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Office of Policy
Executive Office for Immigration Review

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)

Dear Ms. Reid and Mr. Davidson:

The American Immigration Council (Council) and the American Immigration Lawyers Association (AILA), through their joint initiative, the Immigration Justice Campaign (Campaign), submit the following comments in response to the above-referenced Executive Office for Immigration Review (EOIR) and U.S. Citizenship and Immigration Services (USCIS) rule, USCIS Docket No. 2020-0013-0001, *Security Bars and Processing*, 85 Fed. Reg. 41201 (July 09, 2020) (the “Proposed Rule”).

The Council is a nonprofit organization established to increase public understanding of immigration law and policy, advocate for just and fair administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America’s immigrants. The Council litigates in the federal courts to protect the statutory, regulatory, and constitutional rights of noncitizens, advocates on behalf of asylum seekers before Congress, and has a direct interest in ensuring that those seeking protection in the United States have a meaningful opportunity to do so.

Established in 1946, AILA is a voluntary bar association of more than 15,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. AILA’s mission includes the advancement of the law pertaining to immigration and naturalization and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, U.S. lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws.

The Immigration Justice Campaign is a joint initiative of AILA and the Council. The Campaign’s mission is to strengthen the community of defenders, comprised of attorneys and other supporters, who are ready to vigorously advocate for the rights of detained immigrants in removal proceedings and advocate for systemic change. The primary focus of the Campaign is to channel the energy of the broader legal community into pro bono work for detained immigrants and asylum seekers. The Campaign has a network of more than 12,000 volunteers across the

country who serve noncitizens detained in Texas, Colorado, New Jersey, California, and throughout the Southeast.

It is the long-settled policy of both Congress and the executive branch to provide asylum seekers a fair and meaningful opportunity to seek and apply for protection in the United States. For four decades, federal law—consistent with the United States’ international treaty obligations—has enshrined the basic principle of *nonrefoulement*, the promise not to deport a person to a place where they will be subject to persecution. The Proposed Rule would, for the first time in modern American history, permit the mass-*refoulement* of asylum seekers.

Through the notice of proposed rulemaking, EOIR and USCIS use the COVID-19 pandemic as a justification to deny humanitarian protection. The Proposed Rule purports to protect Americans from COVID-19, even though the United States itself is the current epicenter of the pandemic, with more than 25% of all diagnosed cases worldwide occurring in this country.¹ In addition, the Proposed Rule would eliminate even the prospect of protection under the United Nations Convention against Torture (CAT). For the first time ever, Department of Homeland Security (DHS) officials would be permitted to send someone to a third country unless that person somehow affirmatively proves during a credible fear interview that they would be persecuted or tortured in that specific country—without any requirement that the person be informed of the identity of the country in advance.

Based on our expertise and experience, the Proposed Rule’s changes will violate the clear intent of Congress and international law—reiterated over and over for four decades—that the United States provide a meaningful and fair path to protection for those fleeing persecution. We submit the following comments in opposition to the Proposed Rule and, for the reasons stated below, urge EOIR and USCIS to withdraw the Proposed Rule.

Further, the Council and AILA, through the Campaign, note that the Departments of Justice and Homeland Security failed to provide a sufficient period for interested parties to comment on this Proposed Rule. Under most circumstances, agencies must provide public comment periods of at least 60 days in length.² There is no evidence that 60 days would be unfeasible or unlawful in the present case.

Moreover, the rushed 30-day comment period is particularly inappropriate given the Proposed Rule’s sweeping scope, which would eliminate protections for virtually all asylum seekers so long as the COVID-19 pandemic continues. The 30-day comment period is also inappropriate given the concurrent Notice of Proposed Rulemaking on asylum which closed on July 15, to which the Council and AILA devoted considerable time and effort responding, limiting our ability to respond to the Proposed Rule.

¹ Scottie Andrew, “The US has 4% of the world’s population but 25% of its coronavirus cases,” *CNN*, June 30, 2020, [cnn.com/2020/06/30/health/us-coronavirus-toll-in-numbers-june-trnd/index.html](https://www.cnn.com/2020/06/30/health/us-coronavirus-toll-in-numbers-june-trnd/index.html).

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.”).

