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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

August 10, 2020

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)

Dear Ms. Reid and Mr. Davidson:

The Women's Refugee Commission ("WRC") writes to comment upon the joint notice of proposed rulemaking issued by the Department of Homeland Security and Department of Justice (collectively, the "Departments") on July 9, 2020, entitled "Security Bars and Processing." (the "Proposed Rule").

The Proposed 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. Women's Refugee Commission believes that the new bars to asylum and bars to other relief in the Proposed 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 will be that many, including many women and children, will suffer persecution and death, even though our country's laws, as consistent with our obligations under international law, clearly provide for relief. As with the Proposed Rule issued on June 15 relating to Asylum and Withholding of Removal, Women's Refugee Commission believes that this Proposed Rule is blatantly contrary to our nation's laws and a dramatic departure from this country's leadership in being a place of refuge for those who are persecuted.

As discussed further in Section II, *infra*, below, given the limited duration of the comment period and the far-reaching scope of the proposed changes makes it impossible for WRC to respond fully to each aspect of the Proposed Rule. We therefore focus in these comments on the aspects of the Proposed Rule that will most directly and profoundly impact applicants who have already been subject to precarious conditions in third countries, as well as applicants who are or may in the future be subject to immigration detention.

I. The Women's Refugee Commission and the Migrant Rights and Justice Program's Interest in Commenting on the Proposed 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 Proposed Rule.[1] 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 Proposed Rule contravenes domestic and international law, and that it will place asylum and withholding of removal beyond the reach of nearly all applicants. WRC urges the Departments to withdraw the Proposed Rule immediately.

II. Objection to the Expedited Time Frame for the Proposed Rule

Considering WRC's interest in comment on the substance of the Proposed Rule, WRC strongly objects to the expedited comment period provided by the government to comment on this proposed rule.

Generally, agencies must provide interested parties sufficient time to comment on a proposed rule, meaning a public comment period of at least 60 days in length.[2] There is no compelling reason to except the Proposed

[1]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).

[2]*See, e.g.,* Exec. Order 12866, 58 Fed. Reg. 51735 (Oct. 4, 1993) (directing agencies generally to furnish "not less than 60 days" for public comment); Exec. Order 13563, 76 Fed. Reg. 3821 (Jan. 21, 2011) ("To the extent feasible and permitted by law, each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally be at least 60 days.").

Rule from the Executive Orders' general rule of providing a minimum of 60 days for public comment. Rather, the highly technical, nuanced, legal and policy issues the Proposed Rule addresses—and, above all, the severe human cost it is certain to inflict in virtually eliminating protections for all asylum seekers so long as the COVID-19 pandemic continues—illustrate why a minimum of 60 days must be allowed for the public to file comments in response to the rule. Moreover, the 30-day comment period is particularly inappropriate given the inherent challenges of meaningfully engaging in public comment during an unprecedented and ongoing global pandemic. Finally, the 30-day comment period is inappropriate given the concurrent Notice of Proposed Rulemaking on asylum that the Departments issued, which closed on July 15, to which WRC devoted considerable time and effort responding, further limiting our ability to prepare exhaustive comments on the Proposed Rule.

As such, we joined with 30 other organizations to request an extension of the comment period on the Proposed Rule[3]— a request the Departments have ignored.

III. The Proposed Rule Would Create Significant, Unnecessary, and Unlawful Hurdles to Asylum Seekers in Need of Protection; The Rule Must Be Withdrawn

The Proposed Rule is an unprecedented attack on the institution of asylum that would all but eliminate the possibility of relief. Among other things, the Proposed 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.[4]

- Apply the national security bar to asylum, including as amended through the Proposed Rule to include public health grounds, at the initial screening stage, while also 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[5] and deny asylum seekers the chance to have their claims heard before immigration judges.

- Allow the Department of Homeland Security ("DHS") and the Department of Justice ("DOJ") to remove individuals seeking withholding or deferral of removal under the Immigration and Nationality Act or the Convention of Torture to third countries *before* the adjudication of their application(s).[6]

Each of these proposals, standing alone, creates a significant, unnecessary, and unlawful hurdle to the asylum seekers and refugees most in need of aid. When taken together, the changes are a catastrophic curtailment of

[3]Request to Provide a Minimum of 60 days for Public Comment in Response to the Department of Homeland Security (DHS) United States Citizenship and Immigration Services (USCIS) and Department of Justice (DOJ) Executive Office for Immigration Review (EOIR) (the Departments) Joint Notice of Proposed Rulemaking (NPRM): Security Bars and Processing; RIN 1615-AC57/ Docket No. USCIS 2020-0013 (Jul.24, 2020). https://s33660.pcdn.co/wp-content/uploads/2020/08/Comment-Period-Extension-Request_Security-Bars-and-Processing-RIN-1615-AC57-Docket-No.-USCIS-2020-0013-.pdf.

