

Lauren Alder Reid, Assistant Director  
Office of Policy, Executive Office for Immigration Review (EOIR)  
5107 Leesburg Pike, Suite 2616  
Falls Church, VA 22041

Maureen Dunn, Chief  
Division of Humanitarian Affairs, Office of Policy and Strategy  
U.S. Citizenship and Immigration Service  
Department of Homeland Security  
20 Massachusetts Ave. NW  
Washington, DC 20529-2140

January 21, 2020

**Re: 84 FR 69640; EOIR Docket No. 18-0002, A.G. Order No. 4592-2019; RIN 1125-AA87, 1615-AC41; Comments in Opposition to Proposed Rulemaking: Procedures for Asylum and Bars to Asylum Eligibility**

Dear Assistant Director Reid and Chief Dunn,

The two national Jewish organizations below respectfully submit this comment to oppose the Department of Homeland Security U.S. Citizenship and Immigration Services (USCIS) and the Department of Justice Executive Office for Immigration Review (EOIR) Notice of Proposed Rulemaking on the changes to Procedures for Asylum and Bars to Asylum Eligibility.

We are particularly concerned by the expansion of criminal bars to asylum included in the Proposed Rules, EOIR Docket No. 18-002, issued December 19, 2019. The Proposed Rules will punish vulnerable individuals seeking protection in the United States. It will further limit access to asylum and will be especially detrimental to already routinely criminalized individuals, including LGBTQ+ immigrants.

For the reasons detailed in the comments that follow, DHS and DOJ should immediately withdraw the Proposed Rules and dedicate their efforts to advancing policies that allow individuals to exercise their fundamental right to seek asylum. Please do not hesitate to contact us with any questions or for further information.

Karen Levit, Esq.  
National Civil Rights Counsel, ADL

Meggie Weiler  
Policy Officer, HIAS



**DETAILED COMMENTS in opposition to 84 FR 69640; EOIR Docket No. 18-0002, A.G. Order No. 4592-2019; RIN 1125-AA87, 1615-AC41; Comments in Opposition to Proposed Rulemaking: Procedures for Asylum and Bars to Asylum Eligibility**

The two undersigned Jewish organizations welcome the opportunity to comment on the Proposed Rules to add seven additional categorical bars to asylum eligibility, EOIR Docket No. 18-002.

ADL is a leading anti-hate organization founded in 1913 to stop the defamation of the Jewish people and to secure justice and fair treatment for all. We are rooted in a community that has experienced the plight of living as refugees throughout its history. ADL has advocated for fair and humane immigration policy since our founding and has been a leader in exposing anti-immigrant and anti-refugee hate that has poisoned our nation's debate.

HIAS, founded in 1881, is the oldest refugee serving organization in the world. Today, in addition to our work in partnership with local organizations resettling and supporting refugees, HIAS works in Mexico. There, we assist asylum seekers in obtaining legal protection, conduct "know your rights" presentations and individual screenings, and help asylum seekers navigate the difficult U.S. asylum processes. Our attorneys in Mexico assess particular cases for referral to our legal partners on the U.S. side of the border for representation and also represent people who are seeking protection in Mexico.

We write today to oppose the Department of Homeland Security U.S. Citizenship and Immigration Services (USCIS) and the Department of Justice Executive Office for Immigration Review (EOIR) Notice of Proposed Rulemaking on the changes to Procedures for Asylum and Bars to Asylum Eligibility.

**United States Asylum Law Has Already Strayed far From Our Obligations under International Treaties, Returning to This Country's Shameful History of Turning Away Displaced People**

ADL and HIAS are mindful that Jews have a long history of displacement throughout the world. Many Jewish American families first came to this country as refugees and asylum seekers. We are also acutely aware of what happens when the United States flatly denies asylum to displaced

persons without consideration for the harm they may face once turned away from this country's protection, for the incident of the *St. Louis* is burned into our collective memory.

