human rights first

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RE: Public Comment Opposing Proposed Rules on Security Bars and Processing - RIN 1615-AC57 / USCIS Docket No. 2020-0013; RIN 1125-AB08 / A.G. Order No. 4747-2020

Human Rights First submits these comments in response to the Department of Homeland Security (DHS) and Department of Justice (DOJ) Executive Office for Immigration Review (EOIR) Notice of Proposed Rulemaking published in the Federal Register on July 9, 2020. The proposed rule would use public health as a pretext to gut humanitarian protections for families, adults, and children seeking safety in the United States and deport them to persecution and torture in violation of U.S. law and international treaty obligations.

Through this proposed rule, the administration seeks to exploit specious public health claims to evade its legal obligations and deport refugees to persecution and torture. The proposed rule would ban, block, and deport people seeking asylum in the United States by mislabeling them as threats to national security on public health grounds. It also grants DHS and DOJ broad powers to declare a host of diseases—many of which are treatable and/or do not present a risk of widespread transmission—as public health threats and bar asylum seekers as a result. Diseases declared as public health emergencies in the United States would also be used to automatically bar asylum seekers from protection. Perversely, the rule would bar from asylum people who have "come into contact with" COVID-19, including while carrying out essential duties as healthcare workers in the United States or while in U.S. immigration detention where official negligence has allowed cases of COVID-19 to proliferate. As a result of the proposed rule, refugees with well-founded fears of persecution and/or likely to be tortured will be deported, and many summarily removed without an asylum hearing.

Leading public health experts have concluded that proposed rule is not based on sound public health principles, is detrimental to public health, and ignores evidence-based measures that would both protect public health and uphold U.S. legal obligations to protect people seeking safety in the United States.[1] Indeed, this administration has long sought to exploit public health

[1] "Public Health Experts Urge U.S. Officials to Withdraw Proposed Rule That Would Bar Refugees from Asylum and Other Humanitarian Protections in the U.S.," (Aug. 6, 2020), https://www.publichealth.columbia.edu/public-

to block and deport asylum seekers.[2] For months, the administration has been using COVID-19 as a pretext to block asylum seekers at the border, expelling over 109,000 people including children and people seeking asylum without an opportunity to apply for legal protections required under U.S. law and treaty obligations.[3] Public health experts have concluded that the March 20, 2020 order from the Centers for Disease Control and Prevention (CDC) that DHS has used to carry out these expulsions relies on similarly specious justifications and disregards evidence-based measures for safe processing of asylum seekers.[4]

Using this sweeping and unprecedented new rule to bar and deport refugees on purported public health grounds would violate U.S. law and treaty obligations. The proposed rule attempts to exploit a narrow exception under U.S. asylum and international refugee law that limits protections for certain individuals who pose a serious threat to the national security of the refugee hosting country, but as discussed in detail below, this limited exception cannot be used to ban refugees on public health grounds nor to bar entire classes of people seeking refugee protection. In response to the COVID-19 pandemic, UNHCR has made clear that "imposing a blanket measure to preclude the admission of refugees or asylum-seekers . . . without evidence of a health risk and without measures to protect against refoulement, would be discriminatory and would not meet international standards."[5]

The agencies have failed to, and cannot, articulate any rational justification for the proposed rule. As public health experts have noted, this rule, like the March 20 CDC order, is "xenophobia masquerading as a public health measure."[6] Human Rights First urges the agencies to withdraw the proposed rule in its entirety and comply with the United States' obligations under domestic and international law to guarantee humanitarian protections for people fleeing persecution and torture.

Human Rights First and Its Interest in This Issue

For over 40 years, Human Rights First has provided pro bono legal representation to refugees seeking asylum in the United States and advocated for the protection of the human rights of refugees. Human Rights First grounds its work in the legal standards of the 1951 Refugee Convention, its Protocol, and other international human rights instruments, and we advocate adherence to these standards in U.S. law and policy. Human Rights First operates one of the largest and most successful pro bono asylum representation programs in the country. Working in partnership with volunteer attorneys at many of the nation's leading law firms, we provide legal

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health-now/news/public-health-experts-urge-us-officials-withdraw-proposed-rule-would-bar-refugees-asylum-and-and.

[2] Caitlin Dickerson & Michael D. Shear, "*Before Covid-19, Trump Aide Sought to Use Disease to Close Borders*," New York Times, (May 3, 2020), https://www.nytimes.com/2020/05/03/us/coronavirus-immigration-stephen-miller-public-health.html.

[3] U.S. Customs and Border Protection, "Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions," https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics, (last modified Aug. 5, 2020).

[4] "Public Health Experts Urge U.S. Officials to Withdraw Order Enabling Mass Expulsions of Asylum Seekers," (May 18, 2020), https://www.publichealth.columbia.edu/public-health-now/news/public-health-experts-urge-us-officials-withdraw-order-enabling-mass-expulsion-asylum-seekers.