I. Chad Wolf, the Purported Acting Secretary of the Department of Homeland Security, Was Unlawfully Appointed and Does Not Have Authority to Promulgate This Regulation

The DHS component of this regulation, which is signed by Acting DHS General Counsel Chad Mizelle following a delegation by the purported Acting Secretary Chad Wolf, is void *ab initio* because Wolf is not the lawful Acting Secretary. On December 9, 2016, President Barack Obama issued Executive Order 13753, establishing the default order of succession at DHS “[i]n case of the Secretary’s death, resignation, or inability to perform the functions of the Office.”³ Under this Executive Order, the Commissioner of U.S. Customs and Border Protection (CBP) was seventh in line for succession in the case of the Secretary’s resignation, after both the Under Secretary for National Protection and Programs and the Under Secretary for Intelligence and Analysis.

On April 10, 2019, DHS Secretary Kirstjen Nielsen exercised her authority to amend the order of succession, issuing a memorandum delegating a new line of succession “in the event I am unavailable to act during a disaster or catastrophic emergency.”⁴ This memorandum, however, did *not* change the line of succession “in the case of ... resignation,” making clear that following a resignation, “the orderly succession of officials is governed by Executive Order 13753, amended on December 9, 2016.”⁵ Secretary Nielsen then resigned that same day.

Following Secretary Nielsen’s resignation, the next in line successor for the Acting Secretary role, under her memorandum and Executive Order 13753, was the Under Secretary for National Protection and Programs. Nevertheless, DHS purported to install the CBP Commissioner, Kevin McAleenan, as the Acting Secretary, despite no lawful authority permitting him to be installed in that position.⁶ McAleenan served as purported Acting Secretary through November 2019, when he claimed to amend the line of succession to allow Chad Wolf, the Under Secretary for Strategy, Policy, and Plans, to serve as Acting Secretary following his own resignation.⁷

This action also occurred more than 210 days following Secretary Nielsen’s resignation, meaning that even if Commissioner McAleenan was properly designated as Acting Secretary on April 10, 2019 under the Federal Vacancies Reform Act and not the Homeland Security Act, by November 8, 2019 he no longer held that authority and could not have lawfully exercised the authority of an Acting Secretary to amend the DHS line of succession.⁸

³ President Barack Obama, Executive Order 13,753, Amending the Order of Succession in the Department of Homeland Security, 81 Fed. Reg. 90.667, December 9, 2016.

⁴ See DHS Orders of Succession and Delegations of Authorities for Named Positions, DHS Delegation No. 00106, Updated April 10, 2019, available at <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/191115%20T%20Dodaro%20re%20Letter%20to%20GAO%20on%20Wolf-Cuccinelli%20Appointment.pdf>.

⁵ *Id.*

⁶ See 6 U.S.C. § 113(g)(2) (“Notwithstanding chapter 33 of title 5, the Secretary may designate such other officers of the Department in further order of succession to serve as Acting Secretary”).

⁷ See Kevin McAleenan, “Amendment to the Order of Succession for the Secretary of Homeland Security,” November 8, 2019, available at <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/191115%20T%20Dodaro%20re%20Letter%20to%20GAO%20on%20Wolf-Cuccinelli%20Appointment.pdf>.

⁸ See 5 U.S.C. § 3346(a)(1) (“Except in the case of a vacancy caused by sickness, the person serving as an acting officer as described under section 3345 may serve in the office ... for no longer than 210 days beginning on the date the vacancy occurs”).

Therefore, because Chad Wolf is not lawfully the Acting Secretary under either the Homeland Security Act or the Federal Vacancies Reform Act, the DHS component of the Proposed Rule is void *ab initio* and must be withdrawn.

II. The Proposed Rule Impermissibly Applies to Classes of Individuals, Is Not Rationally Related to Its Goal, Requires Adjudicators to Apply Categorical Bars, and Would Result in the Mass Refoulement of Refugees in Violation of International Law

The Proposed Rule would inflict grave harm on the most vulnerable by proposing to redefine the phrase “reasonable grounds to believe that the [noncitizen] is a danger to the security of the United States” currently contained in 8 U.S.C. § 1158(b)(2)(A)(v) and 8 U.S.C. § 1231(b)(3)(B)(iv). For the first time, the Proposed Rule would require immigration judges and DHS officers to “consider” whether someone is displaying 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 Department of Health and Human Services (HHS). For the following reasons, this bar should not be adopted.

A. The “Danger to the Security of the United States” Bar on Asylum and Withholding Requires an Individualized Determination That a Person is a Danger, Not That a Person Falls Within a Class of People Who May Pose a Danger.

