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RE: 85 FR 36264; EOIR Docket No. 18-0002; A.G. Order No. 4714-2020, RIN 1125-AA94, 1615-AC42, Comments in Opposition to DOJ/DHS Joint Proposed Rulemaking: Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review

July 15, 2020

To Whom It May Concern,

We write on behalf of the Immigrant Justice Network (IJN) and its four organizational members, Immigrant Legal Resource Center (ILRC), Immigrant Defense Project (IDP), Just Futures Law (JFL), and the National Immigration Project of the National Lawyers Guild (NIPNLG) (“the Organizations”), in response to the above-referenced Proposed Rules published in the Federal Register on June 15, 2020. We write to express our strong opposition to this proposal to amend the regulations pertaining to procedures and standards for adjudicating credible fear screenings in expedited removal proceedings and applications for asylum, withholding of removal, and protection under the Convention Against Torture (CAT).

IJN is a leading voice against the criminalization of immigrants in the United States. Grounded in racial justice values, we build power to defend the dignity of immigrants. We fight for a world where our communities are thriving and free from policing, deportation, and imprisonment. Since 2006, IJN has partnered with community groups and directly impacted individuals who have navigated or survived the detention, deportation, and criminal legal systems to achieve these goals. These partnerships help build long-lasting power for transformational change of our criminal and immigration systems. A description of each of IJN's four organizational members follows.

- The NIPNLG is a national nonprofit organization that provides support, referrals, and legal and technical assistance to attorneys, community organizations, families, and advocates seeking to advance the rights of noncitizens. NIPNLG focuses especially on the immigration consequences of criminal convictions, and its mission is to fight for justice and fairness for noncitizens who have contact with the criminal legal system.
- The ILRC is a national non-profit that provides legal trainings, educational materials, and advocacy to advance immigrant rights. The ILRC's mission is to work with and educate immigrants, community organizations, and the legal sector to continue to build a democratic society that values diversity and the rights of all people. Since its inception in 1979, the ILRC has provided technical assistance on hundreds of thousands of immigration law issues, trained thousands of advocates and pro bono attorneys annually on immigration law, distributed thousands of practitioner guides, provided expertise to immigrant-led advocacy efforts across the country, and supported hundreds of immigration legal non-profits in building their capacity.
- IDP is a New York-based non-profit that conducts litigation and provides training, education, and advocacy in support of advancing the rights of immigrants who are subject to the criminal legal system. IDP's mission is to secure fairness and justice for immigrants in the United States. The organization provides technical assistance to hundreds of immigration attorneys, DOJ-accredited representatives, and criminal and family defense attorneys on issues related to immigration, criminal, and family law, particularly the immigration consequences of law enforcement interactions and criminal court adjudications.
- JFL is a transformational immigration legal shop rooted in movement lawyering. JFL defends and builds the power of immigrants' rights groups working to disrupt and dismantle our deportation and mass incarceration systems. We are legal workers and lawyers with decades of experience, grounded in the core value that lawyering should serve movement organizing. JFL staff have worked on many cases involving the intersection of immigration and criminal law, including recent high-impact decisions on

behalf of individuals and amicus curiae, including *Saget v. Trump* (challenging termination of Haiti’s Temporary Protected Status), *Catalan-Ramirez v. Wong* (Chicago Police Department’s gang database and ICE’s unlawful raid on Catalan-Ramirez), and *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018) (holding that immigration crime of violence definition is unconstitutionally vague).

For the reasons detailed in the comment that follows, the Department of Homeland Security and the Department of Justice should immediately withdraw their current proposal, and instead dedicate their efforts to ensuring that individuals fleeing violence are granted full and fair access to asylum, withholding of removal, and protections under the Convention Against Torture in the United States.

I. Introduction

On June 15, 2020, the Department of Homeland Security (DHS) and the Department of Justice (DOJ) issued a joint set of Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review (“Proposed Rules”) that would upend and radically rewrite the rules governing the procedures and standards for adjudicating credible fear interviews and applications for asylum, withholding of removal, and protection under the Convention Against Torture (CAT). For the people who are seeking protection from persecution and torture and will be harmed by these Proposed Rules, the stakes could not be higher—denial of protection from removal will result in a return to brutal persecution or death. Asylum provides those fleeing horrors with physical safety, a path to citizenship and security, and the opportunity to reunite with immediate family members who may still remain in danger abroad.

The rules proposed by DHS and DOJ were not undertaken with the utmost care and adherence to the law and treaties that form the basis of asylum protection, nor do these rules consider the impact on vulnerable populations meriting relief. The Proposed Rules violate these principles and will have immediate and long-lasting effects on the equal protection, due process, and statutory rights of affected people. The Proposed Rules are arbitrary, capricious, and vague, and they contravene the intent of the humanitarian protections passed by Congress. They also do not take into account the vast agency resources that will be spent in order to dramatically reformulate the credible fear interview process and procedures for adjudication of asylum, withholding of removal, and protection under CAT--systems with established rules that have been in place for more than two decades. For these reasons, we urge that the Proposed Rules be rescinded in their entirety.

Our comment focuses on select provisions of the Proposed Rules; nevertheless, the Organizations oppose all proposed changes. These proposed changes are arbitrary, capricious, and *ultra vires*. They would gut the asylum, withholding of removal and CAT protections

enshrined in United States and international law. We submit this comment to express grave concerns about the administration's continued efforts to undermine due process protections for noncitizens and to exclude refugees and their families from obtaining the security and stability that the United States asylum and overall humanitarian system has long promised.

II. The Departments Failed to Give the Public and Affected Parties Adequate Opportunity to Comment on the Proposed Rule

At the outset, we note that DOJ and DHS have not provided a meaningful opportunity for the public to comment on the Proposed Rules. The 30-day comment period provided by the Departments, ending July 15, 2020, includes the federal holiday of Independence Day, when businesses and federal and state governments are closed. Additionally, the country has been under a national emergency since March 2020 due to the COVID-19 global pandemic.¹ As a result, governors throughout the country have urged people to stay home and work from home, and immigration procedures have been regularly shifting in response to the new circumstances brought on by the pandemic. Practitioners have been required to expend additional time and resources to keep up-to-date with changes to immigration law and practice and to readily inform clients of the ever-changing legal landscape. Those working remotely have more limited and inconsistent access to clients, physical documents, information, and technology needed to fully analyze and comment on the Proposed Rules, with minimal advance warning. Normal business operations have been dramatically disrupted, including those of DOJ, DHS, and other federal agencies. The ongoing national emergency related to COVID-19 will thus prevent commenters from submitting thorough, detailed analyses of the rule within the restrictive 30-day timeframe proposed by the Departments. Despite requests to extend the comment period, the Departments have taken no steps to provide the public and affected parties adequate time to comment on such drastic and harmful proposed changes to asylum and withholding adjudications.

