paragraph (e).

Approved:

Chad R. Mizelle,

Senior Official Performing the Duties of the General Counsel, U.S. Department of Homeland Security.

Approved:

Dated: October 14, 2020.

William P. Barr,

Attorney General.

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