Under both 8 U.S.C. § 1158(b)(2)(A)(v) and § 1231(b)(3)(B)(iv), the application of a bar to asylum or withholding on “security” grounds must be an individualized determination. As the Attorney General explained in *Matter of A-H-*, an adjudicator must determine that “information about [a noncitizen] supports a reasonable belief that the [noncitizen] poses a danger.”⁹ This requires an individualized determination specific to each individual. Yet the Proposed Rule seeks to apply the bar to “class[es] of [noncitizens]” based on their travel through a location where an epidemic has occurred.¹⁰ By definition, a determination that someone is barred because they fall within a “class” of individuals is not an individualized determination.

In addition, the national security bar requires a determination that a person *is* a danger to the security of the United States, not a determination that a person *may* be a danger to the United States. As the Third Circuit explained in *Yusupov v. Att’y General*:

[W]e must take the statute to mean what it says: “is” indicates that Congress intended this exception to apply to individuals who (under a reasonable belief standard) actually pose a danger to U.S. security. It did not intend this exception to cover [noncitizens] who conceivably could be such a danger or have the ability to pose such a danger (a category nearly anyone can fit).¹¹

The Proposed Rule does not dispute the conclusions in *Yusupov*, citing to the case in a footnote and agreeing that “The [noncitizen] must actually pose [a] level of danger,” to fall under the national security bar. DHS attempts to distinguish it by declaring that “Nonetheless, an

⁹ *Matter of A-H-*, 23 I. & N. Dec. 774, 788 (A.G. 2005).

¹⁰ Proposed Rule, 85 Fed. Reg. at 41215.

¹¹ *Yusupov v. Att’y. Gen. of U.S.*, 518 F.3d 185, 201 (3d Cir. 2008), as amended (Mar. 27, 2008); *see also Malkandi v. Holder*, 576 F.3d 906, 914 (9th Cir. 2009) (explicitly adopting this holding from *Yusupov*).

individual’s membership within a class of [noncitizens] arriving from a country in which the spread of a pandemic poses serious danger itself presents a serious security risk.”¹² This conclusory statement ignores the fact that a person who is only a member of a “class” of people who *may* have an infectious disease is exactly the type of person that *Yusupov* explicitly declared would not fall within the statutory bar.

The Department further attempts to avoid the clear contradiction with the statute’s requirement of a determination that a person “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 that “reliable testing may not be available, and, even where available, the time frame required to obtain test results may both be operationally unfeasible and expose DHS officers, other [noncitizens], and domestic communities to possible infection while results are pending.”¹³

The repeated use of the word “may” in the Proposed Rule offers a tacit acknowledgement that individuals apprehended at the border are not categorically a danger. And as *Yusupov* made clear, “the ... interpretation of ‘is a danger’ as ‘may pose a danger’ fails at the first step of the *Chevron* analysis.”¹⁴ In other words, it is in violation of the statute.

B. The Proposed Rule Creates a New Free-Standing Ultra Vires “Public Health” Bar to Credible Fear That Is Unrelated to Eligibility for Asylum.

Under 8 U.S.C. § 1225(b)(1)(B)(v), a person provided a credible fear interview must demonstrate a “significant possibility” that they “could establish eligibility for asylum.” This requires a forward-looking analysis to the merits of an asylum claim that will be adjudicated in the future during removal proceedings.¹⁵ That asylum claim will not be adjudicated for some time. The credible fear screening process itself takes at minimum seven to 10 days and at times months,¹⁶ and for those who pass the credible fear process and are placed into removal proceedings, it will be a matter of months or years before an application for asylum is adjudicated.¹⁷

As a result, a person who is, or may be, infectious at the time of entry to the United States is likely to no longer be infectious at the time the application for asylum is adjudicated—the relevant date for the examination of “eligibility for asylum” under 8 U.S.C. § 1225(b)(1)(B)(v). Thus, even if DHS has direct evidence that a person has an infectious disease such as COVID-19 at the time of entry to the United States, that would not provide reasonable grounds to determine that a person will be a danger to the security of the United States *at the time of adjudication* of

¹² Proposed Rule, 85 Fed. Reg. at 41209-210, n53 (citing *Yusupov* and *Malkandi*).

¹³ *Id.*

¹⁴ *Yusupov*, 518 F.3d 201.