The complexity of the Proposed Rules requires a full 60-day comment period. The Proposed Rules propose changes to the substance of asylum law as well as the procedures for adjudicating all forms of relief from persecution and torture and within two agencies. Assessing the merits of the Departments' position with respect to each of the proposed changes requires a full comment period. Moreover, the Proposed Rules do not provide calculations of the time and cost burden on immigration judges, asylum officers, immigration attorneys, and criminal defense attorneys.² The public and affected parties cannot meaningfully comment without sufficient time to gather data or to conduct the analysis needed to rebut the Departments' statement that "the Departments do not expect the proposed changes to increase the adjudication time for

¹ Proclamation No. 9994, 85 Fed. Reg. 15337 (Mar. 2020).

² See 85 Fed. Reg. 36289 (explaining without evidence that "the proposed rule does not propose any changes that would make adjudications more challenging than those that are already conducted. . . Accordingly, the Departments do not expect the proposed changes to increase the adjudication time for immigration court proceedings involving asylum applications or for reviews of negative fear determinations").

immigration court proceedings involving asylum applications or for reviews of negative fear determinations”³ or that “[t]o the extent there are any direct impacts of this rule, they would almost exclusively fall on” asylum applicants.⁴ The 30-day comment period also does not allow the public sufficient time to evaluate the Departments’ information under the Information Quality Act or to assess the Proposed Rules against objective or publicly available information.⁵ For all of the reasons detailed above, IJN strongly believes that the Proposed Rules require an extended comment period. Nevertheless, IJN attempts to address the many issues of concern to immigrant communities and their advocates in this comment.

III. The Proposed Rules in Their Entirety Will Have a Chilling Effect on Applicants and Contravene the Intent of Congress in Protecting Asylum Seekers

The Proposed Rules explicitly state that “the proposed changes are likely to result in fewer asylum grants annually due to clarifications regarding the significance of discretionary considerations and changes to the definition of firm resettlement.”⁶ The Departments do not provide any explanation of why the current grant rates of asylum under these current definitions violate the intent of the statutes passed by Congress to protect those who fear persecution. Furthermore, the Departments have pointed to no changes in statute or case law that authorize them to create radical changes to asylum standards that, in many instances, have been in place for at least 40 years.⁷ The Departments instead make a feeble attempt to justify the entirety of the Proposed Rules by citing a case⁸ that pre-dates the creation of refugee and asylum procedures and is wholly unrelated to the section of the Immigration and Nationality Act that relates to humanitarian forms of relief.

Instead, the only logical reasons for these sweeping changes are to deter individuals from filing asylum applications for many of the reasons discussed below: their information will be irresponsibly disclosed by DHS to an unlimited number of third parties; they fear eventual deportation back to persecution or torture because their meritorious claims will not be recognized under the Proposed Rules; or they will suffer the dire legal consequences of their applications being deemed “frivolous” under the new standard set forth in the Proposed Rules. Thus, the main goal of the Departments in proposing these rules is to contravene the intent of Congress that the United States provide protection to those who seek refuge from persecution or torture around the world. The Departments provide no justification for how the proposed changes will result in

³ 85 Fed. Reg. 36289.

⁴ 85 Fed. Reg. 36290.

⁵ 44 U.S.C. § 3516 note. *See Harkonen v. United States DOJ*, 800 F.3d 1143 (9th Cir. 2015) (discussing the Information Quality Act).

⁶ 85 Fed. Reg. 36289.

⁷ *See* Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980); *Matter of Acosta*, 19 I&N Dec. 211, 232–33 (BIA 1985).

⁸ The Departments cite to *Kleindienst v. Mandel*, 408 U.S. 753, 753 (1972), a case regarding an application for a “temporary nonimmigrant visa to a Belgian journalist” to attend an academic conference.

fewer grants of asylum and also will uphold the intent of Congress at the same time, and so the Proposed Rules should be withdrawn.

IV. The Organizations Oppose the Proposal to Permit Broad Disclosure of Information Contained in Applications for Asylum, Withholding of Removal, and Relief under CAT and Information Regarding Individuals Subject to Reasonable Fear or Credible Fear Determinations to Third Parties (proposed 8 CFR 208.6(d))

The proposed asylum rule includes a provision authorizing the disclosure of asylum applications⁹ to third parties that eviscerates the confidentiality protections currently enshrined in the law, without sufficiently justifying its sudden departure from longstanding policy, and without accounting for the significant harm that could result to asylum seekers as a result. The agencies attempt to justify their expansion of the disclosure authorization as necessary to ensure that these applications “are not being used to shield fraud,” so that “other types of criminal activity are not shielded from investigation and prosecution,” and so the government is able to “fully defend” its position in “any legal action relating to the [non-citizen’s] immigration or custody status.”¹⁰ These justifications fall far short of the requirement that agencies examine all relevant evidence, explain their decision in detail, justify departures from past practices, and consider all reasonable alternatives before reaching a final policy decision.

For the past two decades, the agencies have abided by the policy guidance adopted by the USCIS Asylum Division and General Counsel to the then-Immigration and Naturalization Service related to disclosure of confidential information contained in asylum applications.¹¹ This guidance explicitly recognized that protecting an asylum applicant’s identity or any information that might reveal their identity is of the utmost concern. This is to provide an asylum applicant safety from “retaliatory measures by government authorities or non-state actors in the event that the claimant is repatriated, or endanger the security of the claimant’s family members who may still be residing in the country of origin.”¹² Moreover, the agencies recognized that public

⁹ References to “asylum applications” in this section include all applications for relief made using the Form I-589, including asylum, withholding of removal, and relief under Article III of the Convention Against Torture (CAT).

¹⁰ 85 Fed. Reg. 36292.

