



**WOMEN'S  
REFUGEE  
COMMISSION**

Lauren Alder Reid,  
Assistant Director Office of Policy  
Executive Office for Immigration Review

Andrew Davidson,  
Asylum Division Chief Refugee Asylum and International Affairs Directorate  
U.S. Citizenship and Immigration Services

April 21, 2021

**RE: Executive Office for Immigration Review, Department of Justice and U.S. Citizenship and Immigration Services, Department of Homeland Security, Security Bars and Processing; Delay of Effective Date (USCIS Docket No: USCIS 2020-0013 A.G. Order No. 5004-2021)**

Dear Ms. Reid and Mr. Davidson:

The Women's Refugee Commission ("WRC") writes to comment upon the joint notice of the interim final rule with request for comments issued by the Department of Homeland Security and Department of Justice (collectively, the "Departments") on March 22, 2021, "Security Bars and Processing; Delay of Effective Date". This notice further delayed the effective date of the "Security Bars rule" (the "Final Rule"), adding public health concerns to the asylum security bars, to December 31, 2021. The Final Rule was originally set to go into effect on January 21, 2021, but was then delayed by the Biden administration for 60 days until March 22, 2021.

The Final Rule would impose unprecedented new barriers to applicants seeking asylum, withholding of removal, or protection under the Convention Against Torture in the United States based on their fear of persecution in their home country. WRC believes that the new bars to asylum and bars to other relief in the Final Rule, along with additional changes to the standards for initial fear screenings, would make accessing protection under asylum, withholding of removal, or the Convention Against Torture ("CAT") impossible for the vast majority of applicants. The result would be that many asylum seekers, including numerous women and children, will suffer persecution and death, even though our country's laws, consistent with our obligations under international law, clearly provide for relief. WRC believes that this Final Rule is blatantly contrary to our nation's laws, international obligations, and the Biden administration's commitment to create a humane, orderly asylum system for those seeking protection. By connecting public health with immigration enforcement and tasking immigration judges and officials to diagnose an infectious disease, the Final Rule would undermine the welfare of asylum seekers and the U.S. public instead of protecting public health.

WRC previously submitted a comment on the joint notice of proposed rulemaking issued by the Departments on July 9, 2020, entitled “Security Bars and Processing”, and urged the Departments to revoke the Proposed Rule.<sup>1</sup> We focus the following comments on the reasons that the Final Rule does not represent an effective way to protect public health while reducing barriers for noncitizens seeking forms of protection in the United States, and why it should be revoked.

**The Women’s Refugee Commission and the Migrant Rights and Justice Program’s Interest in Commenting on the Final Rule.** The WRC is a non-profit organization that advocates for the rights of women, children, and youth fleeing violence and persecution. We are leading experts on the needs of refugee women and children and the policies and programs that can protect and empower them. The Migrant Rights and Justice (“MRJ”) Program focuses on the right to seek asylum in the United States and strives to ensure that refugees, including women and children, are provided with humane reception in transit and in the United States, given access to legal protection, and protected from exposure to gender discrimination or gender-based violence.

Since 1996, the MRJ team has made numerous visits to the southwest border region, including along Mexico’s northern border, as well as to immigration detention centers for adult women and families and to shelters housing unaccompanied children throughout the country. WRC has interviewed hundreds of detained women seeking asylum in the United States whose ability to seek asylum would likely have been profoundly negatively impacted by the changes in the Final Rule.<sup>2</sup> Based on the information that we collect on these visits and our analysis of the laws and policies relating to these issues, we advocate for improvements, including by meeting with government officials and service providers and by documenting our findings through fact sheets, reports, backgrounders, and other materials. We make recommendations to address identified or observed gaps or ways in which we believe the corresponding department or agency can improve its compliance with the relevant standards.

As leading experts on legal and humanitarian protections to asylum seekers, and on the harms of often punitive treatment of asylum seekers at U.S. borders and in immigration detention facilities, WRC is gravely concerned that the Final Rule would violate domestic and international law, and that it would place asylum and withholding of removal beyond the reach of nearly all applicants. As a result, WRC urges the Departments to revoke the Final Rule immediately.