[4] Proposed Rule, 85 Fed. Reg. at 41211, 41212.

[5] Proposed Rule, 85 Fed. Reg. at 41215, 41217, 41218.

[6] Proposed Rule, 85 Fed. Reg. at 412161.

the scope of eligibility for relief both under our immigration laws and under the international agreements incorporated into domestic law by statute.[7]

WRC joins with all those organizations and individuals who are strongly objecting to these dramatic proposed changes, and we urge that each of them be withdrawn because they are contrary to law and contrary to our nation's tradition as a place of refuge for those seeking to escape persecution.

IV. There is No Genuine Public Health Rationale for Excluding Asylum Seekers on the Grounds Indicated in the Proposed Rule and the Proposed Rule is Neither Logical nor Reasonable in its Attempts to Do So

The Proposed Rule would create a new mandatory bar to asylum for individuals who exhibit symptoms of, have come into contact with, or have come from or passed through a country with prevalence of certain diseases, on the grounds that they pose a threat to the security of the United States. This would include diseases which have triggered an ongoing declaration of a public health emergency, such as the current COVID-19 emergency. However, it would also apply to other communicable diseases of public health significance that the Secretary of DHS and Attorney General (in consultation with the Department of Health and Human Services ("HHS")) determine "would cause a danger to the public health in the United States" and allow the Secretary and Attorney General to designate the countries (or regions therein) and time periods (based on the "incubation and contagion period") or other circumstances in which individuals from those countries will be considered "a danger to the security of the United States" and barred from asylum. This could apply to treatable diseases including, gonorrhea, Hansen's disease, syphilis, tuberculosis, and other communicable diseases such as cholera, diphtheria, plague, smallpox, yellow fever, and more.[8] The Proposed Rule could also cover international public health emergencies, which in the past included outbreaks of the Zika virus and the H1N1 flu.[9]

In doing so, the Proposed Rule exploits 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). As discussed further below, WRC strongly objects to the Proposed 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. Second, 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. The Departments provide no basis for their discriminatory and sweeping conclusion other than to point to the deaths and rising rate of infection caused by COVID-19. In addition, it also gives the Departments expansive authority to declare other entirely treatable diseases, including sexually transmitted infections like gonorrhea, as national security threats and mandatorily deny asylum to refugees as a result. Far from protecting public health, the Proposed Rule could 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

[7] *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").

[8] *See* 42 C.F.R. § 34.2(b) and Exec. Order No. 13295.

[9] *Public Health Emergency of International Concern,* Wikipedia, https://en.wikipedia.org/wiki/Public_Health_Emergency_of_International_Concern (accessed Aug. 9, 2020).

immigration enforcement.[10] 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 crossing, potentially complicating efforts to control outbreaks of communicable disease.[11]

Indeed, the Proposed Rule would apply to asylum seekers who have never been infected with any of the aforementioned diseases, but who have "symptoms consistent" with one of the expansive list of designated diseases, or who have "come into contact with such a disease" or who were recently in an area affected by the disease – even if that individual were infected in the past and subsequently treated or cured of the disease. The Proposed Rule's extraordinarily expansive scope would therefore empower the administration to categorically deny humanitarian protections to asylum seekers based on their travel route to the United States without regard to whether an individual was actually infected or exposed to a communicable disease of concern during transit. Under the Proposed Rule, an asylum seeker who transits briefly through a country (even for an airport layover) affected by any of diseases covered by the proposed regulation would be mandatorily denied asylum – even where tourists, students, business travelers, and residents from or passing through that same country are not banned from entering the United States. In this way, the Proposed Rule's sweeping and highly inappropriate scope would make it applicable to asylum seekers who present negligible or no risk to public health.