[5] UNHCR, "Key Legal Considerations on access to territory for persons in need of international protection in the context of the COVID-19 response," (March 16, 2020), https://www.refworld.org/docid/5e7132834.html.

[6] "Public Health Experts Urge U.S. Officials to Withdraw Proposed Rule That Would Bar Refugees from Asylum and Other Humanitarian Protections in the U.S.," *supra* note 1.

representation, without charge, to hundreds of refugees each year through our offices in California, New York, and Washington D.C. This extensive experience dealing directly with refugees seeking protection in the United States is the foundation for our advocacy and informs the comments that follow.

The Agencies Have Not Allowed a Sufficient Period for Comment on the Proposed Rule

This sweeping rule would rewrite fundamental aspects of U.S. asylum law in violation of domestic law and treaty obligations and would grant DHS and DOJ—agencies that lack public health expertise—broad and unprecedented authority to block and deny humanitarian protections to asylum seekers on public health grounds. By providing only a limited 30-day comment period, the agencies are effectively denying the public the right to meaningfully comment under the notice and comment rulemaking procedures required by the Administrative Procedure Act (APA). On July 24, 2020, Human Rights First joined with dozens of other organizations to request an extension to the comment period; to date, we have not received a response.[7]

To meaningfully respond to this rule, the public needs more than 30 days to ascertain the full scope of the regulation, consult with public health and medical experts on its purported justifications and effects, and consider the rule's implications for people seeking refugee protections in the United States. Moreover, the administration proposed this rule shortly after proposing a rule on June 15 that would rewrite decades of asylum law and regulations through multiple complex provisions; that proposed rule also had an insufficient 30-day comment period.[8] These overlapping comment periods have made it extremely difficult to analyze and provide detailed commentary on the rules.

Further, the June 15 and July 9 proposed rules contradict one another. In the July 9 Notice of Proposed Rulemaking, the agencies acknowledge that "these procedures for processing individuals in expedited removal proceedings … differ from expedited removal procedures set forth in" the earlier rule, request comment on how to reconcile the rules, and state that they will reconcile the proposals during the final rulemaking stage. This is an evasion of notice and comment rulemaking requirements. The public must have the opportunity to comment on decisions that the agencies make to reconcile the proposed rules before either go into effect. At this stage, the public cannot reasonably speculate as to how the agencies would reconcile the rules or comment meaningfully on the contradictory procedures. As such, the agencies must publish a reconciled rule and provide an additional comment period to comply with their obligations under the APA.

On this basis alone, the agencies should rescind this rule and, should they choose to reissue it, grant the public significantly more time to respond.

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[7] "Letter Requesting Extension of Public Comment Period for Proposed Rule Making Fundamental Changes to Asylum Processing and the Immigration System," (July 24, 2020), https://www.womensrefugeecommission.org/research-resources/letter-requesting-extension-of-public-comment-period-for-proposed-rule-making-fundamental-changes-to-asylum-processing-and-the-immigration-system/.

[8] Dep't of Homeland Security & Dep't of Justice, "Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review," 85 FR 36264, (June 15, 2020).

Unprecedented Public Health Powers Would be Conferred by the Rule on Agencies and Individual DHS Officers and Immigration Judges who Lack Such Expertise

The proposed rule would amend 8 C.F.R. § 208.13/1208.13, 8 C.F.R. § 208.16/1208.16, 8 C.F.R. § 208.30/1208.30 to grant DHS and DOJ, agencies that lack public health and medical expertise, unprecedented authority to ban asylum seekers on purported public health grounds. These agencies would be empowered to designate a potentially vast array of diseases as threats to national security, determine which countries and areas are experiencing outbreaks, decide the periods of "incubation and contagion" of these diseases, and ban asylum seekers coming from or who have travelled through countries where the agencies deem a designated disease to be "prevalent" – one of many vague terms left undefined by the rule. DHS officers and immigration judges, who similarly lack relevant expertise, are also directed by the rule to deny humanitarian protections to individuals who have come into contact with or exhibit symptoms of diseases covered by the rule, as determined by DHS and DOJ.

Refugees should not be blocked from asylum in the United States and deported to persecution based on the politicized and unqualified determinations of DHS and DOJ. While the agencies are required to "consult" with the Department of Health and Human Services, DHS and DOJ would have final authority to make public health determinations with potential life-or-death consequences for asylum seekers. Such decisions should not be made by agencies that lack public health expertise and have not been authorized by Congress to make such determinations. Moreover, individual DHS and DOJ adjudicators would be directed by the rule to arbitrarily ban asylum seekers exposed to a covered diseased or based on their "symptoms" – regardless of whether asylum seekers are actually infected with a designated disease. For instance, an individual who coughs or reports a fever would be barred from asylum and withholding of removal if an immigration judge or DHS officer finds those symptoms "consistent with" COVID-19, as the proposed rule itself suggests.[9] Yet these "symptoms" may be the result of an asylum seeker having barely eaten or slept while detained in dire conditions in U.S. immigration detention or due to a host of other medical conditions. For instance, a search of webmd.com of diseases associated with "cough and fever" returns 107 results, including the common cold.[10] Human Rights First has represented many clients with entirely treatable and/or non-infectious conditions that could well be mistaken by an untrained DHS or DOJ adjudicator as "symptoms consistent with" COVID-19, such as asthma, chronic obstructive pulmonary disease, and cancers that cause clients to experience fever, cough, and shortness of breath.