¹¹ See Letter from Joseph E. Langlois, the Director of the Asylum Division, Office of Refugee Asylum and International Operations, U.S. Citizenship and Immigration Services, to all Asylum Office Directors and Deputy Directors (June 15, 2005) [hereinafter “Langlois Letter and Fact Sheet”], at <https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/fctsheetconf061505.pdf>; U.S. Citizenship & Immigration Services, Refugee, Asylum, and International Operations Directorate, *Affirmative Asylum Procedures Manual* (rev. May 2016) [hereinafter “Asylum Manual,”] (quoting the standard from the Memorandum from Bo Cooper, INS General Counsel, to Jeffrey Weiss, INS Director of Int’l Affairs, *Confidentiality of Asylum Applications and Overseas Verification of Documents and Application Information 3* (June 21, 2001) as the general standard for confidentiality), at <https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/AAPM-2016.pdf>

¹² Langlois Letter and Fact Sheet, *supra* note 3.

disclosure might “give rise to a plausible protection claim where one would not otherwise exist by bringing an otherwise ineligible claimant to the attention of the government authority or non-state actor against which the claimant has made allegations of mistreatment.”¹³

These concerns have also been heeded by reviewing courts, where the government has negligently revealed information even *tending* to show that a non-citizen has applied for asylum. In *Lin v. U.S. Dept. of Justice*, the Second Circuit vacated the removal order of an asylum applicant who complained that the release of his Certificate of Release from prison to Chinese authorities for forensic examination violated the confidentiality provisions the agencies now seek to expand.¹⁴ In so holding, the court noted that “[t]he government through its negligence has potentially exposed Lin and his family to risks beyond those that he claims caused him to flee China,” and that the government’s attempt to limit the disclosure prohibition to “sensitive material” could not stand, as “[s]o long as the information is ‘contained in’ or ‘pertain[s] to’ any asylum application it is confidential and may not be disclosed by government officials.”¹⁵ Other courts reviewing claims of unlawful disclosure by asylum applicants have allowed disclosure only where the information would not necessarily lead the recipient to conclude that it was in connection with an asylum application.¹⁶

The agencies here fail utterly to contend with the existence of these past interpretations of the disclosure prohibitions or precedent upholding them, or with the concerns that underlie them. Moreover, the existing regulations contain multiple exceptions to the limitations on disclosure, including where interagency arrangements have been established, and only require that criminal law enforcement agencies or other entities (including other governments’) request for information pertaining to asylum applications be approved by the Secretary of Homeland Security on a case-by-case basis.¹⁷ The proposed expansion of the disclosure authorization is justified as merely a matter of convenience to the agencies. No attention is paid to the countervailing concerns of retaliation against asylum seekers as noted in *Lin*, or the need to carefully vet requests for information to avoid harm to the asylum seeker. The implication, rather, is that all claims for asylum are fraudulent, and all asylum seekers are criminals. These categorical assumptions are without justification and violate the letter and the spirit of the immigration law provisions relating to refugees, as recognized by the past practice of the agency with regard to disclosure.

In justifying the expansion of the disclosure authority to reveal information relating to asylum applications, the agencies claim without evidence that the current regulations and

¹³ *Id.*

¹⁴ *Lin v. U.S. Dept. of Justice*, 459 F.3d 255, 268 (2d Cir. 2006).

¹⁵ *Id.*

¹⁶ See *Angov v. Lynch*, 788 F.3d 893 (9th Cir. 2015); *Lyashchynska v. U.S. Atty. Gen.*, 676 F.3d 962 (11th Cir. 2012).

¹⁷ See Langlois Letter and Fact Sheet, *supra* note 3.

practices implementing them shield applicants from detection for abuse and fraud. However, the government has not had difficulty prosecuting fraud related to asylum proceedings under the current regulations.¹⁸ Moreover, the Departments rely on unsupported assertions that expanded disclosure authority would avoid shielding criminal activity from investigation and prosecution, but the Proposed Rules fail to provide any evidence that confidentiality protections impede criminal investigation & prosecution. In fact, prosecutions of reentry offenses have increased exponentially without the need for revision of these rules.¹⁹ The Departments assert only that expanded disclosure authority would ease the administrative burden of defending against claims of unlawful activity by its agents, but they fail to provide a reasoned explanation for why the current policies in place are inadequate and burdensome.

Finally, the provision of the Proposed Rules relating to mandated reporting and child abuse would result in such an extreme expansion of the role of asylum officers and adjudicators, and even counsel for the government, as to be patently unlawful and arbitrary and capricious. Asylum adjudicators are not mandated reporters. Federal law at 42 U.S.C. 13031 defines mandated reporters of child abuse as those engaged in a variety of certain activities and professions on federal lands or in federal facilities.²⁰ None of the enumerated activities or professions specified in subsection (b) of 42 U.S.C. 13031 include immigration proceedings or involve the adjudication of asylum claims. To the extent that these provisions purport to authorize DHS personnel, including assistant chief counsel, or immigration judges, to report allegations of child abuse to the relevant authorities, the agencies offer absolutely zero reasoning for why the governing statute would include them. In any case, the agencies fail entirely to identify who would have expanded authority to disclose confidential information under this provision, and how such authority would be exercised. They also fail to explain how such personnel would be trained to identify activity subject to mandated reporting, or the costs and administrative burdens of doing so. Implementation of such provisions would be so chilling to asylum seekers' ability to candidly testify as to their experiences and fears, and potentially subject so many applicants to unwarranted intrusion into their family lives, that they are absolutely unconscionable, in addition to being *ultra vires* and arbitrary and capricious.

¹⁸ See, e.g., “Phony immigration attorney filed more than 215 fraudulent asylum applications,” ICE.gov (Mar. 11, 2020) at <https://www.ice.gov/news/releases/phony-immigration-attorney-filed-more-215-fraudulent-asylum-applications>, “Queens immigration attorney sentenced to five years in prison for operating asylum fraud scheme,” USCIS.gov (May 9, 2019), at <https://www.uscis.gov/news/news-releases/queens-immigration-attorney-sentenced-five-years-prison-operating-asylum-fraud-scheme>; NBC News, “New York man accused of allegedly defrauding immigrants by filing fraudulent asylum applications: DA,” Aug. 8, 2018, at <https://www.nbcnewyork.com/news/local/new-york-man-accused-of-defrauding-immigrants-by-filing-fraudulent-asylum-applications/1824497/>.

¹⁹ See “Department of Justice Prosecuted a Record-Breaking Number of Immigration-Related Cases in Fiscal 2019,” Department of Justice, Office of Public Affairs (Oct. 17, 2019), at <https://www.justice.gov/opa/pr/department-justice-prosecuted-record-breaking-number-immigration-related-cases-fiscal-year>.

²⁰ 42 U.S.C. 13031(a)-(b) (2006).

The impact of these proposed changes to the disclosure provisions is potentially vast, and extremely harmful to asylum seekers. Overall, the Departments seek to use the information provided by asylum seekers in order to prosecute them, without regard for their protection. By burying the provisions relating to disclosure in such an expansive exercise of rulemaking, the Departments seek to avoid the scrutiny of their failure to adequately justify the expansion of their authority, and further criminalize migration far beyond their authority under the immigration law.