Moreover, the Proposed Rule ignores the existence of effective, evidence-based public health measures and treatments that could mitigate the effect of communicable diseases (including COVID-19) while preserving access to asylum. The Proposed Rule would cruelly even apply to asylum-seekers who are health workers exposed to COVID-19 or other diseases in the course of their professional duties caring for others in this country. Leading U.S. experts in public health have recommended measures that could be used to safely process asylum seekers and migrants at the border during the COVID-19 pandemic.[12] The Proposed Rule also ignores guidance from UNHCR, the U.N. Refugee Agency, which clarifies that states cannot impose "blanket measure[s] to preclude the admission of refugees or asylum-seekers" in response to the COVID-19 pandemic.[13]

Finally, the Proposed Rule is also not logical or reasonable. The Proposed Rule is proposed as a way to bar asylum and withholding for those who have COVID-19 symptoms or symptoms of other covered diseases or illnesses; those who have come into contact with the disease; and those who were present in a country where the disease is prevalent or epidemic "anytime within the number of days equivalent to the longest known incubation and contagion period for the disease." But an asylum hearing, whether as part of an affirmative application or as a defense to removal in INA section 240 proceedings, takes place months if not years after an individual enters the United States. A person who has COVID-19 or another covered disease or sickness when they enter the country may have long since recovered by the time their hearing occurs. Likewise, there is no logical relationship at the time of that later hearing between the applicant's long-past presence in a country where COVID-19 or another covered disease or sickness exists and their supposed current danger to the United States.

As for credible fear screenings, those interviews are a mechanism for assessing the likelihood of eligibility for asylum at the later defensive asylum hearing if the applicant passes credible fear. Likewise, the happenstance

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[10]Letter from Public Health Experts to Secretary Alex Azar and Dr. Robert Redfield, Director of the Centers for Disease Control and Prevention (May 18, 2020), https://www.publichealth.columbia.edu/sites/default/files/public_health_experts_letter_05.18.2020.pdf.

[11]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.

[12] https://www.publichealth.columbia.edu/sites/default/files/public_health_experts_letter_05.18.2020.pdf

[13]U.N. HIGH. COMM'R FOR REFUGEES, *Key Legal Considerations on Access to Territory for Persons in Need of International Protection in the Context of the COVID-19 Response* para. 1 (Mar. 16, 2020), https://www.refworld.org/docid/5e7132834.html.

of whether an individual has COVID-19 or another covered disease or sickness at the particular moment of their affirmative or defensive hearing should not determine their eligibility for asylum or withholding. That is particularly so because anyone who is infected at the time of that hearing could have contracted the disease after coming to the United States. Moreover, this approach would be impossible to implement in any reasonable way. Will generalized symptoms like fever or cough, which are common to many diseases, be grounds for an asylum and withholding denial? If an individual is determined to have COVID-19 or another covered disease or sickness at the time of the hearing, would a subsequent negative test constitute changed circumstances warranting a reopening of proceedings and an opportunity to seek asylum and withholding again? If not, how can the government justify removing someone as ineligible for withholding, for example, if that person no longer has COVID-19 or another covered disease or sickness and therefore no longer poses any danger? Doing so would plainly violate the government's non-refoulement obligations.

V. The Proposed 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. Women's Refugee Commission 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 Proposed 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 Proposed 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 has 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."[14] 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.[15] In our 2017 report, *Prison for Survivors*, we noted among other pressing concerns the following examples from the

[14] *See* Women's Refugee Commission, *Prison for Survivors*, 28.

[15] 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.

Joe Corley Detention Center in Texas, the Laredo Processing Center in Texas, the Eloy Detention Center in Arizona, and the Mesa Verde Detention Center in California:

- *"Significant delays in accessing medical care, such as at Joe Corley where women told us that it takes 7-10 days from the time a request to see the doctor is submitted until it is granted. […]*
- *"Inadequate and denied care, as in the case of a Karen at Joe Corley, who had a high fever for 15 days and was only given ibuprofen despite repeated requests for medical attention, and Melinda at Eloy who suffered from ovarian cysts, was experiencing vaginal bleeding, and received only Tylenol for two months. At Laredo, WRC spoke to a woman who had a cyst and explained that she simply gets a sedative. At Eloy, Joe Corley, and Mesa Verde, women told us that the only consistent medical care is acetaminophen and the instruction to "drink more water." One woman summed up the effects of this denied care, saying, "Our medicine is water and to cry."*
- *"Lack of follow-up care for chronic health concerns, as in the case of Michaela. She had been diagnosed with ovarian cancer prior to being detained and was refused regular check-ups in detention despite the fact that the doctor whose care she had been under prior to being detained stipulated that the visits were critical for her care."*[16]

Similarly, WRC helped file a complaint with the DHS Office of Inspector General (OIG) and Office for Civil Rights and Civil Liberties (CRCL) on behalf of ten mothers in ICE family detention facilities in July 2015, in which the mothers reported grossly inappropriate medical that included more than 250 children being given adult dosages of vaccines, and a child vomiting blood told simply to drink water without referral to external medical care.[17]