**The Final Rule Creates Significant, Unnecessary, and Unlawful Hurdles for Asylum Seekers in Need of Protection.** The Final Rule is an unprecedented attack on the institution of asylum that

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<sup>1</sup> Women Refugee Commission Comment RE: Executive Office for Immigration Review, Department of Justice and U.S. Citizenship and Immigration Services, Department of Homeland Security, Joint Notice of Proposed Rulemaking: Security Bars and Processing (USCIS Docket No. 2020-0013-0001/ RIN 1615–AC57), August 10, 2020 <https://www.womensrefugeecommission.org/wp-content/uploads/2020/08/WRC-Comment-on-Security-Bars-Processing-NPRM-08102020.pdf>

<sup>2</sup> Reports of our findings include: Women's Refugee Commission, *Prison For Survivors: The Detention of Women seeking Asylum in the United States*, (2017); Women’s Refugee Commission, Lutheran Immigration and Refugee Service, and Kids in Need of Defense, *Betraying Family Values: How Immigration Policy at the United States Border is Separating Families*, (2017); Women’s Refugee Commission and Lutheran Immigration and Refugee Service, *Locking Up Family Values, Again: A Report on the Renewed Practice of Family Immigration Detention*, (2014); Women’s Refugee Commission, *Migrant Women and Children at Risk: In Custody in Arizona*, (2010); Women’s Refugee Commission, *Torn Apart by Immigration Enforcement: Parental Rights and Immigration Detention*, (2010); Women’s Refugee Commission, *Innocents in Jail: INS Moves Refugee Women From Krome to Turner Guilford Knight Correctional Center*, (2001); Women’s Refugee Commission, *Behind Locked Doors: Abuse of Refugee Women at the Krome Detention Center*, (2000); Women’s Refugee Commission, *Liberty Denied: Women Seeking Asylum Imprisoned in the U.S.*, (1997); and Women’s Refugee Commission, *Chaos, Confusion, and Danger: The Remain in Mexico Program in El Paso* (2019)

would all but eliminate the scope of eligibility for relief, both under our immigration laws and under the international agreements incorporated into domestic law by statute.<sup>3</sup> Among other things:

- *The Final Rule Would Increase the Burden on Asylum Seekers and Deny them the Chance to Have Their Claims Heard Before a Judge, Leading to the Mass Refoulement of Asylum Seekers.* The Rule would create a new, mandatory bar to asylum, to withholding of removal under the Immigration and Nationality Act, and to withholding of removal under the Convention Against Torture for individuals who may exhibit symptoms of certain diseases, who may have been perceived to come into contact with certain diseases, or who have come from a country or passed through a country deemed to have a prevalence of certain diseases, on the grounds that they pose a threat to the security of the United States.<sup>4</sup> Additionally, the Final Rule would apply this national security bar at the initial staging stage, increasing the standard an applicant is required to meet to the more likely than not standard usually reserved for full merits adjudication hearings. This would significantly increase the burden on an asylum seeker at what was intended to be an initial screening with a low evidentiary burden<sup>5</sup> and deny asylum seekers the chance to have their claims heard before immigration judges.
- *The Final Rule Would Improperly Allow DHS to Deport Applicants with a Fear of Torture to Third Countries.* Under the Final Rule, asylum officers--as part of the expedited removal process--would decide whether to place an asylum seeker in full removal proceedings, or to remove the asylum seeker to a third country without a hearing. Given that asylum seekers only request withholding or deferral of removal in removal proceedings before an immigration judge after the credible fear process is completed, it is unclear when and how asylum seekers would be advised of the potential for removal to a third country and thus given the opportunity to provide evidence against a third country removal under the process set forth the Final Rule. This provision raises particularly grave concerns because it would foreclose asylum seekers from receiving withholding of removal and protection under the Convention Against Torture, which courts have recognized are mandatory forms of relief. This will result in individuals being sent to countries in which they would face serious harm, and is a fundamental violation of the United States' domestic and international legal obligations to refrain from returning refugees to persecution or torture.