V. The Proposed New Discretionary Bars Further Exclude Those in Need of Protection

The Proposed Rules outline twelve factors as criteria that adjudicators will consider when determining if an applicant merits a grant of asylum in the agency's discretion. While the Departments have historically given some weight to the first three criteria proposed,²¹ *see Matter of Pula*, 19 I&N Dec. 467, 474 (BIA 1987), the Departments propose to add nine factors that have not been traditionally considered in determining whether an otherwise eligible asylum applicant merits this form of protection.²² While the Organizations oppose all of the discretionary factors in the Proposed Rules,²³ our comment focuses primarily on the proposed addition of criminal bars at 8 CFR § 208.13(d)(2)(i)(C) and 8 CFR § 1208.13(d)(2)(i)(C), stating that the Secretary and the Attorney General “will not favorably exercise discretion” to grant asylum for an applicant who “would otherwise be subject to § 208.13(c) [or under paragraph (c) of section 1208.13] but for the reversal, vacatur, expungement, or modification of a conviction or sentence unless the alien was found not guilty.”²⁴

First, we point out that, by adding the nine proposed discretionary bars at 8 CFR § 208.13(d)(2)(i) and 8 CFR § 1208.13(d)(2)(i)--including the criminal bars in paragraph (C),--the Proposed Rules eviscerate the guidance laid out in *Matter of Pula*, which explains how adjudicators should exercise discretion. In doing so, the Proposed rules do not create discretionary *factors* but instead create *entirely new bars with an exception*. This is evident from

²¹ 85 Fed. Reg. 36293 (proposing 8 CFR § 208.13(d)(1)), 36301-36302 (proposing 8 CFR § 1208.13(d)(1)).

²² 85 Fed. Reg. 36293 (proposing 8 CFR § 208.13(d)(2)), 36302 (proposing 8 CFR § 1208.13(d)(2)). Notably, the Departments do not explain why they will no longer consider the *positive* discretionary factors listed in *Matter of Pula*, which include “general humanitarian considerations, such as an alien’s tender age or poor health” and an guidance that “discretionary factors should be carefully evaluated in 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.” 19 I&N Dec. at 474.

²³ The organizations note that the Departments import many of the discretionary factors from other bars that Congress has not stated an intention to apply to asylum applicants. Specifically, the Proposed Rules import a ground of inadmissibility for having more than one year of unlawful presence as a “significant adverse factor, consistent with the unlawful presence bar” at INA 212(a)(9)(B)(i)(II). 85 Fed. Reg. 36284. It also proposes as an adverse factor the “failure to file taxes or fulfill related obligations,” which has no basis as a bar or negative factor in any section of the INA. *Id.* Both of these bars are wholly unrelated to an applicant’s eligibility or merit to receive protection from persecution or torture and should not be included.

²⁴ 85 FR 36293, 36302.

the text of the regulation: “The Secretary, *except as provided in paragraph (d)(2)(ii)* of this section, *will not* favorably exercise discretion under section 208 of the Act”.²⁵ The Departments cite no direct statutory authority in section 208 of the INA for creating these new bars. Instead, the Departments makes a desperate attempt to import legal standards related to admission and adjustment of status, saying “the Departments believe it is similarly appropriate” because asylum is also discretionary.²⁶ However, the Departments provide no justification to show that Congress intended all discretionary forms of relief to be adjudicated using the same factors, nor do they explain why the standard set out in *Matter of Pula*--which incorporates consideration of both negative *and positive factors*--should be completely rewritten in this way.

More specifically, the addition of the criminal bars at 8 CFR § 208.13(d)(2)(i)(C) and 8 CFR § 1208.13(d)(2)(i)(C) impermissibly punishes asylum seekers who have suffered constitutionally deficient process in their criminal proceedings. The Proposed Rules also deny full faith and credit to state court proceedings by disregarding the findings and orders of state courts during such proceedings.²⁷ Finally, the Proposed Rules rely on legally impermissible authority by extending *Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003), to modifications of a criminal sentence, as the Attorney General has impermissibly attempted to establish in *Matter of Thomas & Thompson*, 27 I&N Dec. 674, 674–75 (A.G. 2019).

A. The Proposed Rules undermine Sixth Amendment protections and harm immigrants who have experienced due process violations in their criminal proceedings.

By allowing immigration judges to give weight to criminal adjudications that have been reversed, vacated, expunged, or modified by a criminal court, the Proposed Rules unfairly penalize asylum applicants who have experienced due process violations during their criminal proceedings.²⁸ In *Padilla v. Kentucky*, the Supreme Court recognized that the immigration consequences of a conviction are sufficiently serious for the Sixth Amendment to require a noncitizen defendant to be competently advised of them before agreeing to a guilty plea.²⁹ Thus, such a failure to advise a noncitizen defendant of the immigration consequences of a guilty plea is constitutionally deficient.

By allowing immigration judges to ignore the validity of a withdrawal or vacatur of a plea and consider the now-vacated or withdrawn plea in a discretionary analysis, the Proposed

²⁵ 85 Fed. Reg. 36293, 36302 (proposing 8 CFR § 208.13(d)(2)(i) and 8 CFR § 1208.13(d)(2)(i)) (emphasis added).

²⁶ 85 Fed. Reg. 36283.

²⁷ See *Saleh v. Gonzales*, 495 F.3d 17, 25-26 (2d Cir. 2007) (discussing 28 U.S.C. § 1738, requiring federal courts to give full faith and credit to state acts, records, and judicial proceedings and U.S. Const. art. IV, § 1, and finding that there was no violation where the BIA stopped short of “refusing to recognize or relitigating the validity of [Saleh’s] state conviction”).

²⁸ 85 Fed. Reg. 36284, 36296 (proposing 8 CFR § 208.13(d)(2)), 36302 (proposing 8 CFR § 1208.13(d)(2)).

²⁹ *Padilla v. Kentucky*, 559 U.S. 356 (2010).

Rules hold asylum seekers whose rights were violated under *Padilla* to a different standard; even though they, too, were denied effective assistance of counsel in the course of their underlying criminal proceedings, asylum seekers will be denied access to asylum protection and the accompanying stability in the United States. The Proposed Rules, therefore, compound the harm to immigrants who, in addition to facing persecution in their home countries, have been prejudiced when denied a constitutionally compliant process in the U.S. criminal legal system. Allowing immigration judges to ignore the validity of a plea withdrawal or vacatur in these cases will undoubtedly lead to the wrongful exclusion of countless immigrants from asylum simply because, under the Proposed Rules, they will be barred from asylum eligibility in spite of the violation of their constitutional right to due process in criminal proceedings.