¹⁵ See, e.g. *Grace v. Whitaker*, 344 F. Supp. 3d 96, 139 (D.D.C. 2018), *aff’d in part, rev’d in part and remanded sub nom. Grace v. Barr*, 19-5013, 2020 WL 4032652 (D.C. Cir. July 17, 2020) (“The statute ... focuses on eligibility at the time of the removal proceedings.”).

¹⁶ See Section III(C), *infra*.

¹⁷ See Transactional Records Access Clearinghouse, *Immigration Court Backlog Tool*, https://trac.syr.edu/phptools/immigration/court_backlog/, last accessed July 27, 2020 (revealing that the average immigration court case had been pending for 1,089 days).

the application for asylum and withholding of removal. The Proposed Rule itself acknowledges that “it can be months or years before [asylum] cases are adjudicated.”¹⁸

By seeking to apply the new infectious disease bar at the time of the credible fear interview, DHS would therefore be applying the “danger to the United States” bar *backwards*—asserting that individuals would not be able to establish eligibility for asylum at the removal hearing because months or years prior they may have been infectious and *at that time* may have presented a danger to the security of the United States.

Indeed, DHS explicitly acknowledges that the rule is designed to prevent community spread within the United States following a person’s entry, as well as to protect the health of border security personnel during initial processing.¹⁹ But each of those rationales for the rule apply to conduct and consequences that would occur *prior* to an application for asylum being adjudicated.²⁰

When Congress created the credible fear process, it did not provide DHS authority to create new bars to credible fear that are unrelated to eligibility for asylum *at the time of adjudication*. Therefore, DHS cannot take the credible fear screening process and backfill a public health exception that does not exist in law.

C. The Proposed Rule Is Not Justified by the Credible Fear Process’ Timeline and the Availability of Testing.

The reasoning put forward by DHS is also contradicted by the timeline for adjudicating credible fear interviews. Despite DHS’ assertion that the rule is necessary because “In many cases it is not possible to know whether any particular individual is infected at the time of apprehension,” the Proposed Rule would not affect the processing of individuals at the time of apprehension. Rather, the Proposed Rule’s revisions to the credible fear process would apply at the time of the credible fear interview and continue to apply during the immigration judge credible fear review process. The interview and immigration judge review process, all of which occur prior to removal proceedings, can take anywhere from seven to 10 days in CBP custody under the expedited Prompt Asylum Claim Review/Humanitarian Asylum Review Process programs²¹ (which are currently subject to legal challenge)²² to a period of weeks or months for those transferred to U.S. Immigration and Customs Enforcement (ICE) detention.²³

This timeline obviates the Proposed Rule’s claim that a categorical determination of a danger is necessary because “the time frame required to obtain test results may both be operationally

¹⁸ Proposed Rule, 85 Fed. Reg. at 41205.

¹⁹ Proposed Rule, 85 Fed. Reg. at 41204-41206.

²⁰ Even if a person entered the United States and *did* spread an infectious disease, if they were no longer infectious at the time of the adjudication of the application for asylum, an immigration judge would not be able to find that the person “is” a danger to the security of the United States—only that they *had been* a danger.

²¹ American Immigration Council, *Policies Affecting Asylum Seekers at the Border*, January 29, 2020, <https://www.americanimmigrationcouncil.org/research/policies-affecting-asylum-seekers-border>.

²² See *Las Americas Immigrant Advocacy Center v. Wolf*, No. 1:19-cv-03640-RDM (D.D.C. filed Dec. 5, 2019).

²³ See, e.g. American Immigration Council, *Challenging Credible Fear Interview and Bond Hearing Delays*, <https://www.americanimmigrationcouncil.org/litigation/challenging-credible-fear-interview-and-bond-hearing-delays> (describing the Council’s lawsuit challenging months-long delays in providing credible fear interviews).

unfeasible” or that DHS officers and other noncitizens may become infected while results are pending. Even with the Proposed Rule, both CBP and ICE would continue to hold people in congregate settings during the credible fear process. At no point in the Proposed Rule does DHS even consider or provide *any* information on the time frame for the credible fear process, nor does the Proposed Rule provide *any* information on the time that individuals typically spend in CBP custody.²⁴ Indeed, prior to the creation of the so-called “Title 42 process,”²⁵ in mid-March families were being held in CBP custody for an average of 131 hours in total.²⁶ At times, this figure has been substantially higher, including during the family separation crisis when children were routinely held for more than five days.²⁷ Because individuals held in CBP or ICE custody would still be held in a congregate setting if the agencies choose not to release them,²⁸ any infectious disease spread would occur inside those facilities *before* the Proposed Rule was applied, entirely obviating the Proposed Rule’s concerns about spread within border facilities.