Extensive documentation and accounts from government agencies, government medical experts, and detention center guards also detail grossly inadequate and inappropriate medical care in ICE detention. DHS's own OIG has found inadequate medical care in ICE immigration detention facilities across multiple inspections.[18] Similarly, DHS's own medical experts have issued multiple and alarming warnings about medical care in ICE detention facilities, especially in family detention facilities.[19]

Thus far in Fiscal Year 2020 alone, individuals apprehended by CBP have comprised over 50 percent, or nearly 20,000 people, of the average daily population in ICE detention facilities, with the vast majority likely seeking protection in the form of asylum, withholding of removal, or relief under the Convention Against Torture (CAT).[20] WRC believes the Proposed Rule, if implemented, would leave these and any future asylum seekers detained in ICE detention facilities at grave risk of return to harm simply due to the inadequate medical care that has been documented for years. Yet ICE health care has been perhaps even more unacceptable, and rendered thousands vulnerable to severe illness, during the COVID-19 pandemic – leaving more asylum

[16]Women's Refugee Commission, *Prison for Survivors*, 28. Note that all names are pseudonyms in order to protect identity.
[17]"ICE's Failure to Provide Adequate Medical Care to Mothers and Children in Family Detention Facilities." Complaint filed with DHS OIG and DHS CRCL on July 30, 2015. https://www.aila.org/advo-media/press-releases/2015/deplorable-medical-treatment-at-fam-detention-ctrs/public-version-of-complaint-to-crcl.
[18]See, for example, DHS OIG, *Concerns about ICE Detainee Treatment and Care at Detention Facilities*, December 11, 2017, available at: https://www.oig.dhs.gov/sites/default/files/assets/2017-12/OIG-18-32-Dec17.pdf. DHS OIG, *Concerns about ICE Detainee Treatment and Care at Four Detention Facilities*, June 3, 2019, https://www.oig.dhs.gov/sites/default/files/assets/2019-06/OIG-19-47-Jun19.pdf.
[19]Miriam Jordan, "Whistle-Blowers Say Detaining Migrant Families 'Poses High Risk of Harm,'" July 18, 2018, https://www.nytimes.com/2018/07/18/us/migrant-children-family-detention-doctors.html.
[20]Statistics from U.S. Immigration and Customs Enforcement (ICE), accessed August 7, 2020, current as of August 1, 2020. https://www.ice.gov/detention-management.

seekers through no fault of their own in exactly the kind of scenario in which the Proposed Rule would curtail their ability to obtain protection and relief.

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 facilities where recommended physical distancing measures are impossible to implement – is to release people from detention.[21] Instead, ICE has doubled down on an approach that reveals the agency knowingly contributed to spread of the disease within and between its facilities.[22] 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.[23] 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 had too many individuals tested positive.[24] 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. Yet, if implemented, the Proposed 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.[25] 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

[21]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-spread-coronavirus/. *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-From-Drs-Allen-Rich-to-Congress-Re.html#document/p4/a557238.

[22]Emily Kassie and Barbara Marcolini, "'It Was Like a Time Bomb': How ICE Helped Spread the Coronavirus," July 10, 2020, https://www.nytimes.com/2020/07/10/us/ice-coronavirus-deportation.html.

[23]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-eloy-officers-detail-management-failures-enabling-covid-outbreak/3255079001/.

[24]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-at-bakersfield-immigration-facility-emails-show-ice-deliberately-limited-testing.

[25]*See* Women's Refugee Commission, *Prison for Survivors*, 9-10.

abused by CBP personnel.[26] 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 issues."[27] Other organizations and government watchdogs have also extensively documented similar issues in CBP custody including extremely prolonged stays in dangerously overcrowded and often-filthy cells, inadequate medical treatment, inedible and insufficient food, lack of access to basic hygiene products, and more.[28] WRC has 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. In a tragically emblematic case of this, in May 2019, Carlos Gregorio Hernández Velasquez, a 16-year-old boy, entered CBP custody healthy[29] but passed away six days later in a pool of vomit and blood on the cement floor of a Border Patrol station.[30] The former acting head of CBP called Carlos's death "predictable and preventable" and resigned soon after his death, but Carlos was the sixth migrant child to have died in after entering the U.S. in under a year and the third to have died from complications from the flu diagnosed while in custody.[31] 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,[32] yet the Proposed 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.

VI. Immigration Judges and DHS Officials Are Not Properly Qualified to Diagnose and Interpret Symptoms of Infectious Diseases

The Proposed Rule provides 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

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[26] *Id.*

[27] Women's Refugee Commission, *Chaos, Confusion, and Danger: The Remain in Mexico Program in El Paso, 6* (2019).