B. The Proposed Rules violate the full faith and credit to which state court decisions are entitled.

The Proposed Rules improperly authorize immigration adjudicators to ignore the decision of a state court, even where the order on its face complies with *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003), and cites substantive and procedural defects in the underlying proceeding. The text of the Proposed Rules allow the immigration judge to consider a conviction or sentence “unless the [noncitizen] was found *not guilty*.”³⁰ However, the Proposed Rules ignores the legal standard set out in *Pickering*, which requires immigration judge to recognize vacatures of criminal convictions for reasons beyond factual innocence; specifically, “if a court with jurisdiction vacates a conviction *based on a defect in the underlying criminal proceedings*, the respondent no longer has a ‘conviction’ within the meaning of section 101(a)(48)(A).”³¹ Thus, the text of the Proposed Rules would allow immigration judges to nonetheless consider state court criminal adjudications that do not result in convictions for immigration purposes and to ignore the legal validity of state court orders.

The Departments do not offer any justification for allowing immigration judges to ignore the validity of post-conviction relief where a conviction is vacated based on a defect in the underlying criminal proceedings.³² In fact, the Departments misrepresent the applicable law to justify authorizing adjudicators to disregard otherwise valid state orders. A vacated judgment is neither “final” nor a “judgment”—it “has no effect” whatsoever.³³ Likewise, a vacated

³⁰ 85 Fed. Reg. 36293 (8 CFR § 208.13(d)(2)(i)(C)), 36302 (8 CFR § 1208.13(d)(2)(i)(C)) (emphasis added).

³¹ *Pickering*, 23 I.&N. Dec. at 624, *rev'd on other grounds by Pickering v. Gonzales*, 465 F.3d 263, 267- 70 (6th Cir. 2006)) (emphasis added).

³² 85 Fed. Reg. 36284 (stating inaccurately that “giving effect to judicial decisions that modified sentences in some manner for the sole purpose of mitigating immigration consequences would frustrate Congress’s intent in setting forth those consequences for aliens convicted of certain crimes” (citing *Matter of Thomas & Thompson*, 27 I&N Dec. at 682)).

³³ *See, e.g., Fort Knox Music Inc. v. Baptiste*, 257 F.3d 108, 110 (2d Cir. 2001).

conviction is no conviction at all. Nothing in the statutory definition of “conviction” suggests a different approach here.³⁴

Thus, nothing in the statute allows the government to treat a vacated judgment as valid and effective based on when, how, or why it was vacated. Put differently, the validity of a court order does not depend on the judge’s apparent subjective reasons for entering it, or even whether the judge’s legal reasoning was wrong,³⁵ and the statute leaves no room for the Proposed Rules to allow immigration judges to ignore the legal effect entirely.³⁶

Apart from their textual infirmity, the Proposed Rules abandon the presumption of validity that should accompany state court orders and the presumption of innocence that forms the core of criminal proceedings, thus upending settled principles of law. The authority extended to adjudicators by the Proposed Rules violates the law of multiple circuits, including *Pickering*, on which it relies.³⁷ In *Pickering v. Gonzales*, the Sixth Circuit Court of Appeals held that the BIA was limited to reviewing the authority of the court issuing the order as to the basis for his vacatur.³⁸ Similarly, in *Reyes-Torres v. Holder*, the Ninth Circuit Court of Appeals held that “the inquiry must focus on the state court’s rationale for vacating the conviction.”³⁹ In addition, the Third Circuit Court of Appeals in *Rodriguez v. U.S. Att’y Gen.* held that the adjudicator must look only to the “reasons explicitly stated in the record and may not impute an unexpressed motive for vacating a conviction.”⁴⁰ Moreover, the *Rodriguez* court stated that, to determine the purpose of a vacatur, the adjudicator must first look to the face of the order vacating the conviction, and “if the order explains the courts reasons . . . the [adjudicator’s] inquiry must end there.”⁴¹ The Proposed Rules contain no such limiting language to guide the adjudicator’s inquiry. Instead, the Rules provide no guidance to adjudicators, granting them indefinite authority to look beyond any facially valid vacatur. Such breadth of authority undermines asylum seekers’ rights to a full and fair proceeding.

³⁴ 8 U.S.C. § 1101(48)(A) (“The term ‘conviction’ means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where—(i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or *nolo contendere* or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed.”).

³⁵ See, e.g., *Patton Boggs, LLP v. Chevron Corp.*, 825 F. Supp. 2d 35, 40 (D.D.C. 2011).

³⁶ See, e.g., *Lee v. Ali (In re Ali)*, No. 17-30413, at *5 (Bankr. S.D. Tex. Jan. 30, 2018) (“A court’s orders are generally presumed valid; therefore, the burden of establishing that the Harris County Court’s order was invalid rests with [the challenger].”).

³⁷ 85 Fed. Reg. 36284 (citing *Matter of Pickering*, 23 I&N Dec. at 624-25).

³⁸ *Pickering*, 465 F.3d at 267-70.

³⁹ *Reyes-Torres v. Holder*, 645 F.3d 1073, 1077-78 (9th Cir. 2011) (citing *Cardoso-Tlaseca v. Gonzales*, 460 F.3d 1102, 1107 n.3 (9th Cir. 2006), and *Pickering v. Gonzales*, 454 F.3d 525 (6th Cir. 2006), amended and superseded by *Pickering*, 465 F.3d at 263).

⁴⁰ *Rodriguez v. U.S. Att’y Gen.*, 844 F.3d 392, 397 (3d Cir. 2006) (noting that “[T]he IJ may rely only on reasons explicitly stated in the record and may not impute an unexpressed motive for vacating a conviction.”).

⁴¹ *Id.* (“Put simply, ‘[w]e will not . . . permit[] . . . speculation . . . about the secret motives of state judges and prosecutors[.]’” (quoting *Pinho v. Gonzales*, 432 F.3d 193, 214-215 (3d Cir. 2005))).

C. The Proposed Rules wrongly extend Matter of Thomas & Thompson to all forms of post-conviction relief and impose an ultra vires and unnecessary burden on asylum seekers.

Finally, the Proposed Rule allowing immigration judges to consider “modification of a sentence unless the [noncitizen] was found not guilty” is *ultra vires* and unnecessary. As an initial matter, the Proposed Rules’ reliance on *Matter of Thomas & Thompson* is flawed. The Attorney General’s decision in *Matter of Thomas & Thompson* fails to justify the exceedingly narrow language of the Proposed Rules, as no agency or circuit authority has limited the effect of post-conviction relief to cases where the applicant was found not guilty and excludes consideration of vacatures and modifications even where the applicant’s innocence is not at issue.⁴²

Furthermore, the Attorney General’s decision in *Matter of Thomas & Thompson* has no justification in the text or history of the immigration statute, nor has it been given deference by any circuit to date. Nowhere does the plain text of the INA support giving adjudicators the authority to give effect only to state court sentence modifications undertaken to rectify substantive or procedural defects in the underlying criminal proceedings, or when the applicant is found to be not guilty. Nothing in the statute allows the government to treat a vacated judgment as valid and effective based on when, how, or why it was vacated. The validity of a court order does not depend on the judge’s apparent subjective reasons for entering it, or even whether the judge’s legal reasoning was wrong,⁴³ and the statute leaves no room for the Proposed Rules to allow immigration judges to ignore the legal effect entirely.⁴⁴