In 1939, the German ship *St. Louis* sailed for Cuba carrying 937 passengers. Almost all of them were Jews fleeing Nazi Germany. Most of the Jewish passengers had applied for U.S. visas and were planning to stay in Cuba only until they could enter the United States. However, political conditions in Cuba changed abruptly just before the ship sailed and only 28 passengers were actually admitted by the Cuban government. The remaining 908 passengers were left in limbo – unable to disembark and be admitted to Cuba and terrified of turning back. The *St. Louis* was ordered out of Cuban waters on June 2, 1939 and sailed so close to Miami that passengers could see its lights. Some of them cabled President Franklin D. Roosevelt asking for refuge. He never responded. Instead, the State Department sent a passenger a telegram stating that passengers must “await their turns on the [visa] waiting list and qualify for and obtain immigration visas before they may be admissible into the United States.”<sup>1</sup>

The asylum seekers aboard the *St. Louis* had no choice but to return to Europe. Notably, they did not return to Germany. Jewish organizations were able to negotiate with four European governments to secure entry visas for the passengers. Germany invaded Western Europe in May 1940, trapping 532 former *St. Louis* passengers. About half – 254 people – were murdered in the Holocaust.<sup>2</sup>

Since turning away the *St. Louis*, the United States has become a signatory to the 1967 Protocol Relating to the Status of Refugees,<sup>3</sup> which binds parties to the United Nations Convention Relating to the Status of Refugees (“Refugee Convention”).<sup>4</sup> This obligates the U.S. to comply with the principle of *non-refoulement* – an asylum seeker cannot be sent to another territory or state where they fear threats to their life or freedom on protected grounds, even if potential refugees have allegedly committed criminal offenses. Although the Refugee Convention allows signatory states to exclude and/or expel asylum seekers, this is only permitted in limited circumstances.

Under the Refugee Convention, a person can only be excluded and/or expelled if that person “having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.”<sup>5</sup> This is only meant to be applied in “extreme cases” in which

---

<sup>1</sup> United States Holocaust Memorial Museum, Holocaust Encyclopedia, “Voyage of the St. Louis,” <https://encyclopedia.ushmm.org/content/en/article/voyage-of-the-st-louis>.

<sup>2</sup> *Id.*

<sup>3</sup> 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.

<sup>4</sup> Convention Relating to the Statute of Refugees, July 28, 1951, 140 U.N.T.S. 1954.

<sup>5</sup> *Id.* at art. 33(2).

the particularly serious crime committed is a “capital crime or a very grave punishable act.”<sup>6</sup> The United Nations High Commissioner for Refugees (UNHCR) has further elucidated what qualifies as a particularly serious crime. To be considered a particularly serious crime, the crime “must belong to the gravest category” and be limited “to refugees who become an extremely serious threat to the country of asylum due to the severity of crimes perpetrated by them in the country of asylum.”<sup>7</sup> UNHCR specified that the particularly serious crime bar does not encompass less severe crimes: “[c]rimes such as petty theft or the possession for personal use of illicit narcotic substances would not meet the threshold of seriousness.”<sup>8</sup> Even if an asylum seeker has been convicted of a particularly serious crime, an adjudicator considering whether an individual should be barred from protection for that conviction must conduct an individualized analysis and consider any mitigating factors.<sup>9</sup>

It was not until 1980 that the United States asylum system was codified in statute through the Refugee Act. Along with other measures designed to bring the U.S. domestic legal code into compliance with the Refugee Convention, the Refugee Act created a “broad class” of refugees eligible for a discretionary grant of asylum.<sup>10</sup>

Under the current asylum system, displaced persons seeking asylum have the evidentiary burden of establishing that they are eligible for asylum.<sup>11</sup> They must do this in the face of a complex web of laws and regulations, without the benefit of appointed counsel and often from a remote immigration jail.<sup>12</sup> The obstacles to winning asylum are overwhelmingly high; indeed, in some areas of the country and before some immigration judges, it is almost impossible to succeed.<sup>13</sup>

---

<sup>6</sup> U.N. High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* 2, U.N. Doc. HCR/IP/Eng/REV. ¶ 154-55, (1979, reissued 2019).

<sup>7</sup> U.N. High Commissioner for Refugees (UNHCR), *Criminal Justice and Immigration Bill: Briefing for the House of Commons at Second Reading* ¶ 7 (July 2007), <http://www.unhcr.org/enus/576d237f7.pdf>.

<sup>8</sup> *Id.* at ¶ 10.

<sup>9</sup> *Id.* at ¶ 10-11; U.N. High Commissioner for Refugees, *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).