[28] *See, e.g.*, Human Rights Watch, *In the Freezer: Abusive Conditions for Women and Children in US Immigration Holding Cells* (Feb. 28, 2018), https://www.hrw.org/report/2018/02/28/freezer/abusive-conditions-women-andchildren-us-immigration-holding-cells; DHS OIG, *OIG-18-84: Special Review – Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy* (Sept. 27, 2018), at 8, https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-84- Sep18.pdf; DHS OIG, *OIG-19-46: Management Alert - DHS Needs to Address Dangerous Overcrowding Among Single Adults at El Paso Del Norte Processing Center* (May 30, 2019), https://www.oig.dhs.gov/sites/default/files/assets/2019- 05/OIG-19-46 May19.pdf; DHS OIG, OIG-19-51: *Management Alert - DHS Needs to Address Dangerous Overcrowding and Prolonged Detention of Children and Adults in the Rio Grande Valley* (July 2, 2019), https://www.oig.dhs.gov/sites/default/files/assets/2019-07/OIG-19-51-Jul19_.pdf.

[29] *See* Physicians for Human Rights, *Health Risks of Customs and Border Protection Detention*, 2 (July 2019) https://phr.org/wp-content/uploads/2019/07/PHR-Fact-Sheet_Health-Risks-of-CBP-Detention.pdf ("A CBP agent stated that he "did not show signs of illness" during his initial screening on the day he arrived.").

[30] Zolan Kanno-Youngs, *Teenager Dies at Border Station While Awaiting Move to Shelter*, N.Y. Times (May 21, 2019).

[31] Robert Moore, Susan Schmidt, Maryam Jameel, *Inside the Cell Where a Sick 16-year-old Boy Died in Border Patrol Care*, ProPublica (Dec 5, 2019). https://www.propublica.org/article/inside-the-cell-where-a-sick-16-year-old-boy-died-in-border-patrol-care.

[32] *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; 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.

disease" designated in subsections (i) and (ii).[33] 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.[34] However, neither immigration judges nor asylum officers are generally trained, nor are they required to be trained, in medicine or public health.[35] They are therefore patently unqualified to make the assessments required by the Proposed 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.

VII. The Proposed Rule is at Odds with Congressional Intent and is Contrary to Statute

Th Proposed Rule would redefine the national security bar contained in current 8 U.S.C. 1158 (b)(2)(A)(v) and 8 U.S.C. 1231(b)(3)(B)(iv), "reasonable grounds to believe that the [noncitizen] is a danger to the security of the United States," to require immigration judges and asylum officers to "consider" whether someone is showing symptoms of an infectious disease for which a national emergency has been declared, or that has been designated by the Attorney General and the secretaries of DHS and the HHS. The Departments correctly note in the Proposed Rule that Congress allows the Attorney General and the Secretary of DHS to "establish additional limitations and conditions" *as long as they are consistent with the statute.* However, this novel expansion of the national security bar is directly at odds with Congressional intent in how Congress incorporated this bar into the Refugee Act. The legislative history of the Refugee Act clearly demonstrates that Congress enacted the withholding of removal provision, including the national security exclusion ground "with the understanding that it is based directly upon the language of the Protocol and it is intended that the provision be construed consistent with the Protocol."[36] When the United States ratified the Refugee Protocol in 1968, the Secretary of State in a letter transmitting the Protocol to the President for signature noted that, "[a]s refugees are by definition without a homeland, deportation of a refugee is a particularly serious measure, and it would not be humanitarian to deport a refugee for reasons of health."[37]

Indeed, the Departments of State and Health, Education and Welfare explicitly rejected a proposed reservation to the Refugee Protocol on "health related grounds."[38] UNHCR also has since made clear in an advisory opinion submitted in U.S. federal court that the danger sufficient to trigger the national security exception is equivalent to "a serious danger to the foundations or the very existence of the State."[39] Despite this, the

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[33] Proposed Rule, 85 Fed. Reg. at 41215, 41217, 41218.

[34]Columbia University Mailman School of Public Health, *Protecting Asylum during the COVID-19 Pandemic: A Public Health Primer on the July 9 Trump Administration Proposed Rule on Asylum,* 4 (2020) https://www.publichealth.columbia.edu/sites/default/files/public_health_primer_20200730.pdf.

[35]Under 8 U.S.C. § 1225(b)(1)(E), asylum officers are required by law to have "professional training in country conditions, asylum law, and interview techniques." Immigration judges do not have any statutory job requirements, but EOIR requires them to have a degree in law and at least seven years of experience "preparing for, participating in, and/or appealing formal hearings or trials involving litigation and/or administrative law." EOIR, "Immigration Judge," June 9, 2017, https://www.justice.gov/legal-careers/job/immigration-judge.