The same is true of orders modifying, clarifying, or altering a judgment or sentence. Again, nothing in the statute authorizes the government to ignore such an order based on the adjudicator’s view of the reasons behind it, much less a limitation to orders where the applicant is not guilty. And there is no serious argument that Congress contemplated federal asylum adjudicators second-guessing state courts in this way. The statute’s plain language flatly forecloses this aspect of the proposal. The Board recognized this in *Matter of Cota-Vargas*, where it concluded that applying “the *Pickering* rationale to sentence modifications has no discernible basis in the language of the Act.”⁴⁵

⁴² See, e.g., *Reyes-Torres*, 645 F.3d at 1077-78; *Cardoso-Tlaseca*, 460 F.3d at 1107 n.3; *Matter of Cota-Vargas*, 23 I&N Dec. 849, 852 (BIA 2005).

⁴³ See, e.g., *Patton Boggs, LLP v. Chevron Corp.*, 825 F. Supp. 2d 35, 40 (D.D.C. 2011).

⁴⁴ See, e.g., *Lee v. Ali (In re Ali)*, No. 17-30413, at *5 (Bankr. S.D. Tex. Jan. 30, 2018) (“A court’s orders are generally presumed valid; therefore, the burden of establishing that the Harris County Court’s order was invalid rests with [the challenger].”).

⁴⁵ 23 I&N Dec. at 852.

Nor does the legislative history support such a rule. Based on the text of the INA and the well-documented legislative history behind Congress’s definition of “conviction” and “sentence” in 8 U.S.C. § 1101(a)(48), the Board in *Matter of Cota-Vargas* determined that “appl[ying] the Pickering rationale to sentence modifications has no discernible basis in the language of the Act.”⁴⁶ Neither the text of the INA nor the legislative history of the definitions reveal any attempt on Congress’s part to change the longstanding practice of giving effect to state court sentencing modifications. For these reasons, *Matter of Thomas & Thompson* lacks Congressional support for its rule and should not be extended by the Departments as proposed.

Moreover, as applicants for immigration benefits or relief from removal, asylum seekers already bear the burden of demonstrating their eligibility for asylum.⁴⁷ The Proposed Rules do not alter or shift this burden, nor do they provide evidence supporting the need for this and other proposed discretionary bars. Immigration law, and asylum law in particular, is already highly complex, and the process of seeking asylum is in many instances re-traumatizing, particularly for applicants who do not have counsel to represent them and who lacked effective counsel in their underlying criminal proceedings. The Proposed Rules as applied to asylum applicants who seek post-conviction relief transform an already difficult process into an adversarial inquiry, contrary to the intent of Congress.

VI. The Proposed Consideration of Criminal and Other Bars as Part of the Credible Fear Screening Process Would Be a Dramatic and Harmful Departure from the Current Credible Fear Framework.

The Proposed Rules would dramatically alter the credible fear screening process in a way that would severely limit vulnerable individuals’ ability to make and pursue fear-based claims, by forcing them to prove such claims entirely within expedited removal proceedings. These rules would cause countless individuals with meritorious claims for asylum, withholding of removal, and protection under CAT to be removed from this country and returned to harm, without due process or the opportunity to make their case as required by law.

First, under the Proposed Rules, individuals in expedited removal proceedings who receive a positive fear determination would no longer be referred to immigration court for proceedings under section 240 of the INA. Instead, they would be referred to more limited-in-scope “asylum and withholding only” proceedings under 8 CFR § 208.2(c)(1) and 8 CFR § 1208.2(c)(1)), in which they would be prohibited from seeking other forms of relief.⁴⁸

⁴⁶ *Id.*

⁴⁷ *Matter of S-K-*, 23 I.&N. Dec. 936, 939-40 (BIA 2006).

⁴⁸ 85 Fed. Reg. 36267.

Second, significantly departing from the current framework, the Proposed Rules would require asylum officers in the credible fear screening process to determine applicability of any bars to asylum or withholding of removal when determining credible fear or reasonable possibility of persecution.⁴⁹ This determination would require asylum officers to undertake legally complex analysis regarding the applicability of criminal bars--along with any other bars--despite very limited access to necessary documents and other evidence and despite individuals' frequent lack of legal representation at the credible fear stage. By contrast, under current regulations, an individual who establishes credible fear of persecution or torture but appears to be subject to a mandatory bar is referred to INA § 240 proceedings for full consideration of the fear-based claim and applicability of any bars.⁵⁰

Under the Proposed Rules, an individual in the credible fear screening who is determined to be barred from asylum would be given a negative fear determination with respect to asylum, even if able to establish credible fear of persecution based on the statutory definition of a refugee.⁵¹ If an individual is barred from asylum but not statutory withholding of removal, or if the individual is determined to have a "reasonable possibility" of torture, that individual would be referred to asylum-and-withholding-only proceedings pursuant to 8 CFR § 208.2(c)(1) for consideration of statutory withholding of removal or relief under CAT (*see* proposed 8 CFR § 208.30(e)(5)(1)(B)). Significantly, if the individual receives a negative fear finding due to a mandatory bar, the individual's only recourse would be to seek review by an immigration judge pursuant to 8 CFR § 208.30(g) and 8 CFR § 1208.30(g); INA § 235(b)(1)(B)(iii)(III). That review is extremely limited in scope: it must be completed within 24 hours and "in no case later than 7 days,"⁵² thus denying the applicant meaningful opportunity to prepare their case for review, to gather documents, or to find representation.

In justifying the creation of this new procedure, the Departments misstate reality. The Proposed Rules equate the appearance of a bar to asylum during a credible fear interview with the factual *certainty* that a bar applies. In reality, many of the current (and proposed) bars to asylum require legally complex analysis⁵³ that will be burdensome within the context of expedited removal proceedings and credible fear interview adjudications. In misstating the complexity of this legal analysis, the Departments do not adequately justify eliminating the current process and, instead, require asylum officers to take on this responsibility during the credible fear interview process. The Departments especially fail to justify this proposed change in light of the myriad proposed bars to asylum that this administration has set out in this and

⁴⁹ *See* proposed 8 CFR § 208.30(e)(1)(iii), (e)(2)(iii), and (e)(5); 8 CFR § 1003.42(d).

⁵⁰ *See* 8 CFR § 208.30(e)(5).

⁵¹ *See* proposed 8 CFR § 208.30(e)(5)(1)(A).

⁵² 8 CFR § 1003.42(e).