<sup>10</sup> See *I.N.S. v. Cardoza-Fonseca*, 40 U.S. 421, 423 (1987).

<sup>11</sup> 8 USC § 1158(b)(1)(B); 8 CFR § 1240.8(d).

<sup>12</sup> See Daniel Connolly, Aaron Montes, and Lauren Villagran, “Asylum seekers in U.S. face years of waiting, little chance of winning their cases,” *USA Today*, September 25, 2019, <https://www.usatoday.com/in-depth/news/nation/2019/09/23/immigration-court-asylum-seekers-what-to-expect/2026541001/>.

<sup>13</sup> Manuel Roig-Franzia, “Immigrants risk it all seeking asylum. The answer is almost always ‘no,’” *Washington Post*, July 24, 2019, [https://www.washingtonpost.com/lifestyle/style/migrants-risk-it-all-seeking-asylum-the-answer-in-court-is-almost-always-no/2019/07/23/9c161b2e-a3f7-11e9-b732-41a79c2551bf\\_story.html](https://www.washingtonpost.com/lifestyle/style/migrants-risk-it-all-seeking-asylum-the-answer-in-court-is-almost-always-no/2019/07/23/9c161b2e-a3f7-11e9-b732-41a79c2551bf_story.html).

## The Proposed Rules Will Preclude Even More Individuals from Asylum Protections

The Proposed Rules come at a time when a number of newly imposed barriers to accessing asylum in the United States have made the system even harder for refugees to navigate.<sup>14</sup> A series of policies enacted over the past several years act as an overlapping web to preclude asylum eligibility for untold numbers of displaced persons simply because of their national origin, manner of entry, or flight path.<sup>15</sup> This includes a July 2019 Interim Final Rule in which the Administration barred from asylum any individual who transits through a third country before arriving at the United States Southern border, disqualifying all but Mexican asylum seekers at the Southern border.<sup>16</sup>

In addition to these policy changes, included in the Proposed Rules is a bar for individuals convicted of illegal reentry under Section 1326 of the Immigration Nationality Act from asylum.<sup>17</sup> The agencies justify this change by arguing that this crime suggests repeated disregard for immigration laws given that asylum seekers can present their claim at a port of entry without reentering the United States.<sup>18</sup>

However, for asylum seekers today, illegal reentry is not a disregard of the laws but rather an attempt – at any cost – to seek safety in light of policies that physically prevent them from doing so. For several years, through the practice of “metering,” the United States has been blocking access to asylum at the Southern border by refusing to process protection requests and forcing individuals to wait on a list before they are able to even approach a border agent.<sup>19</sup> In a study of the policy published by the Department of Homeland Security (DHS) Office of Inspector General (OIG), the agency determined that metering would push many migrants – who attempted to present to border agents – to subsequently cross between ports of entry in an attempt to secure safety faster.<sup>20</sup> Additionally, just last week the Administration began implementation of an Asylum Cooperative Agreement (ACA) with Guatemala at the border, which permits the U.S. to send asylum seekers from Honduras, El Salvador, and possibly Mexico to Guatemala to seek

---

<sup>14</sup> The National Immigrant Justice Center maintains a frequently updated timeline providing details of each of the asylum bans and other policies issued and implemented by the administration undermining asylum access at <https://www.immigrantjustice.org/issues/asylum-seekers-refugees>.

<sup>15</sup> The National Immigrant Justice Center maintains a frequently updated timeline providing details of each of the asylum bans and other policies issued and implemented by the administration undermining asylum access at <https://www.immigrantjustice.org/issues/asylum-seekers-refugees>.

<sup>16</sup> 84 Federal Reg. 33829 (July 16, 2019). <https://www.federalregister.gov/documents/2019/07/16/2019-15246/asylum-eligibility-and-procedural-modifications>

<sup>17</sup> See 8 U.S.C. § 1326.

<sup>18</sup> Proposed Rules at 69648.

<sup>19</sup> Congressional Research Service, “The Department of Homeland Security’s Reported “Metering” Policy: Legal Issues,” August 13, 2019. <https://fas.org/sgp/crs/homesecc/LSB10295.pdf>

<sup>20</sup> Department of Homeland Security Office of Inspector General, OIG 18-84, *Special Review - Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy*. (2018).

protection.<sup>21</sup> The establishment of these policies, coupled with the devastating Migrant Protection Protocols, are evidence that it is virtually impossible for asylum seekers – especially those arriving at the Southern border – to access the U.S. asylum system at all. This leaves them with few other options for reaching safety beyond crossing between ports of entry.

