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

## I. INTRODUCTION

The Catholic Legal Immigration Network, Inc. (CLINIC)[1] submits these comments in strong opposition to the proposed rules. For the past three years, the agencies have taken steps to make it more and more difficult for those fleeing harm to obtain protection in the United States.[2] CLINIC submitted a detailed comment to last month's proposed rules on asylum which seek to eliminate the asylum system which has been in place in our country for half a century.[3]

The proposed rule on "Security Bars and Processing" would render virtually everyone seeking asylum, withholding of removal, or withholding under the Convention Against Torture

[1] These comments were primarily authored by Victoria Neilson, Managing Attorney of CLINIC's Defending Vulnerable Populations (DVP) Program. CLINIC would like to acknowledge legal intern Angelicca Telles for her work on the comment.
[2] *See* National Immigrant Justice Center, A Timeline of The Trump Administration's Efforts To End Asylum, (Jul. 2020), https://immigrantjustice.org/issues/asylum-seekers-refugees. [Hereinafter NIJC Asylum Timeline].
[3] CLINIC, *CLINIC Submits Comments on Proposed Rule that Would Gut Asylum Protections*, (Jul. 15, 2020), https://cliniclegal.org/resources/asylum-and-refugee-law/clinic-submits-comments-proposed-rule-would-gut-asylum-protections. [Hereinafter CLINIC Asylum Comment].

(CAT) ineligible for protection for the foreseeable future.[4] Those who have traveled through a country where the pandemic is prevalent, including Mexico, would be categorically ineligible for virtually all protection. Those who are physically in the United States would likewise be ineligible for protection if they have symptoms that could be related to COVID-19 or have potentially come into contact with COVID-19.[5]

The proposed rule is so sweeping and vague that it would be unworkable in practice. It arbitrarily and irrationally equates almost all asylum seekers with security risks, such as known terrorists, and it justifies this near-complete end to asylum eligibility by citing to economic difficulties that the COVID-19 pandemic has caused in the United States without providing any data on why asylum seekers specifically would negatively affect the economy. As Pope Francis has said, "we're realizing that all our thinking, like it or not, has been shaped around the economy. In the world of finance it has seemed normal to sacrifice [people], to practice a politics of the throwaway culture, from the beginning to the end of life."[6] The proposed rule cynically uses the real economic suffering of many Americans during this pandemic as a pretext to sacrifice the rights of the most vulnerable people who only seek the opportunity to live a life without fear.

CLINIC embraces the core Gospel value of welcoming the stranger. CLINIC promotes the dignity and protects the rights of immigrants in partnership with a dedicated network of Catholic and community legal immigration programs. CLINIC is the largest nationwide network of nonprofit immigration programs, with approximately 375 affiliates in 49 states and the District of Columbia. Through its affiliates, CLINIC advocates for the just and humane treatment of asylum seekers through direct representation, pro bono referrals, and engagement with policy makers.

CLINIC submits this comment urging the Department of Justice (DOJ) and Department of Homeland Security (DHS) to withdraw these proposed rules in their entirety. U.S. policies on immigration should reflect the country's core moral values and historical practice of welcoming immigrants and refugees fleeing persecution. Immigration policies should ensure justice, offer protection, and treat immigrants humanely. People of faith have consistently stood by the principle that all immigrants, especially the most vulnerable among us, including asylum seekers, deserve an immigration system that is fair and humane. CLINIC likewise believes that the most vulnerable among us need greater protections and opportunities, including the ability to work to support themselves and their families. In this vein, CLINIC submits the following comments in opposition to the proposed change**s.**

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[4] COVID-19 *Is Here to Stay. People Will Have to Adapt, The World Is Not Experiencing a Second Wave: It Never Got Over the First*, THE ECONOMIST, Jul. 2, 2020, https://www.economist.com/leaders/2020/07/02/covid-19-is-here-to-stay-people-will-have-to-adapt.

[5] Although this comment will reference the rule's application to COVID-19, it could be applied in the future to other public health crises. *See* 85 Fed. R. at 41211, "it would also clarify the availability of critical tools within the Departments' statutory authority should another pandemic strike." While this comment focuses on the current impact of the rule based on its application to COVID-19, the proposed rule would allow the agencies to apply similar bans based on other diseases in the future. CLINIC strongly opposes this proposed rule, not only as applied to COVID-19, but as applied to any potential pandemic.

[6] *See* Bill Chappel, *'This Is Not Humanity's First Plague,' Pope Francis Says Of Coronavirus*, NPR WNYC, Apr. 9, 2020, https://www.npr.org/sections/coronavirus-live-updates/2020/04/09/830759485/this-is-not-humanity-s-first-plague-pope-francis-says-of-coronavirus.

## II. CLINIC STRONGLY OBJECTS TO THE NPRM PROCESS

### A. The Agencies Should Not Have Issued a Proposed Rule of this Breadth and Complexity with a Mere 30-Day Comment Period in the Midst of a Pandemic

In addition to the substance of the comments we submit below, CLINIC adamantly opposes the process of publishing this proposed rule. The Notice of Proposed Rulemaking (NPRM) is very complex, purportedly relying on public health concerns, economic concerns, and complicated areas of immigration law. A proposed rule of this breadth and complexity should have given the public a 60-day comment period rather than this 30-day period.