The proposed rule does not, and cannot, explain how DHS officers and immigration judges who lack public health/medical expertise will make these determinations; yet, the rule asserts that the time needed to make such decisions will be "minimal."[11] Will DHS officers and immigration judges also use webmd.com to decide which asylum seekers are banned under the proposed rule? The decision-making process framed by the rule is nonsensical and unworkable; it would result in decisions that are absurd, arbitrary, and unjust. As public health experts have made clear, testing, tracing, and treatment are appropriate tools to address COVID-19. Banning asylum seekers from U.S. legal protections, including those waiting in the United States for adjudication

[9] 85 FR 41202.
[10] "Cough and Fever," WebMD.com, https://symptomchecker.webmd.com/multiple-symptoms?symptoms=cough%7Cfever&symptomids=59%7C102&locations=14%7C66 (last accessed Aug. 10, 2020).
[11] 85 FR 41214.

of their requests for protection, based on the unqualified public health/medical judgements of DHS and DOJ political appointees and functionaries bears no relationship whatsoever to controlling the spread of COVID-19 or other diseases.

The Proposed Rule Creates Sweeping New Bars to Asylum and Withholding of Removal in Violation of U.S. Law and Treaty Obligations

Through 8 C.F.R. § 208.13/1208.13 and 8 C.F.R. § 208.16/1208.16, the agencies propose to create unprecedented public health bars to asylum and withholding of removal protections by mislabeling refugees seeking safety in the United States as threats to national security on public health grounds. These bars violate U.S. asylum laws and binding international treaty obligations to protect refugees from being return to persecution and torture; the rules as proposed are *ultra vires* and must be rescinded. If codified, these proposed rules will lead to the illegal deportation of people to places where their lives and safety will be at risk.

United States law and treaty obligations prohibit the United States from returning an individual to persecution. When Congress codified this *non-refoulement* obligation through the Refugee Act of 1980, it did so "with the understanding that [the provision] is based directly upon the language of the [Refugee] Protocol and it is intended that the provision be construed consistent with the Protocol."[12] In the process of ratifying the Refugee Protocol, the U.S. Department of State made clear that deporting refugees on public health grounds would violate U.S. obligations to protect refugees, noting: "As refugees by definition are 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."[13] Barring and deporting asylum seekers on public health grounds is an unprecedented and illegal attempt to expand and exploit a narrow exception to U.S. and international refugee laws limiting protections for a refugee who poses a serious threat to the security of the host country.[14]

Categorical prohibitions on asylum and withholding of removal—as proposed in this rule for individuals who have recently been in countries where covered diseases are "prevalent" as decided by DHS and DOJ—are not in keeping with U.S. obligations to protect refugees from return to persecution. Even during moments of public health concern, public health measures cannot be used to deny individuals an effective opportunity to seek asylum. Legal guidance issued by the UN Refugee Agency (UNHCR) on COVID-19 makes clear that policies categorically barring asylum seekers on public health grounds are incompatible with countries' *non-refoulement* obligations: "Imposing a blanket measure to preclude the admission of refugees or asylum-seekers, or of those of a particular nationality or nationalities, without evidence of a health risk and without measures to protect against refoulement, would be discriminatory and would not meet international standards. . . . Denial of access to territory without safeguards to protect against refoulement *cannot be justified on the grounds of any health risk*."[15] Deporting

[12] H.R. Conf. Rep. No. 96-781, at 20 (1980).
[13] "Letter of Submittal from the Department of State to the President of the United States, Protocol Relating to the Status of Refugees," (July 25, 1968), https://books.google.com/books?id=09Xg93YBnXEC&lpg=PR8&ots=-VjAyjyGjg&dq=%22among%20the%20rights%20which%20the%20Protocol%20would%20guarantee%20to%20refugees%20is%20the%20prohibition%22&pg=PR8#v=onepage&q&f=false.
[14] 8 U.S.C § 1158(b)(2)(A)(iv); 8 U.S.C § 1231(b)(3)(B)(iv); Convention Relating to the Status of Refugees (1951) Article 33(2) (as a party to the Protocol Relating to Status of Refugees, the United States is bound to the requirements of the Refugee Convention).
[15] UNHCR, "Key Legal Considerations," *supra* note 5 (emphasis added).

individuals seeking asylum from the interior of the United States on the same grounds is similarly incompatible with international treaty obligations and unjustifiable as a public health measure.