Precluding this population from being eligible for asylum protections is a clear violation of Article 31 of the 1951 Refugee Convention that states “[t]he Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.”<sup>22</sup> Taking away eligibility for asylum – for those who have been pushed back from official ports of entry or from speaking with border agents – because they reenter the United States out of fear for their lives, represents a clear abdication of both our responsibilities under the Refugee Convention and adherence to our own asylum practices and laws.

### **Alternative Forms of Relief Are Not Adequate Substitutes for Asylum Ineligibility**

As a means of justifying these additional bars to asylum eligibility, the Administration has pointed to the availability of alternative forms of relief.<sup>23</sup> However, the availability of these protections does not nullify the harm caused by the Proposed Rules’ new limits on asylum.

The two alternatives, withholding of removal and protection under the Convention Against Torture (CAT), do not offer the same protections as asylum and are significantly harder to obtain. To qualify, asylum seekers must prove that there is a clear probability they will face persecution or torture – a higher bar than the credible fear threshold for asylum.<sup>24</sup> Due to this higher burden of proof, many individuals with a valid refugee claim who may have obtained asylum had they not been barred due to the Proposed Rules will be removed to their country of origin to face persecution or even death.

---

<sup>21</sup> Mica Rosenberg, “U.S. Implements plan to send Mexican asylum seekers to Guatemala,” *Reuters*, January 6, 2020. <https://www.reuters.com/article/us-usa-immigration-idUSKBN1Z51S4>

<sup>22</sup> Refugee Convention, *supra*, at art 31.

<sup>23</sup> *See, e.g.*, Proposed Rules at 69644.

<sup>24</sup> Withholding of removal requires the petitioner to demonstrate his or her “life or freedom would be threatened in that country because of the petitioner’s race, religion, nationality, membership in a particular social group, or political opinion.” *INS v. Stevic*, 467 U.S. 407, 411 (1984) (quoting 8 U.S.C. § 1231(b)(3)). Unlike asylum, however, the petitioner must show a “clear probability” of the threat to life or freedom if deported to his or her country of nationality. The clear probability standard is more stringent than the well-founded fear standard for asylum. *Id.*; *see also Cardoza-Fonseca*, 480 U.S. at 431 (describing the difference between a well-founded fear of persecution and a clear probability of persecution). For CAT relief, an applicant must show it is more likely than not that he or she will be tortured or killed by or at the government’s acquiescence if removed to the home country. 8 C.F.R. § 1208.16(c)(2).

Even for those individuals who are able to meet the higher standard, withholding and CAT still fall short.<sup>25</sup> In addition to the fact that recipients do not have access to permanent residency or citizenship, there are risks of prolonged family separation and significant hurdles to accessing employment authorization. Withholding and CAT do not allow for international travel and recipients cannot be reunited with family in the United States because only those granted asylum are eligible to petition for a spouse or child to join them as derivatives on that status.<sup>26</sup> As such, this protection leaves many individuals in limbo; it does not offer them the security and safety needed for refugees to heal from trauma and to fully rebuild their lives.

### **The Proposed Rules are Unnecessary Given the Existing Bars to Asylum**

Asylum is a discretionary immigration benefit. Immigration adjudicators already have vast discretion to deny asylum to those who meet the definition of refugee but have been convicted of certain types of criminal conduct. Therefore, the agencies' efforts to add additional categories of barred conduct for asylum eligibility is simply unnecessary.

There already exist several outright bars to asylum, including: individuals who are convicted of a "particularly serious crime;" individuals who committed a "serious nonpolitical crime outside of the United States;" individuals who are a danger to the security of the United States; individuals who are inadmissible or removable due to terrorist activity; individuals who were "firmly resettled" in another country prior to arriving in the United States; and individuals who 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.<sup>27</sup>

Under current law, an individual with a criminal record can have asylum denied by an Immigration Judge or Asylum Officer as a matter of discretion. The Proposed Rules specifically outline the conduct that will preclude asylum seekers from obtaining protection, which removes the life-saving discretion of immigration adjudicators to determine whether the circumstances of a specific case merit preclusion from asylum protection that, for many, will end in removal and persecution.