The United States now routinely tests over 750,000 people a day for COVID-19, and by August 3, 2020 had tested nearly 53 million people.²⁹ The President of the United States has repeatedly declared, “We have the best testing in the world.”³⁰ DHS does not explain why it cannot test each person who seeks asylum upon apprehension and have the results within the time required for a credible fear interview and immigration judge review.

D. The Proposed Rule Impermissibly Requires Adjudicators to Apply a Categorical Bar to Some Migrants and an Individualized Bar to Others Without Clear Guidance or Distinction.

Proposed 8 C.F.R. §§ 208.13(c)(10) and 1208.13(c)(10) do not provide clear guidance as to whether adjudicators are required to apply an individualized or a categorical bar, and in some circumstances appears to entirely remove discretion from adjudicators and require a blanket determination that a person be subject to the bar, without an individualized determination.

Under the Proposed Rule, the adjudicator “may consider” symptoms or a travel history “in determining whether there are reasonable grounds for regarding the [noncitizen] or a class of

²⁴ The Proposed Rule mentions the average time that an immigrant is held in ICE custody, *see* 85 Fed. Reg. at 41,205, but that figure is for all individuals held in ICE custody, including individuals apprehended inside the United States. As DHS acknowledges, that figure includes the time during which an immigrant is held for 240 proceedings, not the credible fear process.

²⁵ Under this process, Border Patrol officers summarily “expel” individuals to Mexico or their home country, citing the CDC Order under 42 U.S.C. § 265 “suspending the introduction” of certain individuals. *See* Dara Lind, “Leaked Border Patrol Memo Tells Agents to Send Migrants Back Immediately — Ignoring Asylum Law,” *ProPublica*, April 2, 2020, <https://www.propublica.org/article/leaked-border-patrol-memo-tells-agents-to-send-migrants-back-immediately-ignoring-asylum-law>.

²⁶ Information on file with author.

²⁷ Department of Homeland Security, Office of Inspector General, *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>.

²⁸ *See, e.g.*, House Committee on Oversight and Reform, “DHS Officials Refuse to Release Asylum Seekers and Other Non-Violent Detainees Despite Spread of Coronavirus,” April 17, 2020, <https://oversight.house.gov/news/press-releases/dhs-officials-refuse-to-release-asylum-seekers-and-other-non-violent-detainees>.

²⁹ Centers for Disease Control and Prevention, *Testing Data in the U.S.*, <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/testing-in-us.html>, last accessed August 4, 2020.

³⁰ Statement of President Donald J. Trump, *Transcript: ‘Fox News Sunday’ interview with President Trump*, Fox News, July 19, 2020, <https://www.foxnews.com/politics/transcript-fox-news-sunday-interview-with-president-trump>.

[noncitizens] as a danger to the security of the United States” in two distinct circumstances. First, under Proposed 8 C.F.R. §§ 208.13(c)(10)(i), 1208.13(c)(10)(i), the adjudicator “may consider” symptoms or travel history when (i) “The disease has triggered an ongoing declaration of a public health emergency under federal law.” The regulation provides no further standards under this provision for what it means to “consider” symptoms or travel history.

Second, under Proposed 8 C.F.R. §§ 208.13(c)(10)(ii), 1208.13(c)(10)(ii) the adjudicator “may consider” symptoms or travel history when the Attorney General and the DHS Secretary, in consultation with the Secretary of HHS, have jointly (A) “determined that because the disease is a communicable disease of public health significance that is prevalent in another country ... the physical presence in the United States of [noncitizens] who are coming from such country ... would cause a danger to the public health in the United States,” *and also* (B) have jointly “designated the foreign country or countries ... and the period of time or circumstances in which the Secretary and the Attorney General deem it necessary for the public health” that individuals coming from such country “who either are still within the number of days equivalent to the longest known incubation and contagion period for the disease or exhibit symptoms ... be regarded as a danger to the security of the United States under section 208(b)(2)(A)(iv) of the Act.”