[36] H.R. Conf. Rep. No. 96-781, at 20 (1980).

[37]Letter from Dean Rusk Secretary of State, to President Lyndon Johnson (Jul 25, 1968), https://books.google.com/books?id=09Xg93YBnXEC&printsec=frontcover#v=onepage&q&f=false.

[38]Dep't of Health, Edu., and Welfare, Memorandum for Ambassador Graham Martin re: Protocol Relating to the Status of Refugee, July 22, 1968; Dep't of Health, Edu., and Welfare, Letter to Ambassador Graham Martin re: Protocol Relating to the Status of Refugee, July 16, 1968.

[39]U.N. HIGH. COMM'R FOR REFUGEES, *Advisory Opinion from the Office of the United Nations High Commissioner for Refugees (UNHCR) on the Scope of the National Security Exception Under Article 33(2) of the 1951 Convention Relating to the Status of Refugees* (Jan. 6, 2006), https://www.refworld.org/docid/43de2da94.html.

Proposed Rule would apply the national security bar to public health risks and diseases not of the nature or anywhere near the level of danger that Congress was concerned about when it included the national security bar to withholding in the Refugee Act.

Even more problematically, despite both 8 U.S.C. § 1158(b)(2)(A)(v) and § 1231(b)(3)(B)(iv) requiring the application of a bar to asylum or withholding on "security" grounds to be part of an individualized determination that a person *is* a danger, the Proposed Rule seeks to apply the bar to "class[es] of noncitizens" based on their travel through a location where a pandemic such as COVID-19 or an epidemic has occurred.[40] A determination that an applicant is barred because they fall within a "class" of individuals is by definition not an individualized determination as required by statute.

As the Third Circuit has noted in the context of a similarly worded national security exception to withholding of removal, Congress "did not intend this exception to cover aliens who conceivably could be such a danger or have the ability to pose such a danger (a category nearly anyone can fit)."[41] "Congress intended this exception to apply to individuals who . . . actually pose a danger to U.S. security." "[M]ere suspicion" is not sufficient.[42] Yet, as discussed previously, the Proposed Rule would bar individuals from asylum without any evidence that they have actually contracted a disease of concern but on the uninformed and untrained opinion of the non-expert adjudicator that their symptoms are indicative of the disease or based on the fact that the individual has potentially (but not necessarily actually) been exposed to the disease. No reasonable person could, for instance, conclude that an asylum seeker who has come into contact with, but not contracted, a disease could pose a national security threat to the United States, and yet the Proposed Rule would bar such an individual from asylum and withholding from removal.

The Departments' attempts to explain away the conflict with the statute's requirement of a determination that a person actually "is" a danger by stating that "[i]n many cases it is not possible to know whether any particular individual is infected at the time of apprehension," and by citing both potential risk of exposure to officers and the public and operational feasibility considerations preventing immediate testing of potential applicants upon arrival[43] amount to little more than a tacit acknowledgement that individuals apprehended at the border are not categorically a danger but rather *may* pose a danger. Put simply, the Departments' interpretation of "is a danger" as "may pose a danger" is a violation of the language of the INA.[44]

Additionally, defining "danger to the security of the United States" in terms of long-past exposure to COVID-19 (or similarly short-duration covered diseases or illnesses) is contrary to the text of the relevant asylum and withholding bars; for example, those bars use present tense and therefore only apply to someone who is currently a danger to the United States, not one who only posed danger in the past. These bars to asylum and withholding also must be read consistently with neighboring bars to relief set out in the respective statutes. Those other bars describe unchangeable past conduct that logically impacts whether protection is now warranted; and other characteristics that are unlikely to change. Defining "danger to the security of the United States" to encompass a condition, like potential COVID infection, that will last only a matter of weeks is inconsistent with that statutory context. Likewise, "danger to the security of the United States" must be read in the context of the other bars to refer to an individualized determination that a person actually poses a danger, not a blanket determination that whole groups might potentially pose a danger.

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[40] Proposed Rule, 85 Fed. Reg. at 41215.
[41] *Yusupov v. Att'y Gen.*, 518 F.3d 185, 201 (3d Cir. 2008).
[42] *Id.*
[43] Proposed Rule, 85 Fed. Reg. at 41209-210, n53.
[44] Yusupov, 518 F.3d 201.