**There is no Public Health Rationale for Excluding Asylum Seekers on the Grounds Indicated in the Final Rule.** The Final Rule would exploit public health emergencies (including COVID-19) to deem asylum seekers (both categorically and on an individual basis) a threat to national security and mandatorily bars them from asylum (and even from receiving the lesser relief of withholding of removal on the same grounds). WRC strongly objects to the Final Rule's framing and incorporation of a public health matter as a matter of national security within existing U.S. asylum law and policy and within standing U.S. international legal obligations. Although individuals crossing or attempting to cross the U.S. border may include both those with or without legal status in the United States, the Departments single out – without justification – only those individuals without U.S. legal status as constituting a threat to national security. In addition, the Final Rule also would give the Departments expansive authority to declare other entirely treatable diseases, including

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<sup>3</sup> See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436-40 (1987) (“If one thing is clear from the legislative history of the [Refugee Act of 1980], it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees.”); see also *id.* at fn. 22 (recognizing that the United Nations Handbook has “been widely considered useful [by courts] in giving content to the obligations that the Protocol establishes”).

<sup>4</sup> 85 FR 84160

<sup>5</sup> 85 FR 84160

sexually transmitted infections like gonorrhea, as national security threats and mandatorily deny asylum to refugees as a result.

**The Final Rule Would Undermine instead of Protects Public Health.** Far from protecting public health, the Final Rule would have a serious negative impact on individual and public health as it could erode trust and undermine individuals’ willingness to seek care by linking health concerns to immigration enforcement. Moreover, United Nations experts have cautioned that eliminating asylum protections at borders could be counterproductive and push asylum seekers to cross away from Ports of Entry or official crossings, potentially complicating efforts to control outbreaks of communicable disease.<sup>6</sup>

**The Final Rule Would Deny Asylum and Withholding of Removal to Those Ill Due to Inadequate Conditions and Care in U.S. Immigration Custody.** Under the guise of preventing further spread of disease, the rule would even perversely apply to asylum applicants already inside of the United States who are exposed to or infected with a disease in the United States – even if that infection were due to the U.S. government’s own negligence, maltreatment, or conditions of detention of that individual. WRC and numerous others have for decades extensively documented inadequate health care and medical treatment both in U.S. Customs and Border Protection (“CBP”) facilities and in U.S. Immigration and Customs Enforcement (“ICE”) facilities, including long before the outbreak of COVID-19.

*A. Asylum Seekers Routinely Receive Inadequate and Inappropriate Medical Care in ICE Custody*

Because even a symptom of an illness covered under the Final Rule could render an applicant ineligible for protection under asylum or withholding of removal, WRC is deeply concerned that the state of inadequate and inappropriate medical care in ICE immigration detention facilities – where thousands of asylum seekers are detained each year – could directly impact an applicant’s ability to obtain asylum under the Final Rule, both as relates to illness generally as well as specifically during the COVID-19 crisis. For more than 20 years and across dozens of visits to ICE (or formerly Immigration and Naturalization Service, INS) detention facilities, WRC has heard accounts from those detained of an inability to access medical care and receive appropriate treatment and found medical staffing inadequate. This is not limited to individuals who were already ill when they entered detention (though we have also spoken to individuals who were already ill with non-communicable diseases and receiving inadequate treatment). Many of those who WRC has interviewed entered detention feeling healthy, but as one woman made clear, “Instead of keeping us healthy, they are letting us leave [detention] in really bad shape.”<sup>7</sup> Over and over, WRC has recorded examples of health care that was delayed and denied. These accounts are not only consistent with WRC’s other extensive research, but also with widespread reporting by numerous human rights, medical, immigration, and other organizations.<sup>8</sup>

Public health and medical experts have made clear from the onset of the pandemic that the appropriate, safe, and responsible approach towards those in ICE detention – which consists of

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<sup>6</sup> U.N. HIGH. COMM’R FOR REFUGEES, Practical Recommendations and Good Practice to Address Protection Concerns in the Context of the COVID-19 Pandemic (Apr. 15, 2020), <https://data2.unhcr.org/en/documents/details/75453>.

<sup>7</sup> See Women’s Refugee Commission, Prison for Survivors, 28.