The national security exception the proposed rule claims to rely on was never intended to and cannot be expanded to bar asylum seekers on public health grounds. UNHCR has explained that this exception applies only to those individuals who pose "a serious danger to the foundations or the very existence of the State"[16] that "can only be countered by removing the person from the country of asylum."[17] Returning a refugee to persecution "must be the last possible resort to eliminate or alleviate the danger; and, the danger to the country of refuge must outweigh the risk to the refugee upon refoulement."[18] This national security exception "must be interpreted restrictively."[19] Conduct covered by the narrow exception includes "attempts to overthrow the government of the host State through violence or otherwise illegal means, activities against another State which may result in reprisals against the host State, acts of terror and espionage."[20] The proposed rule's sweeping bar, which would be applied to asylum seekers through categorical determinations based on recent travel and speculative judgements about potential past exposure to a covered disease, does not fall within, or even close to, the limits of the national security exception. Returning refugees to countries where they will face persecution is not proportionate to any minimal risk an individual asylum seeker might pose to public health. As public health experts have made clear, the appropriate response to communicable diseases of public health concern, including COVID-19, is to test, isolate, trace, and treat affected individuals. The rule provides for none of these evidence-based health measures.

Finally, the proposed rule would ban many asylum seekers without an individualized, case-by-case determination of the actual danger the person poses. U.S. federal courts of appeal have agreed that an individualized assessment is required when the government decides whether an asylum seeker may be barred from U.S. protection as a security threat.[21] As the Third Circuit noted, 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)."[22] Yet, the proposed rule creates a "category nearly any [asylum seeker] can fit" by barring asylum seekers based on their travel route to the United States regardless of whether they are infected with, were actually exposed to, or likely to have even come in contact with a covered disease. As UNHCR has noted in the context of the national security exception, "[t]here must be a rational connection between the removal of the refugee and the elimination of the danger."[23] The proposed rule does

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[16] UNHCR, "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.

[17] UNHCR, "Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees," (2003), https://www.refworld.org/docid/3f5857d24.html.

[18] UNHCR, "Advisory Opinion," *supra* note 16.

[19] UNHCR, "A Guide to International Refugee Protection and Building State Asylum Systems," (2017), https://www.unhcr.org/3d4aba564.pdf.

[20] *Id.*

[21] *See, e.g.*, *Yusupov v. Att'y Gen.*, 518 F.3d 185 (3d Cir. 2008); *Malkandi v. Holder*, 576 F.3d 906 (9th Cir. 2009); *Hernandez v. Sessions*, 884 F.3d 107 (2d. Cir 2018) (Droney, J., concurring).

[22] *Yusupov*, 518 F.3d at 201.

[23] UNHCR, "Advisory Opinion," *supra* note 16.

not offer any rationale justification to bar asylum seekers on public health let alone national security grounds.

The only protection permitted for individuals seeking humanitarian protection subject to the proposed rule is the extraordinarily limited relief of deferral of removal under the Convention Against Torture (CAT). But this protection from deportation is only for individuals who fear torture, does not confer permanent legal status, and is subject to rapid termination, including upon the receipt of so-called "diplomatic assurances" that the person will not be subjected to torture if returned.[24] These assurances are not legally binding,[25] effectively evade the absolute prohibition under CAT on returning an individual to torture, and raise serious concerns about the safety of individuals returned to countries alleged to torture, or acquiesce in the torture of, their citizens. [26] By barring all other humanitarian relief, the proposed rule would leave the few asylum seekers who manage to qualify for this limited and inadequate relief at risk of forced return to countries where they could be subject to torture.

The Proposed Rule Would Result in Perverse and Unjust Denials of Asylum, Including Asylum-Seeking Healthcare and Other Essential Workers, Detained Asylum Seekers, and Asylum Seekers Forced to Remain in Mexico by DHS

The bars to asylum and withholding of removal created by this rule would perversely ban from protection asylum-seeking healthcare and other essential personnel subject to the rule[27] who are exposed to COVID-19 while working to contain the pandemic, detained asylum seekers who come into contact with COVID due to the negligence of U.S. officials in permitting its spread, and thousands of asylum seekers blocked by the administration at the southern U.S. border due to the metering of asylum seekers at ports of entry and the administration's illegal Migrant Protection Protocols (MPP).