Thus, as written, this provision simultaneously instructs adjudicators that they “may consider” symptoms and travel history for a determination under 8 U.S.C. 1158(b)(2)(A)(iv), but also instructs adjudicators that the Secretary of Homeland Security and the Attorney General have already “deem[ed]” entire classes of individuals “[to] be regarded as a danger to the security of the United States under section 208(b)(2)(A)(iv) of the Act.” Because an asylum officer would be bound by the determination of the Secretary of Homeland Security, as the regulation is written no individualized determination would be possible under 8 U.S.C. 1158(c)(10)(ii).

E. Asylum Officers and Immigration Judges Are Not Qualified to Interpret Symptoms of Infectious Diseases.

The Proposed Rule provides both asylum officers and immigration judges with the authority to determine whether a person “can reasonably be regarded as a danger to the security of the United States” by “consider[ing] whether the [noncitizen] exhibits symptoms consistent with being inflicted with any contagious or infectious disease” designated in subsections (i) and (ii).³¹

Importantly, neither asylum officers nor immigration judges are trained in medicine.³² The only symptoms of COVID-19 listed in the Proposed Rule are “fever, cough, and shortness of breath.”³³ But numerous diseases or non-infectious medical conditions that do not pose a danger

³¹ Proposed Rule, 85 Fed. Reg. at 41215, 41217, 41218.

³² 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>.

³³ Proposed Rule, 85 Fed. Reg. at 41202.

to the security of the United States may cause those symptoms, including the common cold.³⁴ Under the Proposed Rule, if someone arrived at a credible fear interview or an asylum merits hearing with a cough, an asylum officer or immigration judge with no medical training would be required to “consider” whether the cough is more likely to be COVID-19 than the common cold.

Tasking people who are mostly lawyers to make medical determinations does not comport with the role that Congress gave asylum officers and immigration judges, makes arbitrary enforcement a near-certainty, and substantially raises the risk of *refoulement*.

F. The Proposed Rule Would Lead to the Mass Refoulement of Refugees.

The Proposed Rule represents the first time that DHS has tried to strip refugees of the right to seek withholding of removal. As DHS itself has repeatedly asserted, withholding of removal implements the United States’ obligation under international law to avoid returning refugees to countries where they will be persecuted.³⁵ The Proposed Rule seeks to avoid that acknowledged obligation by branding entire “classes” of asylum seekers to be “dangers to the security of the United States” simply based on their travel history. This does not comport with our duties under international law, nor does it comport with the humanitarian principles upon which this nation is built.

While the United States is the current epicenter of the pandemic, almost no country has been untouched by the COVID-19 virus. Responding to the pandemic requires balance, not a fundamental elimination of humanitarian protections. This need for balance has been acknowledged by senior DHS officials. Mark Morgan, the Senior Official Performing the Duties of the CBP Commissioner, recently testified in front of Congress when discussing travel restrictions at ports of entry and emphasized that the pandemic requires a balancing between public health and other important interests.³⁶

There are economies on the Mexican side as well as the United States side that thrive and are dependent on each other, especially in the border cities. That’s important. And so we have been involved in those discussions. ... When we look at this, *it cannot just be done from a public health perspective*. It’s got to be a balance of the public health risk and the economy.

The Proposed Rule entirely fails to acknowledge that humanitarian protections also require “a balance of the public health risk.” In doing so, it will lead to the unnecessary and unlawful persecution and torture of thousands of vulnerable refugees.

³⁴ See, e.g., Mayo Clinic, “Common Cold,” April 20, 2019, <https://www.mayoclinic.org/diseases-conditions/common-cold/symptoms-causes/syc-20351605> (listing fever, cough, and shortness of breath as symptoms).

³⁵ See, e.g. *Asylum Eligibility and Procedural Modifications*, 84 Fed. Reg. 33829, 33835 (July 16, 2019) (“[T]he United States has implemented the non-refoulement provisions of these treaties ... through the withholding of removal provisions at section 241(b)(3) of the INA.”).

³⁶ Testimony of Mark Morgan, Senior Official Performing the Duties of the CBP Commissioner, Senate Hearing on Customs and Border Protection Oversight, June 25, 2020, available at <https://www.c-span.org/video/?473378-1/senate-hearing-customs-border-protection-oversight> (emphasis added).

III. The Proposed Rule Would Improperly Allow DHS Officers to Deport Individuals With a Fear of Torture to Third Countries

The Proposed Rule would further radically contravene U.S. obligations under the Immigration and Nationality Act (INA) and the Refugee Convention by allowing low-level DHS officers to decide on their own to remove individuals who have demonstrated a fear of torture to a third country. DHS officers, as part of the expedited removal process, would decide whether to place an asylum seeker in full removal proceedings under section 240 of the INA, or to remove the asylum seeker to a third country. This dangerous proposal will result in individuals being sent to countries in which they would face serious harm and should not be implemented.