⁵³ For example, the aggravated felony bar to asylum, INA 208(b)(2)(B)(i), would require asylum officers to use the categorical analysis for any criminal conviction issued by any of the 50 states and U.S. territories, which may vary based on the circuit where the asylum application is adjudicated. *See, e.g., Moncrieffe v. Holder*, 569 U.S. 184 (2013).

prior proposed rules. Furthermore, many of the proposed bars are fact-specific and often require evidence that an applicant will not have readily available while detained after fleeing persecution in their home country and possibly traveling through a third country (or set of third countries). This will effectively transform the credible fear interview into a long, burdensome interrogation in which an asylum officer will probe all areas of the applicant's life in search of conduct that can be framed as a bar to asylum, with no due process protections for the applicant to seek review of inaccurate records created during this interview. Allowing the immigration judge to determine the applicability of a bar to asylum in an INA § 240 proceeding allows asylum applicants the opportunity to present evidence and legal arguments with the assistance of legal counsel and an opportunity for judicial review, to ensure that such legal bars are applied as intended by Congress.

The Departments also falsely state as justification for the proposed changes that “the proposed rule would reasonably balance the various interests at stake [and] would promote efficiency by avoiding duplicative administrative efforts while ensuring that those who are subject to a mandatory bar receive an opportunity to have the asylum officer’s finding reviewed by an immigration judge.”⁵⁴ However, the Departments do not provide any evidence to demonstrate that the current process of referring applicants to a proceeding under INA § 240 is in fact “duplicative” of any other process that currently exists in the regulations. Under the current regulations, asylum officers do not consider the statutorily mandatory bars to asylum eligibility during the credible fear interview process.⁵⁵ Instead the Proposed Rules create the exact redundancy that the Departments then point to as justification for the proposed changes. Because the basis for the proposed changes is not factual and exists entirely in the hypothetical world of the Proposed Rules, it is arbitrary and capricious and should be abandoned by the Departments.

Furthermore, the Proposed Rules grossly misconstrue the level of review and due process protections that are provided for an applicant during a credible fear review by an immigration judge under 8 CFR § 208.30(g), as a false assurance that the Proposed Rules do not deprive asylum applicants of due process. The Departments fail to point out that an applicant does not have a right to legal representation to assist with presenting the complex legal arguments during the credible fear process or a review by an immigration judge, an expedited procedure that mostly takes place while the applicant is detained in remote areas of the country. Additionally, it

⁵⁴ 85 Fed. Reg. 36272.

⁵⁵ See 8 CFR § 208.30(d) (“The purpose of the interview shall be to elicit all relevant and useful information bearing on whether the applicant has a credible fear of persecution or torture[.]”); 8 CFR § 208.30(e)(2) (“[A]n alien will be found to have a credible fear of persecution if there is a significant possibility . . . the alien can establish eligibility for asylum under section 208 of the Act or for withholding of removal under section 241(b)(3) of the Act); 8 CFR § 208.30(e)(5)(i) (“[I]f an alien is able to establish a credible fear of persecution but appears to be subject to one or more of the mandatory bars to applying for, or being granted, asylum contained in section 208(a)(2) and 208(b)(2) of the Act, or to withholding of removal contained in section 241(b)(3)(B) of the Act, the Department of Homeland Security shall nonetheless place the alien in proceedings under section 240 of the Act for full consideration of the alien's claim”).

is unclear whether the applicant may submit additional evidence to challenge the findings of the Asylum Officer.⁵⁶ Regardless, this expedited review process provides insufficient time for the applicant to gather such evidence to show that a mandatory bar to asylum does not apply.⁵⁷ For example, it often takes weeks or months to obtain criminal records from domestic or international authorities, records that would be needed to dispute any allegations of criminal bars to asylum and withholding of removal.

The Proposed Rules do not consider how this burden on the applicant is justified in light of the proposed stripping of the due process protections that are currently provided in INA § 240 proceedings. Nor do the Departments justify how this proposed new process is less burdensome to the Departments than the process set forth in current regulations. In fact, the Departments provide no statistics to show how many INA § 240 proceedings are initiated as a result of an asylum officer identifying a mandatory bar to asylum during the credible fear process; statistics that the Departments should be able to provide as they have access to their own information. Without such information, the Organizations cannot adequately comment on the burden of the Proposed Rules on the Departments or on asylum applicants navigating the proposed new process.

Finally, the Proposed Rule also misleads the public into the believing that individuals asserting a credible fear who are barred from asylum based on the proposed new standards “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 under regulations issued pursuant to the legislation implementing U.S. obligations under Article 3 of CAT.”⁵⁸ The Departments hide the ball and do not acknowledge other proposed rules issued by this same administration that further erode the protections of withholding of removal under INA § 241(b)(3) and CAT, including a proposed rule published during this same 30-day notice and comment period that would bar credible fear applicants from eligibility for asylum and withholding of removal, would dramatically increase the standard to show eligibility for CAT protection during the credible fear stage, and would allow DHS officers to deny protection to those eligible for CAT regardless of the evidence presented during the credible fear interview.⁵⁹ By bifurcating their proposals to substantially alter (and in some instances eliminate entirely) the protections laid out by Congress and current regulations, the Departments in the Proposed Rules do not give sufficient opportunity for the

⁵⁶ The proposed and current regulations implicitly limit the evidence that the immigration judge may consider during this review to the record that the asylum officer considered to make the negative credible fear determination. 8 CFR 1208.30(g)(2)(ii); 85 FR 36305. Additionally, the current and proposed regulations require that the immigration judge “shall conclude the review . . . within 24 hours but in no case later than 7 days after” the negative credible fear determination has been finalized by the Asylum Office. 8 CFR 1003.42(e); 85 FR 36299.

⁵⁷ 8 CFR § 1003.42(e) (stating that review by an immigration judge must be completed within 24 hours and “in no case later than 7 days”).

⁵⁸ 85 Fed. Reg. 36289-90.

⁵⁹ *See generally*, Security Bars and Processing, 85 Fed. Reg. 41201 (Jul. 9, 2020).

Organizations and the public to comment on the entirety of the harmful effects of the Proposed Rules on applicants seeking protection from persecution and torture.

VII. The Organizations Oppose the Proposed Expansion of the Definition of “Frivolous” for Determinations under INA § 208(d)(6) (proposed 8 CFR § 208.20(c)) and Proposed Expansion of Pre-Termination of Applications for Asylum, Withholding of Removal, or Relief under CAT (proposed 8 CFR § 1208.13(e))

A. Proposed Expansion of the Definition of “Frivolous” for Determinations under INA 208(d)(6)

Under INA § 208(d)(6), if an asylum application is deemed “frivolous,” and the applicant has received the required warning notice regarding the consequences of filing a frivolous application, the applicant “shall be permanently ineligible for any benefits” in the Immigration and Nationality Act, effective as of the date of a frivolousness determination.