There is no rational public health or national security justification to deny humanitarian protections to and deport individuals potentially exposed to COVID-19 while *inside* the United States, particularly when the administration's indifference and negligence have contributed to widespread exposure in immigration detention facilities and among the general public. A Canadian federal court recently found that the U.S.-Canada Safe Third Country Agreement is unconstitutional due to the dangers that asylum seekers face while applying for protection in the United States, including in U.S. immigration detention, which often results in a "lack of basic human dignity, lack of medical care, and lack of food."[28] Despite these known risks, the administration has refused to exercise existing statutory authority to release asylum seekers and other immigrants from immigration detention and allow them to self-isolate in safety in the midst of the COVID-19 pandemic. Instead, the administration seeks to perversely deny asylum to

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[24] 8 C.F.R. § 208.18(c).
[25] UNHCR, "UNHCR Note on Diplomatic Assurances and International Refugee Protection," (Aug. 2006), https://www.refworld.org/pdfid/44dc81164.pdf.
[26] Amnesty International, "Diplomatic Assurances Against Torture—Inherently Wrong, Inherently Unreliable," https://www.ohchr.org/Documents/HRBodies/CAT/GCArticle3/AI_Briefing.pdf; Human Rights Watch, "Still at Risk: Diplomatic Assurances No Safeguard Against Torture," (Apr. 14, 2005), https://www.hrw.org/report/2005/04/14/still-risk/diplomatic-assurances-no-safeguard-against-torture.
[27] The explanatory section of the proposed rule indicates that these regulatory changes would apply only to asylum seekers arriving in the United States after the final rule is published. Retroactive application would raise additional serious concerns about the rule's scope and justification.
[28] *Canadian Council for Refugees v. Canada*, 2020 FC 770 (July 22, 2020), https://decisions.fct-cf.gc.ca/fc-cf/decisions/en/item/482757/index.do.

detained asylum seekers who are exposed to COVID-19 as a result the administration's refusal to release them.

Further, should DHS and DOJ determine that COVID-19 is "prevalent" in Mexico, asylum seekers forced by the administration to "wait" there due to intentional reductions in the processing of asylum seekers at ports of entry as well as those returned to Mexico and forced to wait for their court proceedings under MPP would be automatically barred from asylum and withholding of removal. These asylum seekers have been forced to wait in Mexico in dangerous and substandard conditions, some for more than 18 months. Denying humanitarian protections to individuals, many of whom have been victims of kidnapping, rape, and assault, based on their presence in a country the United States has forced them to remain in would be cruel and unjust, in addition to illegal. Barring humanitarian protection for asylum seekers solely on the basis of circumstances that the U.S. government has intentionally forced them into violates all notions of fairness and would result in the arbitrary deportation of refugees to countries they have fled.

During the COVID-19 pandemic, Human Rights First's asylum-seeking clients in the United States, like many Americans, have faced new obstacles to their daily survival. The consequences of the pandemic are far-reaching, but those effects are often magnified for asylum seekers who struggle to find work, obtain healthcare, purchase food, secure housing, provide education for their children, and navigate bureaucracy in a language they often do not speak. Many asylum seekers have not been able to shelter at home because they work as healthcare providers or in other essential positions; others must work to provide basic necessities for themselves and their families. Human Rights First represents several asylum seekers, like millions of Americans, who have been exposed to or infected with COVID-19. One of our asylum-seeking clients contracted COVID-19 while pregnant and is now unable to hold her newborn because she remains in isolation. To exploit the pandemic and deny asylum and other humanitarian protection for asylum seekers, like these individuals, merely for having been exposed to COVID-19 in the United States is inhumane and absurd.

The Proposed Rule Makes It Virtually Impossible for Asylum Seekers to Pass Initial Fear Screenings and Returns Refugees to Danger Without a Hearing

The proposed rules would amend 8 C.F.R. § 208.30/1208.30 to evade and effectively elevate the credible fear standard set by Congress, making it all but impossible for asylum seekers to pass preliminary screening interviews and deny them asylum hearings before an immigration judge. These illegal alterations to the credible fear process will result in the deportation of asylum seekers to place where they fear persecution or torture – in violation of U.S. law and treaty obligations.

When Congress established the expedited removal process in 1996, it created a low standard for a positive fear determination so that "there should be no danger that an [individual] with a genuine asylum claim" would be summarily "returned to persecution."[29] Senator Orrin Hatch, one of the principal sponsors of the legislation, explained further that the preliminary fear interview uses "a low screening standard for admission into the usual full asylum process."[30] Accordingly, the asylum statute does not require that an asylum seeker establish full eligibility for relief in the preliminary fear screening, but rather a "significant possibility" that she is

[29] H.R. Rep. No. 104-469, Pt. 1, at 158 (1996).
[30] 142 Cong. Rec. 25,347 (1996).

eligible for relief after a full hearing before an immigration judge. As discussed below, even this standard is difficult for asylum seekers, many of whom are traumatized by the persecution that they have escaped and the dangers they faced during the journey to the United States, to meet.

The proposed rules would effectively rewrite the credible fear process and impose an extraordinarily heightened and unfair requirement to pass preliminary fear screenings. The proposal directs DHS officers conducting fear screenings to enter negative determinations for asylum seekers who would otherwise meet the "significant possibility" standard set by Congress if they are found to be subject to the rule *i.e.* passed through a country where a designated disease is prevalent, exhibit symptoms of, or have come into contact with such a disease. Officers are permitted to enter a positive fear determination only if an asylum seeker establishes that she is "more likely than not" to face *torture* if removed to her home country. That requirement is not the preliminary screening standard but the proof ordinarily required of an individual seeking protection against return to torture during a full evidentiary hearing before an immigration judge.