These Proposed Rules are particularly troubling when it comes to criminal behavior related to the smuggling or harboring of an alien. Under the current law, smuggling an undocumented person into the country is already a ground of inadmissibility, a ground of deportability, a crime

---

<sup>25</sup> Ibid.

<sup>26</sup> 8 C.F.R. § 208.21(a).

<sup>27</sup> "Asylum Bars", U.S. Citizenship and Immigration Services, April 1, 2011, <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/asylum-bars>

indicative of moral turpitude, a bar to a finding of good moral character,<sup>28</sup> and a conviction for alien smuggling is considered an aggravated felony.<sup>29</sup>

A conviction for alien smuggling can be an aggravated felony, which is considered a particularly serious crime.<sup>30</sup> Courts have explained that harboring or transporting undocumented immigrants is a separate offense that does not in and of itself trigger the inadmissibility or deportability ground for alien smuggling. However, it may carry criminal penalties and a conviction for harboring or transportation may trigger the aggravated felony ground of deportability.<sup>31</sup> An aggravated felony is a ground of deportability, a bar to many forms of relief, and a permanent bar to establishing good moral character if the conviction occurred on or after November 29, 1990. Someone can be convicted of alien smuggling even if that person was not paid and was helping a friend or relative, and even if no sentence was imposed. This would still be considered an aggravated felony for immigration purposes.<sup>32</sup>

At the moment, there is only a narrow, discretionary waiver available to asylum seekers who would otherwise be deemed inadmissible on the grounds of an alien smuggling conviction. The person applying for the waiver must have one of two specified legal statuses and, notably, must have been convicted of smuggling only their spouse, parent, or child – and no other individual. This discretionary waiver is already unavailable for convictions based on smuggling siblings, fiancés, grandparents, cousins, or other relatives. Furthermore, a discretionary waiver of inadmissibility or deportability for alien smuggling will not help an applicant who must establish good moral character.<sup>33</sup>

The Proposed Rules specifically seek to close this exception. They “would broaden [the asylum] bar so that first-time offenders who engage in illegal smuggling or harboring to aid certain family members, in violation of section 1324(a)(1)(A) or (2), are deemed to have committed particularly serious crimes.”<sup>34</sup> The existing exception acknowledges the human need to be with one’s family, and accordingly treats an asylum seeker who committed a crime in furtherance of that basic need as not having committed a “particularly serious crime” for asylum purposes. Under the change being sought, asylum seekers with a valid refugee claim will end up barred

---

<sup>28</sup> Good moral character is a requirement for naturalization, non-Lawful Permanent Resident cancellation of removal, self-petitioning and cancellation of removal under the Violence Against Women Act (VAWA), registry, and one of the forms of voluntary departure.

<sup>29</sup> Alison Kamhi and Rachel Prandini, “Alien Smuggling: What It Is and How It Can Affect Immigrants,” Immigrant Legal Resource Center, *Practice Advisory*, July 2017, [https://www.ilrc.org/sites/default/files/resources/alien\\_smuggling\\_practice\\_advisory-20170718.pdf](https://www.ilrc.org/sites/default/files/resources/alien_smuggling_practice_advisory-20170718.pdf) at 6.

<sup>30</sup> INA § 274(a)(1)(A), INA § 274(a)(2).

<sup>31</sup> Kamhi at 3.

<sup>32</sup> Kamhi at 6.

<sup>33</sup> *Id.* at 4.

<sup>34</sup> Proposed Rules: Procedures for Asylum and Bars to Asylum Eligibility, 84 Fed. Reg. 69640, 69647-8 (Dec. 19, 2019).



from protection and facing unusually harsh consequences for reconciling with immediate family members.

Given that adjudicators already have the discretion to deny relief to most asylum seekers who have been convicted of smuggling or harboring an alien, this proposed change is an unnecessary check on judicial discretion in asylum cases. Indeed, its primary effect will be to further tear apart families seeking refuge in this country – a more subtle version of the family separation practices already in effect at the Southern border. This would be in line with revelations of the Administration’s efforts to use smuggling prosecutions against parents and caregivers as a strategic cudgel in its efforts to discourage displaced families from seeking asylum within our borders.<sup>35</sup> That does not make the Proposed Rules any less an abdication of both our moral duty and our responsibilities under the Refugee Convention.