<sup>8</sup> For a non-exhaustive list of reports, see FN 121 of Women’s Refugee Commission, *Prison for Survivors*, 28. See also: Human Rights Watch, National Immigrant Justice Center, Detention Watch Network, American Civil Liberties Union, *Code Red: The Fatal Consequences of Dangerously Substandard Medical Care in Immigration Detention*, 2018. See also: Hamed Aleaziz, “A Child’s Forehead Partially Removed, Four Deaths, The Wrong Medicine—A Secret Report Exposes Health Care for Jailed Immigrants,” *BuzzFeed News*, December 12, 2019.

facilities where recommended physical distancing measures are impossible to implement – is to release people from detention.<sup>9</sup> Instead, ICE has doubled down on an approach that reveals the agency knowingly contributed to spread of the disease within and between its facilities.<sup>10</sup> Facility guards have reported horrific medical negligence and treatment during the pandemic, including - among other issues - ignoring clear symptoms of COVID-19, subjecting those with fevers to being blasted with cold air in order to sufficiently lower their temperature to permit transport, rationed personal protective equipment, and more.<sup>11</sup> Multiple individuals both detained in and working at ICE detention facilities have become gravely ill and even died during the COVID-19 pandemic. Internal ICE emails confirm that the agency willfully and knowingly rejected more widespread testing at one of its facilities because it lacked the ability to appropriately respond with quarantining if too many individuals tested positive.<sup>12</sup> These practices knowingly place those in ICE’s custody and those who work for the agency at severe risk of illness and death during a pandemic. ICE has deliberately ignored public health guidance in its failed response to the COVID-19 pandemic, resulting in widespread outbreaks of COVID-19 in its facilities.<sup>13</sup> Yet, if implemented, the Final Rule would consequently turn the government’s failure to provide adequate medical care into a reason to deny legal protection guaranteed under U.S. and international law.

*B. Conditions of Confinement in CBP Custody Are Consistently Poor, and Asylum Seekers Receive Inadequate and Inappropriate Medical Care in CBP Custody.*

Inhumane conditions and inadequate provision of medical care for asylum seekers – including children – in CBP facilities along the U.S.-border have been the cause of great and longstanding concern in the advocacy, medical, and legal communities. WRC has spent over two decades travelling to the southwest border, speaking with government officials, on-the-ground advocates, and migrants who have been in CBP custody. We have heard numerous accounts of women, families, and children of inhumane, unsanitary, and inappropriate conditions in CBP custody, as well as of inability to access medical care and treatment when needed. In our 2017 report, *Prison for Survivors*, we found that nearly all of 150 women interviewed in 2016 and 2017 had spent days in freezing cold CBP facilities.<sup>14</sup> Some of the women interviewed by WRC reported being denied access to sufficient food, water, sanitary products, and medical care, while others disclosed being physically abused by CBP personnel.<sup>15</sup> More recently, we documented reports of asylum seekers – including families and young children – spending prolonged periods in CBP custody, sometimes in tents or exposed to the elements in parking lots, and leaving with “significant untreated medical

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<sup>9</sup> Josiah Rich, Scott Allen, Mavis Nimoh, “We must release prisoners to lessen the spread of coronavirus,” *Washington Post*, March 17, 2020, <https://www.washingtonpost.com/opinions/2020/03/17/we-must-release-prisoners-lessen-spreadcoronavirus/>. See also: Letter from Dr. Scott Allen and Dr. Josiah Rich to Congress on Coronavirus and Immigrant Detention, March 19, 2020, available at: <https://www.documentcloud.org/documents/6816336-032020-Letter-FromDrs-Allen-Rich-to-Congress-Re.html#document/p4/a557238>.

<sup>10</sup> Emily Kassie and Barbara Marcolini, “‘It Was Like a Time Bomb’: How ICE Helped Spread the Coronavirus,” *New York Times*, July 10, 2020, <https://www.nytimes.com/2020/07/10/us/ice-coronavirus-deportation.html>.

<sup>11</sup> Noah Lanard, “Whistleblowers Say an ICE Detention Center Used Deceptive Tricks to Conceal COVID Outbreak,” *Mother Jones*, July 21, 2020, <https://www.motherjones.com/politics/2020/07/whistleblowers-say-ice-detention-center-used-deceptive-tricks-to-conceal-covid-outbreak/>. See also: Daniel Gonzalez, “Former Eloy correctional officers blame negligence for huge COVID-19 outbreak,” *Arizona Republic*, July 1, 2020, <https://www.azcentral.com/story/news/politics/immigration/2020/07/01/two-ely-officers-detail-management-failuresenabling-covid-outbreak/3255079001/>.