As a result of this rule, even asylum seekers who would have met the full statutory eligibility requirements for asylum and/or withholding of removal will be deported to the places where they would face persecution. People at risk of torture are also likely to be deported given the extremely high evidentiary requirement the proposed rule creates at the preliminary screening stage. For instance, from March through May 2020, under the CDC order that DHS has been using to effectively eliminate asylum protections at the border, only four people managed to pass screenings for torture under the current screening standard,[31] demonstrating how prohibitive the new evidentiary bar, which is even higher, would be. Imposing this heightened "more likely than not" standard through regulations violates U.S. asylum law and Congress' expressed intent to set a low credible fear standard to ensure that asylum seekers with genuine international protection needs were not returned to persecution.

The screening process proposed by this rule suffers from many of the same defects and absurdities, as discussed above, with respect to immigration court adjudications. DHS officers conducting screening interviews and immigration judges reviewing these decisions lack the medical and public health expertise and qualifications to make these determinations. Asylum seekers who fall sick with a cold or exhibit other symptoms that a screening officer considers to be consistent with COVID-19, as well as those exposed to COVID-19 while detained in Border Patrol facilities or immigration detention centers while awaiting fear interviews, would be blocked from asylum hearings and deported to the countries where they fear persecution.

In addition to being illegal, it is unrealistic and unfair to expect asylum seekers in expedited removal proceedings, who are virtually all detained, rarely represented by legal counsel, and generally unable to present witnesses at the time of their preliminary interviews, to meet this severely heightened standard. In one credible fear interview Human Rights First attended, for example, the applicant, an older woman from Central America, was trying to testify about years of very serious spousal abuse, and the asylum officer, an older man, was genuinely trying to listen to her, but both were speaking through an interpreter who was present over a very poor speakerphone connection. There was an unbearable amount of noise right outside the room from

[31] Camilo Montoya-Galvez, "U.S. ramps up mass expulsions of migrants as border crossings rise," CBS News, (June 13, 2020), https://www.cbsnews.com/news/us-ramps-up-mass-expulsions-migrants-border-crossings-rise-coronavirus-restrictions/.

guards speaking on walkie-talkies and electric doors sliding open and shut, as the applicant struggled to explain forms of sexual abuse she had suffered that she found particularly shameful. Every time she tried to talk about this, her voice would drop, and the interpreter would miss what she had said and not translate it. She had counsel present, who flagged this for the officer, and the applicant was ultimately able to get her testimony heard, but most asylum seekers are unrepresented at this stage. Another asylum seeker, who had experienced detention and torture in Syria, was physically shaking when he met with a lawyer immediately before his credible fear interview, asking for confirmation that in this detention center where he was now they did not torture people. Yet another, a Rwandan national who had also lived through horrors, was a perfectly clear witness in French but found upon receiving the write-up of his credible fear interview, which he had attended without counsel, that the asylum officer had understood his claim backwards, essentially inverting the persecutors and the persecutees.

The proposed rule could also result in the illegal deportation of people who would qualify for U.S. protection from return to torture. Through the Foreign Affairs Reform and Restructuring Act (FARRA) of 1998 Congress directed DOJ to promulgate regulations to implement U.S. obligations under CAT.[32] Under these decades-old rules, asylum seekers in expedited removal proceedings who show a "significant possibility" of establishing eligibility for protection from torture under CAT[33] must be placed in regular removal proceedings with an immigration judge and afforded an opportunity to request protection. DOJ created this framework to "ensure that no alien is removed from the United States under circumstances that would violate Article 3" and provide a "fair resolution of claims to protection" under CAT.[34] Yet, the proposed rule effectively requires asylum seekers to establish full eligibility for protection under CAT *during the initial screening interview* but without the procedural rights and protections required by law for those in regular removal proceedings just to be referred for a hearing before an immigration judge. This requirement contradicts existing regulations, which prohibit DHS officers who conduct asylum interviews from rendering decisions on withholding of removal or claims under CAT.[35]

This proposed, illegally heightened standard gravely undermines the purpose of the preliminary fear screening process created by Congress and will likely result in people being deported to torture (in addition to persecution, as discussed above) – in violation of the absolute prohibition under Article 3 of CAT on returning individuals to torture. To reverse the longstanding regulations implementing U.S. obligations to protect those at risk of torture and to impose this exceedingly high standard at the preliminary screening stage violates FARRA and is inconsistent with the requirements of the APA. The agencies have not provided a meaningful explanation of how this significant alteration to the credible fear process meets U.S. treaty obligations or reconciled the proposed rules with existing regulations that prohibit DHS officers from rendering determinations that this proposal would effectively direct them to make.