The Proposed Rule also improperly creates a requirement that an asylum seeker in the expedited removal process “affirmatively establish that torture in the prospective country of removal is more likely than not” to avoid being sent to a third country.³⁷ This is very different than the existing requirement, which requires an individual to show a “significant possibility”³⁸ of establishing eligibility for asylum in order to pass a credible fear interview, and a “reasonable fear” of persecution or torture in order to establish eligibility for withholding or CAT.³⁹ Neither the “significant possibility” standard nor the “reasonable fear” standard require an asylum seeker to prove it is “more likely than not” that they will be persecuted or tortured in their home country. That high burden is imposed only at a final removal hearing in front of an immigration judge, when determining whether to grant withholding of removal or CAT. The expedited removal process is not an appropriate mechanism, nor are DHS officers conducting expedited removal screenings the appropriate officials, to impose the same burden as required to win a case in front of an immigration judge.

The Proposed Rule would essentially require asylum seekers to somehow “affirmatively establish” eligibility for withholding of removal or CAT protection in an unknown third country. This is an unlawful and unreasonable requirement that will result in the United States sending individuals to countries in which they will face persecution and torture. It is hard to see how an asylum seeker, especially one at the expedited removal stage who is almost always unrepresented and recently arrived in the United States, would be able to “affirmatively establish” a need for protection from an unidentified third country.

Importantly, the Proposed Rule would not require DHS to reveal to an individual to *which* third country they would be removed, only that there would be possibility of removal “to a third country.” An asylum seeker, in order to avoid being sent to a third country in which they would face persecution or torture, would have to guess where DHS was planning to send them and “affirmatively establish” that they would face persecution there. Experiences of asylum seekers deported from the United States to Guatemala under the recent Asylum Cooperation Agreement with Guatemala show that DHS is not likely to reveal in advance to which third country the

³⁷ Proposed Rule, 85 Fed. Reg. at 412161.

³⁸ INA 235 (b)(1)(B)(5); 8 CFR 208.30(e)(2)

³⁹ 8 C.F.R. § 1208.31.

government is planning to send them. Reports show that even when DHS is required to inform asylum seekers in advance of the country of deportation, the Department fails to do so.⁴⁰

Asylum seekers might have good reason to fear being sent to any number of 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. Furthermore, 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, not to adjudicate the full merits of the claim.⁴¹ Importantly, many people are not represented by counsel during their credible fear interview, are in detention, and have recently arrived in the United States—making it imperative that the credible fear process remain a screening tool to screen out only cases with no significant chance of success on the merits in front of an immigration judge. To insert a requirement that asylum seekers must “affirmatively establish” eligibility for protection at this stage will lead to asylum seekers being sent to countries in which they will face serious harm.

The Proposed Rule is also unclear as to the process by which determinations about removability to a third country will be made for individuals who have shown a credible fear of persecution or torture in their home country. The Proposed Rule situates this determination in the context of the credible fear process, laying out changes to 8 C.F.R § 208.30 and indicates that the Department will decide, in its unreviewable discretion, either to place such a person in removal proceedings under INA Section 240 or to remove them to a third country. But the Rule also requires the Department to advise an asylum seeker “at the time of requesting withholding or deferral of removal”⁴² of the possibility of removal to a third country prior to removing the person to that country. 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 therefore unclear when and how asylum seekers would be advised of the potential for removal to a third country.

The Ninth Circuit has already held that a very similar system, created for the Migrant Protection Protocols (MPP),⁴³ does not provide sufficient protection against *nonrefoulement*. Under the MPP program, noncitizens must “affirmatively” express a fear of return to Mexico and then prove it is “more likely than not” that they “will face persecution or torture if returned to Mexico,”⁴⁴ the same burden of proof under the Proposed Rule to avoid being sent to a third country. In *Innovation Law Lab v. Wolf*, DHS argued that this screening “satisfie[d] our anti-

⁴⁰ Kevin Sieff, “The U.S. is Putting Asylum Seekers on Planes to Guatemala -- Often Without Telling Them Where They Are Going,” Jan. 14, 2020, *The Washington Post*, available at https://www.washingtonpost.com/world/the_americas/the-us-is-putting-asylum-seekers-on-planes-to-guatemala--often-without-telling-them-where-theyre-going/2020/01/13/0f89a93a-3576-11ea-a1ff-c48c1d59a4a1_story.html

⁴¹ 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.)