<sup>12</sup> Andrea Castillo, “ICE deliberately limited testing at Bakersfield immigration facility with COVID-19 outbreak,” *Los Angeles Times*, August 6, 2020, <https://www.latimes.com/california/story/2020-08-06/amid-coronavirus-outbreak-atbakersfield-immigration-facility-emails-show-ice-deliberately-limited-testing>.

<sup>13</sup> Office of Inspector General, *Violations of Detention Standards amid COVID-19 Outbreak at La Palma Correctional Center in Eloy*, AZ March 30, 2021 <https://www.oig.dhs.gov/sites/default/files/assets/2021-04/OIG-21-30-Mar21.pdf>

<sup>14</sup> See Women’s Refugee Commission, *Prison for Survivors*, 9-10

<sup>15</sup> Ibid

issues.”<sup>16</sup> WRC has also spoken with mothers who entered CBP custody with healthy children, only to watch in helpless horror as their children fell ill, became listless, or lost weight due to the poor conditions of care in custody. We have spoken to asylum seekers who begged for help from Border Patrol Agents after falling ill or experiencing a medical issue in custody, only to be ignored or dismissed. Indeed, inhumane conditions and inadequate and inappropriate medical care in CBP custody have led to countless cases of illnesses in asylum seekers, as well as numerous deaths,<sup>17</sup> yet the Final Rule would turn the government’s failure to provide adequate medical care to those in CBP custody – as with ICE custody -- into a reason to deny them protection guaranteed under U.S. and international law.

**Immigration Judges and DHS Officials Are Not Properly Qualified to Diagnose and Interpret Symptoms of Infectious Disease.** The Final Rule would provide immigration judges and asylum officers the authority to determine whether an applicant “can reasonably be regarded as a danger to the security of the United States” by “consider[ing] whether the [noncitizen] exhibits symptoms consistent with being inflicted with any contagious or infectious disease” designated in subsections (i) and (ii).<sup>18</sup> According to the Columbia University Mailman School of Public Health, “[i]dentifying communicable diseases requires careful diagnosis, appropriate investigations and consideration of differential diagnosis” that require expertise in either public health or medicine.<sup>34</sup> However, neither immigration judges nor asylum officers are generally trained, nor are they required to be trained, in medicine or public health. They are therefore patently unqualified to make the assessments required by the Final Rule. Tasking asylum officers and immigration judges – who are mostly lawyers by training—to make medical determinations requiring specialized training and expertise is not consistent with the role Congress gave to these adjudicators, and creates a real risk of both arbitrary enforcement of the rule and the risk of refoulement of an applicant to danger.

## **XI. Conclusion**

WRC opposes the Final Rule because it would unquestionably return vulnerable asylum seekers who merit protection to danger and potentially to death. This Final Rule is the latest in a series of unlawful, baseless attacks on the asylum system in the U.S. that fundamentally undermine our moral and legal obligations as a country to protect those fleeing persecution and harm. Additionally, the Final Rule has no basis in public health, and would undermine instead of protect the well-being of asylum seekers and the U.S. public.

We urge the Departments to rescind the Final Rule.

Sincerely,

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<sup>16</sup> Women’s Refugee Commission, *Chaos, Confusion, and Danger: The Remain in Mexico Program in El Paso*, (2019).

<sup>17</sup> See Physicians for Human Rights, *Health Risks of Customs and Border Protection Detention* (July 2019) [https://phr.org/wp-content/uploads/2019/07/PHR-Fact-Sheet\\_Health-Risks-of-CBP-Detention.pdf](https://phr.org/wp-content/uploads/2019/07/PHR-Fact-Sheet_Health-Risks-of-CBP-Detention.pdf); American Civil Liberties Union of Texas, American Civil Liberties Union Border Rights Center, *RGV Border Patrol Conditions OIG Complaint* (May 17, 2019) 1-2, [https://www.aclutx.org/sites/default/files/aclu\\_rgv\\_border\\_patrol\\_conditions\\_oig\\_complaint\\_05\\_17\\_2019.pdf](https://www.aclutx.org/sites/default/files/aclu_rgv_border_patrol_conditions_oig_complaint_05_17_2019.pdf).

<sup>18</sup> 85 FR 84160