[32] Foreign Affairs Reform and Restructuring Act of 1998, Section 2242(b).
[33] 8 C.F.R. § 208.30.
[34] Dep't of Justice, Immigration and Naturalization Service, "Regulations Concerning the Convention Against Torture," 64 FR 8478 at 8479, 8485 (Feb. 19, 1999).
[35] 8 C.F.R. § 208.16(a).

Under the Proposed Rule, DHS Would Have Authority to Remove Asylum Seekers to Third Countries Where They Would Face Persecution

The proposed rules amend subsection (f)(1) and add subsection (f)(2) to 8 C.F.R. § 208.16/1208.16, which would allow DHS to deport the few asylum seekers who manage to meet the illegally elevated preliminary screening standard imposed by the rule to third countries even if they would face persecution there. Under the rule, DHS would be permitted to carry out these removals *before* an immigration judge decides an asylum seeker's applications for withholding of removal or Convention against Torture protection – denying asylum seekers an opportunity to even have their requests for protection considered.

Asylum seekers subject to the proposed rule who do manage to show that they are more likely than not to suffer torture in their home country could be deported by DHS to third countries unless they prove that they are also more likely than not to suffer torture in that third country. As a result, DHS would be authorized to deport asylum seekers to third countries even where they have well-founded fears of persecution. For instance, an LGBTQ asylum seeker from El Salvador could be deported to Guatemala despite the fact that LGBTQ persons also face life-threatening persecution there.[36] As discussed in detail above, deporting individuals under this standard whether to their home country or a third country where they fear persecution or torture violates U.S. law and treaty obligations. The vague drafting of section (f)(2) would even appear to allow DHS to remove individuals placed in regular removal proceedings who have already or intend to file applications for asylum before that application is adjudicated. Deporting asylum seekers to third countries before pending asylum claims are adjudicated deprives them of the opportunity to establish eligibility for asylum and to remain in the United States in violation of U.S. laws and regulations.

This provision also places an unfair and onerous burden on asylum seekers to prove the harm they might suffer if removed to a third country – particularly when they have not previously lived in or even passed through the proposed third-country of removal and where DHS attempts to remove the person to multiple countries. It is yet another attempt to illegally rewrite the credible fear standard set by Congress and render the protections Congress adopted to prevent the deportation of people who fear persecution and/or torture practically meaningless.

There Is No Legitimate Public Health Justification for the Proposed Regulations

The proposed rule relies on specious public health claims that have been repeatedly debunked by leading public health experts.[37] The agencies ignore evidence-based measures to address COVID-19 and other communicable diseases already in place and fail to consider other measures recommended by public health experts, such as non-discriminatory screening, isolation, and

[36] *See, e.g.*, UNHCR, "Death of transgender asylum seeker in Guatemala highlights increased risks and protection needs for LGBTI community," (Aug. 6, 2020), https://www.unhcr.org/en-us/news/press/2020/8/5f2bb1494/death-transgender-asylum-seeker-guatemala-highlights-increased-risks-protection.html.

[37] "Public Health Experts Urge U.S. Officials to Withdraw Proposed Rule That Would Bar Refugees from Asylum and Other Humanitarian Protections in the U.S.," *supra* note 1; "Public Health Experts Urge U.S. Officials to Withdraw Order Enabling Mass Expulsions of Asylum Seekers," *supra* note 4; "Public Health Measures to Safely Manage Asylum Seekers and Children at the Border," (May 15, 2020), https://www.humanrightsfirst.org/resource/public-health-measures-safely-manage-asylum-seekers-and-children-border.

treatment, to promote the safe processing of asylum seekers.[38] Many countries have implemented public health measures while also protecting and maintaining access to asylum protections, such as through the use of screenings at borders, health certifications, and temporary quarantines where necessary.[39] But the proposed rule disregards these evidence-based measures and instead uses public health as a pretext to gut refugee protections in the United States. It relies on baseless claims that lack a founding in sound public health principles. For example:

- The rule arbitrarily singles out asylum seekers as a threat to public health without justification and creates discriminatory bars to humanitarian protection based on immigration status, which public health experts have termed "xenophobia masquerading as a public health measure."[40]
- The rule is not tailored to minimize public health risks. It applies to potentially broad classes of asylum seekers without regard to actual infection or exposure to a covered disease. Because of the rule's vague language, even individuals infected with COVID-19 in the past but who have since recovered appear to be barred under the rule because they have "come into contact" with the disease – a result with no possible public health justification.
- The rule would authorize DHS and DOJ to declare a vast array of diseases (including cholera, diphtheria, gonorrhea, Hansen's disease (leprosy), pandemic influenza, plague, smallpox, SARS, syphilis, tuberculosis, viral hemorrhagic fevers, yellow fever, and Zika) to be threats to national security and bar asylum seekers as a result. Yet many of these conditions are treatable, not subject to U.S. quarantine laws, and/or do not present a risk of widespread transmission.
- The agencies attempt to justify the rule based on the risk of COVID-19 transmission in congregate detention settings. Yet rather than implementing a categorical and unjustifiable ban on asylum, the administration has refused to use existing legal authority to avoid detaining individuals during the pandemic while awaiting their asylum hearings and permit asylum seekers to self-isolate, as recommended by public health and prison experts.