Under current regulations, an asylum application may be found “frivolous” only if an IJ or the Board finds that the applicant “knowingly” filed a frivolous application, which is defined as an application where “any of its material elements is deliberately fabricated.”⁶⁰ Before declaring an application frivolous, the immigration judge or the Board must be “satisfied that the applicant ... has had sufficient opportunity to account for any discrepancies or implausible aspects of the claim.”⁶¹

Under the Proposed Rules, paragraph (c) of section 208.20 greatly expands the grounds under which an asylum application could be deemed frivolous, defining a frivolous application as one that (1) contains a fabricated essential element, (2) is premised upon false or fabricated evidence, unless the application would have been granted without the false or fabricated evidence, (3) is “filed without regards to the merits of the claim,” or (4) “is clearly foreclosed by applicable law.”⁶² Unlike paragraph (b) of the Proposed Rules at section 208.20, which is limited to “applications filed on or after” the effective date, paragraph (c) says that “beginning on [the effective date], an asylum application is frivolous” if it meets the new standards.⁶³

Each of these new grounds raises significant concerns. Ground (1) of the new rule removes the requirement that a fabrication be “deliberate,” suggesting that asylum applicants who are unaware that an essential element is fabricated may be caught up in this proposed group of penalized applicants. Ground (2) raises considerable concerns about how an immigration judge would determine that evidence is “false” or “fabricated.” Ground (3) is extremely vague,

⁶⁰ 8 CFR §§ 208.20, 1208.20.

⁶¹ 8 CFR § 1208.20.

⁶² 85 Fed. Reg. 36295, 36304.

⁶³ *Id.*

with no indication of what it means for an application to be submitted “without regards to the merit,” likely setting off significant legal battles over the meaning of that term.

Ground (4) is particularly problematic because it will punish asylum applicants for lack of legal expertise, or for pushing the boundaries of asylum law. It will also potentially cause ethical problems for attorneys. Attorneys are arguably obligated to raise legal arguments that are currently foreclosed by binding precedent if they have the opportunity to reverse that precedent on appeal.⁶⁴ Under the rule, advancing such an argument would be grounds for severe sanctions.

The Proposed Rules also provide that an applicant who has received statutory notice of the penalties of filing a frivolous asylum application “need not be given any additional or further opportunity to account for any issues with his or her claim prior to the entry of a frivolous finding.”⁶⁵ This will result in the needless referral of valid applications for asylum to immigration court for applicants who are not afforded an opportunity to explain discrepancies in their application. In addition, even untimely-filed or withdrawn applications could be found frivolous under the proposed rule.

Finally, the Organizations oppose the proposed provision that an applicant who withdraws their application can avoid a frivolousness finding if he or she “wholly disclaims” it and withdraws it “with prejudice,” is eligible for and agrees to accept 30-day voluntary departure, withdraws “any and all applications for relief or protection with prejudice,” and waives the right to appeal and “any rights to file, for any reason, a motion to reopen or reconsider.”⁶⁶ This provision is a cudgel that will be used to threaten applicants into agreeing to either take voluntary departure or instead have their asylum applications be declared frivolous and see themselves forever banned from immigration relief.

Taken together, the new grounds for declaring an application frivolous would severely penalize *pro se* respondents, would pressure many applicants to abandon their cases and take voluntary departure, would create an enormous amount of additional confusion, likely would require attorneys to violate their ethical duties, and would raise serious due process concerns.

B. Proposed Expansion of Pre-Termination of Applications for Asylum, Withholding of Removal, or Relief under CAT Will Further Strip Removal Proceedings of Due Process Protections for Asylum Applicants.

⁶⁴ See, e.g., New York Rules of Professional Conduct, Rule 3.1(b) (explaining that a lawyer’s conduct is not frivolous if “the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law”).

⁶⁵ 85 Fed. Reg. 36295, 36304.

⁶⁶ *Id.*

The Proposed Rules would allow immigration judges to prepermit and deny an application for asylum, withholding of removal, or protection under CAT--based *solely* on the Form I-589 and supporting evidence and without a hearing--if the immigration judge believes that the applicant “has not established a prima facie claim for relief or protection under applicable law.”⁶⁷ This prepermission and premature denial without a hearing could take place upon the immigration judge’s own authority or following a motion of DHS.⁶⁸ Although the applicant is to be given an opportunity to respond prior to prepermission and denial, *only 10 days’ notice* would be required prior to the immigration judge’s denial of the application for asylum, withholding, or CAT relief.⁶⁹

The Proposed Rules provide little detail regarding the breadth of the inquiry that will be used to determine whether a “prima facie claim for relief or protection under applicable law” has been established. As proposed, it is unclear whether this inquiry could include consideration of criminal bars to relief, for example. If motion to prepermit could be triggered by possible bars, an applicant thought to be subject to a criminal bar would have an immense burden to meet to avoid prepermission and denial. For individuals with convictions who must gather evidence or secure legal representation to help demonstrate that they are not subject to an eligibility bar, the Proposed Rule could subject them to swift prepermission and denial on the papers alone, without the opportunity to have a hearing and to make their case before the immigration judge.

The Departments provide no justification or explanation for why the proposed expansion of immigration judge’s authority to prepermit is consistent with current practice, law, and due process. Instead, the Departments state only that current regulations do not require a hearing in all cases.⁷⁰ The Departments’ scant discussion of this proposed change falls far short of sufficient reasoning that could warrant such a dramatic departure in procedure and process and, therefore, is arbitrary and capricious.

VIII. Conclusion

For the foregoing reasons, IJN and its four member organizations, ILRC, IDP, JFL, and NIPNLG, strongly oppose the Proposed Rules. In addition to the arguments made above, the Proposed Rules represent a sweeping and unauthorized change to adjudications of claims of credible fear as well as asylum, withholding of removal, and protection under the Convention Against Torture (CAT) in the United States. The Proposed Rules would endanger the lives of untold thousands by leaving them at greater risk of *refoulement* in violation of our nation’s treaty obligations, and do not make communities safer. As organizations that work closely with immigrant communities, criminal defenders, and immigration attorneys, we encourage the agencies to rescind

⁶⁷ See proposed 8 CFR § 1208.13(e); 85 Fed. Reg. 36277, 36302.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ See 85 Fed. Reg. 36277 (citing 8 CFR § 1240.11(c)(3)).

these harmful Proposed Rules in full.

We request that the agencies consider this comment on the Proposed Rules. Please do not hesitate to contact Cristina Velez at cristina@nipnlg.org if you have any questions or need any further information. Thank you for your consideration.

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