### **Differentiating Among Misdemeanor Convictions**

The United States will only be moving further from its international treaty obligations governing displaced persons by adding Fraudulent Document Offenses, Public Benefits Offenses, and Controlled Substances Offenses as bars to asylum. In previous cases, the Board of Immigration Appeals has cautioned against unusually harsh punishment, and we agree with their assessment that “in such a case, the 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.”<sup>36</sup>

Under the Refugee Convention, a signatory state is only supposed to deny an asylum applicant’s valid claim if that person commits a particularly serious crime and therefore poses a danger to the community.<sup>37</sup> The additional bars to asylum put forth in the Proposed Rules simply do not meet that very high standard. Indeed, UNHCR has already specified that less severe crimes, including the possession of illicit substances for personal use, do not meet the standard of being particularly serious crimes demonstrating that one is a danger to the community.<sup>38</sup> Yet the Proposed Rules seek to disqualify any person from asylum eligibility who is convicted of 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.

---

<sup>35</sup> 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).

<sup>36</sup> *Ibid.*

<sup>37</sup> U.N. High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* 2, U.N. Doc. HCR/IP/Eng/REV. ¶ 154-55, (1979, reissued 2019).

<sup>38</sup> U.N. High Comm’r for Refugees (UNHCR), *Criminal Justice and Immigration Bill: Briefing for the House of Commons at Second Reading* ¶ 7 (July 2007), <http://www.unhcr.org/enus/576d237f7.pdf>.

This would put someone with two possession convictions for personal-use quantities of marijuana in the same category as a career drug dealer.<sup>39</sup> It is precisely in cases like these that a fact-specific inquiry and adjudicator discretion remain a vital necessity for asylum determinations.

Asylum can mean the difference between life and death. Without access to asylum, displaced people who are guilty of minor infractions will find themselves banished to a place where they risk persecution or death – a punishment that clearly does not fit the crime. Therefore, these minor misdemeanor crimes should continue to fall within the discretion of an asylum adjudicator so they can be assessed on a case-by-case basis and should not be part of a designated list of bars to asylum eligibility.

### **The Proposed Rules Will Disproportionately Harm LGBTQ+ Refugees**

The Proposed Rules will have the cumulative effect of making it even more difficult to obtain asylum relief for LGBTQ+ refugees who are also vulnerable to being survivors of trafficking and/or survivors of domestic violence. These refugees are particularly unlikely to know that they are eligible for asylum relief until a law enforcement encounter leads them to a service provider who can advise them of their options. Under the Proposed Rules, that advice may already come too late.

For LGBTQ+ asylum seekers, their home countries may have been a site of violence and disenfranchisement from the public sphere.<sup>40</sup> Following their migration, LGBTQ+ refugees often find themselves isolated from their kinship and national networks. Although they came here seeking safety, undocumented LGBTQ+ immigrants are the disproportionate targets of anti-LGBTQ+ hate violence in the United States.<sup>41</sup> This isolation, violence, and the general discrimination against the LGBTQ+ community leave many LGBTQ+ refugees vulnerable to trafficking, substance abuse, and domestic violence.

The inclusion of offenses related to domestic violence in the expanded asylum bars – the only categorical bar to asylum for which a conviction is not required – harms members of the LGBTQ community who are survivors of domestic violence and/or trafficking.<sup>42</sup> This is especially true

---

<sup>39</sup> *Proposed Rules* at 69654.

<sup>40</sup> See Aengus Carroll and Lucas Ramon Mendos, *State Sponsored Homophobia: A World Survey of Sexual Orientation Laws: Criminalisation, Protection and Recognition* 12th Ed. (International Lesbian, Gay, Bisexual, Transgender, and Intersex Association (ILGA), 2017), [https://ilga.org/downloads/2017/ILGA\\_State\\_Sponsored\\_Homophobia\\_2017\\_WEB.pdf](https://ilga.org/downloads/2017/ILGA_State_Sponsored_Homophobia_2017_WEB.pdf).