In 2010, the CDC finally lifted[41] an immigration ban on individuals living with HIV—a ban first adopted in the 1980s when there were more known cases of HIV/AIDS in the United States than anywhere else in the world (a situation strikingly similar to the current status of COVID-19)—acknowledging that those restrictions were not an effective or necessary public health measure.

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[38] "Public Health Measures," *supra* note 36; Mailman School of Public Health, Columbia University, "Protecting Asylum during the COVID-19 Pandemic: A Public Health Primer on the July 9 Trump Administration Proposed Rule on Asylum," https://www.publichealth.columbia.edu/sites/default/files/public_health_primer_20200730.pdf.
[39] UNHCR, "Coronavirus: UNHCR offers practical recommendations in support of European countries to ensure access to asylum and safe reception" (April 27, 2020), https://www.unhcr.org/en-us/news/press/2020/4/5ea68bde4/coronavirus-unhcr-offers-practical-recommendations-support-european-countries.html.
[40] "Public Health Experts Urge U.S. Officials to Withdraw Proposed Rule That Would Bar Refugees from Asylum and Other Humanitarian Protections in the U.S.," *supra* note 1.
[41] Centers for Disease Control and Prevention, Dep't of Health and Human Services, "Medical Examination of Aliens—Removal of Human Immunodeficiency Virus (HIV) Infection From Definition of Communicable Disease of Public Health Significance," 74 FR 56547 (Nov. 2, 2009).

Human Rights First urges the administration to avoid repeating this grave error by adopting another discriminatory and ineffective ban on the pretext of public health.

The Proposed Rule Eliminates the Authority of Asylum Offices to Reconsider Erroneous Negative Fear Determinations

Proposed 8 C.F.R. § 1208.30(g)(2)(IV)(a) seeks to eliminate the authority of the asylum office to reconsider negative credible fear determinations that have been affirmed by an immigration judge, thus, removing the only remaining review mechanism for asylum seekers placed in expedited removal, including those subject to the proposed public health bar. As judicial review of fear determinations is not permitted, reconsideration by the asylum office, a provision in place for nearly 20 years,[42] provides an important safeguard for asylum seekers placed in expedited removal proceedings. This proposed regulatory change would cut off the opportunity to request reconsideration of a negative determination for asylum seekers who have not passed an initial fear screening, including unrepresented and/or traumatized asylum seekers unable to fully express or clearly articulate their fear of return during an initial interview and review hearing. This proposed change is yet another effort to illegally elevate the credible fear standard. But it does not appear to have any connection to the public health concerns that purportedly justify the proposed rule, and the agencies have offered no explanation for their decision to eliminate this crucial safeguard.

The Proposed Rule Would Apply Asylum Bars at the Credible Fear Stage Unrelated to the Justifications Proffered for the Regulations

The rule also proposes to amend 8 C.F.R. § 208.30(e)(5)(iii) to apply the third-country transit asylum bar at the credible fear stage despite the fact that the interim final rule[43] was vacated by a federal district court on June 30, 2020[44] – a decision which, to date, has not been appealed. Before it was vacated the transit ban resulted in the wrongful denial of asylum protection to hundreds of refugees, separating them from their families and leaving them in legal limbo.[45] The agencies have not offered any explanation whatsoever to justify the inclusion of this provision, which is completely unrelated to the purported public health claims motivating these proposed rules.

Conclusion

Human Rights First urges DHS and DOJ to abandon the proposed rule in its entirety. These regulations would illegally rewrite decades of U.S. asylum law, ignore binding U.S. treaty obligations, and effectively eliminate humanitarian protection for the majority of people seeking safety in the United States – returning them to persecution and/or torture. Instead, the United States can, and must, adopt science-based health measures recommended by public health and medical experts that will both protect public health and uphold its legal and moral obligations to provide refuge to people seeking safety in the United States.

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[42] *See* Sep't of Justice, "Asylum Procedures," 65 FR 76121 (Dec. 6, 2000).
[43] Dep't of Homeland Security, Dep't of Justice, Asylum Eligibility and Procedural Modifications, 84 FR 33829 (July 16, 2019).
[44] *CAIR Coalition v. Barr*, 2020 WL 3542481, (D.D.C. June 30, 2020).
[45] Human Rights First, "Asylum Denied, Families Divided: Trump Administration's Illegal Third-Country Transit Ban," (July 2020), https://www.humanrightsfirst.org/resource/asylum-denied-families-divided-trump-administration-s-illegal-third-country-transit-ban.