Finally, the expedited removal statute defines "credible fear" as "a significant possibility . . . that the alien could establish eligibility for asylum under section 1158 of this title" in later, full removal proceedings. Thus, it violates the expedited removal statute to deny credible fear based on an individual's symptoms of, or risk of infection with, COVID-19 or another covered disease or illness at the time of the credible fear interview. If the bar is applied at all at the credible fear screening stage, the question must be whether there is a significant possibility that, at a full merits hearing months or years later, the proposed bars would not apply. Because any COVID-19 infection or other covered illness or disease active at the time of the credible fear interview would likely have long since ended by the time of the later full asylum hearing, there will always be such a significant possibility that the proposed bars would later be inapplicable. Therefore the application of this proposed bar at the credible fear stage is contrary to the statute.

VIII. The Proposed Rule Impermissibly Increases the Burden on Applicants at the Initial Fear Screening Stage and Would Lead to the Mass Refoulement of Refugees

The Proposed Rule effectively elevates the credible fear standard set by Congress and would block the vast majority of asylum seekers placed by the government in expedited removal proceedings from seeking protection in the United States from persecution or torture. Under the Proposed Rule, an asylum seeker who would have established a credible fear of persecution or a reasonable fear of persecution or torture but is determined by a DHS officer to be subject to any national security bar, including the newly proposed national security bar on the grounds of public health, will not be permitted to seek protection in the United States unless she manages to meet the extremely elevated standard created by the Proposed Rule. Specifically, the Proposed Rule requires individuals who are determined to be subject to the national security bar by untrained and uninformed adjudicators with no public health or medical expertise to show--during the preliminary fear screening interview--that they are "more likely than not" to be tortured in order to potentially be permitted to seek protection in the United States from persecution or torture.

Among other profound concerns, this section of the Proposed Rule would dramatically impact the ability to seek asylum for those in immigration detention. There is an extensive body of evidence demonstrating the deeply harmful impact of immigration detention on individuals, including asylum seekers.[45] Detention is traumatizing, especially where a person has already experienced past trauma, potentially impacting one's ability to recount one's case to an asylum officer or immigration judge.[46] Detention also creates numerous obstacles to a fair immigration process, including an inability to access counsel, a lack of interpretation, immigration proceedings conducted by phone or video that impede the ability to fully make one's case for protection, an inability to obtain needed evidence. For example, WRC has visited multiple detention facilities where the spaces used for telephonic credible fear interviews are incredibly small, uncomfortable, and often not able to ensure confidentiality, and has personally heard numerous reports of inadequate interpretation in the credible fear interview and in immigration court.[47]

All of these facts would make it vastly more difficult for an asylum seeker in detention to meet this increased burden, including the newly proposed bar, during an initial screening. Yet even if an applicant manages to meets this extraordinarily elevated standard and establishes during the preliminary screening that she would be tortured if returned to her country, the proposed rule would empower DHS to remove that person to a third country (unless the person shows that she is more likely than not to be tortured in the third country) without

[45] *See* Women's Refugee Commission, *Prison for Survivors,* fn. 53 (collecting sources documenting the harmful impact of immigration detention on asylum seekers).
[46] *See Id.* fn. 77, 78 (collecting sources discussing the mental health impacts of detention).
[47] *See* Women's Refugee Commission, *Prison for Survivors,* 23.

allowing the person an opportunity to seek protection in the United States. Under the Proposed Rule, if an asylum seeker does not meet the heightened "more likely than not" to be tortured standard imposed by this regulation, she will be found not to have passed the fear screening, even if she otherwise has a well-founded fear of persecution, and she will therefore be subject to removal to the country where she fears persecution or torture.

In elevating the screening standard that Congress set by statute, the Proposed Rule would make it virtually impossible for any person seeking asylum to pass the credible fear process and be permitted to request asylum before an immigration judge. Requiring asylum seekers to meet this heightened "more likely than not" standard during preliminary screenings would unquestionably contravene Congress' intent that the credible fear standard be set low so that "there should be no danger that an alien with a genuine asylum claim" would be summarily "returned to persecution."[48]

Moreover, the Departments note that the current credible fear process "leads to considerable inefficiencies for the United States Government," but fail to consider that requiring an asylum seeker to lay out a full asylum claim and establish that she is not subject to any bars during the initial fear screening would lead to serious due process issues. It is unrealistic and unfair to expect asylum seekers in expedited removal, who are generally detained and rarely represented by legal counsel at the time of their preliminary interviews, to gather sufficient evidence to meet this heightened standard set by the Proposed Rule. As a result, nearly all asylum seekers are likely to receive negative fear determinations and be deported to the countries where they fear persecution, including those with well-founded fears of persecution (the requirement to qualify for asylum) or whose lives or freedom would be threatened if returned to their country (the requirement for withholding of removal protection). In doing so the Proposed Rule would lead to mass *refoulement* – the unlawful and unnecessary persecution and torture of vulnerable asylum seekers.