⁴² Proposed Rule, 85 Fed. Reg. at 41216.

⁴³ American Immigration Council, *Policies Affecting Asylum Seekers at the Border*, January 29, 2020, <https://www.americanimmigrationcouncil.org/research/policies-affecting-asylum-seekers-border>.

⁴⁴ Customs and Border Protection, *MPP Guiding Principles*, Jan. 28, 2019, available at <https://www.cbp.gov/sites/default/files/assets/documents/2019-Jan/MPP%20Guiding%20Principles%201-28-19.pdf>.

refoulement obligations by providing a sufficiently effective method of determining whether aliens fear, or have reason to fear, returning to Mexico.”⁴⁵ The Ninth Circuit strongly disagreed, providing examples of numerous individuals who failed such screenings and were then persecuted upon return to Mexico, and emphasized that “[T]he evidence in the record is enough—indeed, far more than enough—to establish that the Government’s speculations have no factual basis.”⁴⁶ The court then held that the “more likely than not” standard under MPP “does not comply with the United States’ anti-*refoulement* obligations under [8 U.S.C.] § 1231(b).”⁴⁷

Despite this directly relevant precedent involving an identical burden of proof to avoid being returned to a third country, DHS does not discuss or even acknowledge the precedent or the agency’s experiences with MPP.

IV. Changes to the Expedited Removal Process Proposed in This Rule Conflict With the Proposed Regulation Published on July 15; Neither Change Should be Adopted

The Proposed Rule would introduce changes to the expedited removal process that are different than the changes outlined in the Proposed Rule published on June 15, 2020⁴⁸ (“June 15 Proposed Rule”). The present Proposed Rule acknowledges this conflict but instead of indicating clearly 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.”⁴⁹

It is not possible to adequately comment on the implications of these changes without understanding exactly how these two rules would be reconciled. The changes proposed in both rules have enormous life or death consequences for asylum seekers. Neither change should be adopted without a clear explanation of how the expedited removal process would work and an opportunity for the public to comment on that process.

The Proposed Rule would alter the expedited removal process, as explained above in Section III, by requiring that DHS officers screen applicants and bar them from asylum if they appear to have any connection to a pandemic. The Rule would further alter the process by allowing DHS to decide either to remove to a third country individuals who have demonstrated a credible fear of persecution or torture, or to place them in INA Section 240 removal proceedings.⁵⁰ The Proposed Rule published on June 15, 2020 would also make significant changes to the expedited removal process, including changes to the standards of proof in credible fear interviews and requiring that certain asylum seekers who pass their credible fear interviews be placed in “asylum-only” or “withholding-only” proceedings instead of removal proceedings under INA Section 240.

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

⁴⁵ *Innovation L. Lab v. Wolf*, 951 F.3d 1073, 1089 (9th Cir. 2020).

⁴⁶ *Id.* at 1089-1093.

⁴⁷ *Id.* at 1093.

⁴⁸ Notice of Proposed Rulemaking, “Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review,” 85 Fed. Reg. 36264 (June 15, 2020).

⁴⁹ Proposed Rule, 85 Fed. Reg. at 41211.

⁵⁰ Proposed 8 C.F.R. § 208.30(e)(5)(B)

between them would be resolved. Without any clarity about which rule would prevail and in what form, it is impossible to evaluate the rule and its potential impact on asylum seekers. The expedited removal and credible fear processes represent a matter of life and death to people seeking protection from persecution and torture, and it is imperative that our laws and processes are clear so that we do not return individuals to harm in contravention of the INA and the Refugee Convention. For this reason, the Department should, in light of the unresolved conflicts between these proposed rules, adopt neither in the absence of further clarity.

CONCLUSION

AILA and the Council, through the Immigration Justice Campaign, oppose the proposed regulation because it will return vulnerable individuals who deserve protection to danger and potential death. This and other policies are choking off access to asylum and fundamentally undermining the U.S. commitment to protect those fleeing persecution and harm.

We urge the agencies to reconsider the proposed rule and withdraw it from consideration.

Sincerely,

AMERICAN IMMIGRATION COUNCIL

AMERICAN IMMIGRATION LAWYERS ASSOCIATION