<sup>41</sup> See Sharita Gruberg, “LGBTQ Undocumented Immigrants Face an Increased Risk of Hate Violence,” *Center for American Progress*, June 10, 2014, <https://www.americanprogress.org/issues/immigration/news/2014/06/10/91233/lgbt-undocumented-immigrants-face-an-increased-risk-of-hate-violence/>.

<sup>42</sup> Marty Schladen, “ICE Agents Detain Alleged Domestic Violence Victim,” *El Paso Times*, February 16, 2017, <https://www.elpasotimes.com/story/news/2017/02/15/ice-detains-domestic-violence-victim-court/97965624/> (noting that the immigrant detained, a transgender person previously deported following her conviction for crimes such as

because domestic violence incidents often involve the “cross-arrest” of both perpetrator and survivor.<sup>43</sup> Allowing asylum adjudicators to determine the primary perpetrator of domestic violence, absent a conviction, places an unfair burden on survivors who are wrongly arrested. Additionally, increased cooperation between local law enforcement and federal immigration officials further harms LGBTQ immigrants by leaving them particularly vulnerable to the fear of reporting intimate partner and hate violence and the domino effects of over-policing.<sup>44</sup> Thus, LGBTQ asylum seekers caught up in biased policing practices or whose involvement in the criminal justice system is often related to trauma will be disparately impacted by the Proposed Rules that increase the bars to asylum eligibility.

### **Recommendations for DHS and DOJ**

As demonstrated above, the Proposed Rules are harmful to refugees seeking protection in the United States and unnecessary given the discretionary nature of asylum. We believe that the discretion of immigration adjudicators in assessing each individual asylum claim is critical to maintain the protections outlined in the 1951 Refugee Convention, the 1967 Protocol, and the United States’ own laws. Instead of expanding the existing crime bars to asylum, DHS and DOJ should instead:

1. Invest in more asylum officers and immigration judges to review, process, and adjudicate asylum claims. This will allow for the critical discretionary nature of asylum to continue in a way that provides refugees with the opportunity to exercise their fundamental right to seek protection and have their claims heard and evaluated through a fair process. It will also address the overwhelming backlog of pending asylum cases, which just last year hit a record high of 1,071,036, and leaves asylum seekers waiting for months and years for final decisions on their status, and<sup>45</sup>
2. End any efforts to expand the already comprehensive list of bars to asylum. Each asylum claim is different, and each asylum seeker has unique circumstances. Given the humanitarian nature of asylum, immigration adjudicators should be able to hear the

---

possession of stolen mail and assault, was then living at the Center Against Sexual and Family Violence, a shelter for survivors of intimate partner violence).

<sup>43</sup> David Hirschel, et al., “Domestic Violence and Mandatory Arrest Laws: To What Extent Do They Influence Police Arrest Decisions,” *Journal of Criminal Law & Criminology* 98, no. 1 (2007-2008): 255, <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7284&context=jclc> (noting that “[i]n some cases, dual arrests may be the result of legislation, department policies, or both failing to require officers to identify the primary aggressor. In addition, when such provisions are present, police may lack the training or information needed to identify the primary aggressor when responding to a domestic violence assault. This situation may be compounded by batterers who have become increasingly adept at manipulating the criminal justice system, and may make efforts to ‘pre-empt’ victims from notifying police in order to further control or retaliate against them.”).

<sup>44</sup> See eg., Sharita Gruberg, “How Police Entanglement with Immigration Enforcement Puts LGBTQ Lives at Risk,” *Center for American Progress*, April 12, 2017, <https://www.americanprogress.org/issues/lgbtq-rights/reports/2017/04/12/430325/police-entanglement-immigration-enforcement-puts-lgbtq-lives-risk/>.

<sup>45</sup> TRAC Immigration, Syracuse University, *Backlog of Pending Cases in Immigration Courts As of November 2019* (November 2019). [https://trac.syr.edu/phptools/immigration/court\\_backlog/apprep\\_backlog.php](https://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog.php)

asylum claims of those in need of protection and should have the discretion to make decisions on a case-by-case basis. Expanding widespread bars to asylum that prevent individuals from exercising their right to make a claim for protection undermine both the Refugee Convention and U.S. law.

We believe that the U.S. should be investing in building a more efficient asylum system to ensure that all asylum claims are heard and adjudicated fairly. We do not believe in placing obstacles in the way of refugees seeking protection, either through access to asylum in the courts or at our borders.