IX. The Proposed Rule Would Improperly Allow DHS to Deport Applicants with a Fear of Torture to Third Countries

The Proposed Rule would allow the Departments to remove individuals seeking withholding or deferral of removal under the INA and CAT to third countries *before* the adjudication of their application(s). This provision would allow DHS to remove asylum seekers to third countries *before* an immigration judge has even entered an order of removal in their cases. Currently, DHS may attempt to remove an individual to a third country *after* an immigration judge has found the person to be removable from the United States and entered a removal order against them, but simultaneously withheld or deferred that order of removal because the person is more likely than not to suffer persecution or torture if returned to the country of removal.

Under the Proposed 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 proposed by the Proposed Rule. This will result in individuals being sent to countries in which they would face serious harm and should not be implemented.

[48] H.R. Rep. No. 104-469, Pt. 1, at 158 (1996).

Moreover, the Proposed Rule would require applicants to somehow "affirmatively establish" eligibility for withholding of removal or CAT protection in an unknown third country, without likely even being advised of the need to do so by adjudicators. Asylum seekers might have good reason to fear being sent to any number of third countries, but at the expedited removal stage would not be equipped to identify every country to which DHS might send them and in which they might face harm, much less to "affirmatively establish" that they would face such harm. Additionally, there is no mechanism in the expedited removal process by which an asylum seeker could "affirmatively establish" eligibility for protection from a third country, even if DHS were to reveal the third country to which it planned to remove the asylum seeker. Credible fear interviews are initial interviews designed to screen for whether there is a "significant possibility" that an applicant could qualify for protection based on a fear of persecution in their home country, not to adjudicate the full merits of the claim.[49] This could create an unlawful and unreasonable requirement that will absolutely result in *refoulement* of asylum seekers. Further, it defies logic to see how an asylum seeker, especially one at the expedited removal stage who, as described above, is detained in conditions that profoundly impact their ability to successfully navigate the credible fear process, is almost always unrepresented by counsel, and has only recently arrived in the United States, would be able to "affirmatively establish" a need for protection from any number of unidentified third countries.

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. Sending asylum seekers to places where their lives or freedom are threatened is a fundamental violation of the United States' domestic and international legal obligations to refrain from returning refugees to persecution or torture.

X. The Proposed Rule's Changes to the Expedited Removal Process Would Conflict with Changes Introduced in the Recently Published Proposed Regulation on Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review; Neither Change Should Be Adopted

The Proposed Rule would introduce changes to the expedited removal process that would conflict with changes to the expedited removal process in the proposed regulation published on July 15.[50] WRC strongly objects to any of the proposed rules' changes being adopted. The Proposed Rule acknowledges this conflict but instead of explaining how the conflict would be resolved, indicates that "[t]he Departments will reconcile the procedures set forth in the two proposed rules at the final rulemaking stage."[51] Neither change suggested by the proposed rules should be adopted without a clear explanation from the Departments on how the expedited removal process would work and a clear opportunity for the public to comment on the proposed process.

There is no way to understand from this Proposed Rule how these two separate sets of changes to the credible fear and expedited removal processes would work together, and how conflicts between them would be resolved. Without any clarity about which rule would prevail and in what form, it is impossible to evaluate the rule or assess its potential impact. Because of the life or death consequences of the expedited removal and

[49]*See* United States Citizenship and Immigration Services, Refugee, Asylum and International Operations Directorate, "Lesson Plan: Credible Fear of Torture and Persecution Determinations," April 30, 2019 ("The function of the [credible fear screening] process is to quickly identify potentially meritorious claims and resolve frivolous ones with dispatch" (emphasis added) at 9.).
[50]Notice of Proposed Rulemaking, *Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review*, 85 Fed. Reg. 36264 (June 15, 2020).
[51] Proposed Rule, 85 Fed. Reg. at 41211.

credible fear process to asylum seekers and because of the unresolved conflicts between the proposed rules, the Department should adopt neither in the absence of further clarity.

XI. Conclusion

WRC opposes the Proposed Rule because it will unquestionably return vulnerable asylum seekers who merit protection to danger and potentially to death. This Proposed 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.

We urge the Departments to rescind the Proposed Rule.

Sincerely,

/s/
Michelle Brané
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Women's Refugee Commission
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