The Administrative Procedures Act (APA) § 553 requires that "interested persons" from the public have "an opportunity to participate in the rule making." In general, the agencies, must afford "interested persons a reasonable and meaningful opportunity to participate in the rulemaking process."[7] Courts have found that for the agencies to comply with this participation requirement the comment period they give must be "adequate" to provide a "meaningful opportunity."[8] Given the importance of the public's participation in the rule-making process, Executive Order 12866 specifies that "in most cases should include a comment period of not less than 60 days."[9]

While the NPRM acknowledges that the this rule is a significant rule pursuant to Executive Order 12866,[10] it is completely silent on why it is only offering 30 days to comment rather than the 60 days required by Executive Order. Executive Order 13563 explicitly states, "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."**[11]

Moreover, it is clear that not only is the administration giving the public inadequate time to comment, but the administration itself has prepared this rulemaking and the June 15, 2020, asylum rulemaking[12] in haste, acknowledging in the NPRM that these proposed rules are in conflict with the recently proposed rules, but states, that it will "reconcile" them in the final rulemaking and seeks assistance from the public in figuring out how to do so.[13] Rules that would fundamentally change decades of asylum practice should not be assembled in haste and without allowing the public adequate time to comment fully. The agencies themselves admit that they have not fully

[7] *Forester v. CPSC*, 559 F.2d 774, 787 (D.C. Cir. 1977).
[8] *N.C. Growers' Ass'n v. UFW*, 702 F.3d 755, 770 (4th Cir. 2012).
[9] *See* Exec. Order No. 12866, § 6(a), 58 Fed. R. 51,735 (October 4, 1993).
[10] 85 Fed. R. 41214 .
[11] *See* Executive Order 13563 -- Improving Regulation and Regulatory Review (Jan. 18, 2011), https://obamawhitehouse.archives.gov/the-press-office/2011/01/18/executive-order-13563-improving-regulation-and-regulatory-review. [emphasis added].
[12] *See* 85 Fed. Reg. 36264 (June 15, 2020).
[13] 85 Fed. R. 41211.

considered how these two major rulemakings would interact with one another. The public cannot adequately comment on either rule without being apprised of how the agencies would apply the two rules together.

Under any circumstances, it would be wrong for the government to give such a short time period to comment on changes that are this extensive, but the challenges to timely respond to the NPRM are currently magnified by the ongoing COVID-19 pandemic. The Centers for Disease Control and Prevention (CDC) have acknowledged the added stress of performing job functions during COVID-19.[14] Just a week before the NPRM was issued, the United States posted its largest single-day surge in COVID-19 cases.[15] As the public seeks to comment on this proposed rule, it is dealing with massive increases in COVID-19 in "hot spots" throughout the country.[16]

In the context of issuing financial regulations, agencies have granted the public extra time to comment based solely on the challenges imposed by COVID-19. For example, the Bureau of Consumer Financial Protection extended a comment period from an initial 60 days to add 90 days more for the public to comment. The agency published a new NPRM in the Federal Register stating:

> The SNPRM provided a 60-day public comment period that was set to close on May 4, 2020. In light of the challenges posed by the COVID-19 pandemic, and in response to requests from stakeholders to give interested parties more time to conduct outreach to relevant constituencies and to properly address the many questions presented in the SNPRM, the Bureau extended the comment period until June 5, 2020. Since extending the comment period, the Bureau has received requests from a consumer advocacy group, a debt collection trade association, and three State Attorneys General to extend the comment period for an additional 60 day period. These stakeholders state that the COVID-19 pandemic continues to make it difficult to respond to the SNPRM thoroughly. **The Bureau agrees that the pandemic makes it difficult to respond to the SNPRM thoroughly** and to determine when stakeholders will be able to do so. To ensure that stakeholders have the time they need to provide such responses, the Bureau concludes that an extension of the SNPRM comment period to August 4, 2020, is appropriate. This extension should allow interested parties more time to prepare responses to the SNPRM without delaying the rulemaking on this topic. The SNPRM comment period will now close on August 4, 2020.[17] [Emphasis added].

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[14] *See* Centers for Disease Control and Prevention, *Employees: How to Cope with Job Stress and Build Resilience During the COVID-19 Pandemic*, May 5, 2020, https://www.cdc.gov/coronavirus/2019-ncov/community/mental-health-non-healthcare.html.

[15] Mary Van Beusekom, *US Posts Largest Single-Day Jump In New COVID-19 Cases,* Center for Infectious Disease Research and Policy, (Jul. 2, 2020) https://www.cidrap.umn.edu/news-perspective/2020/07/us-posts-largest-single-day-jump-new-covid-19-cases.

[16] Tiffini Theisen, *Florida Reports 253 New Coronavirus Deaths in Third Straight Daily Record*, ORLANDO SENTINEL, Jul. 30, 2020, https://www.orlandosentinel.com/coronavirus/os-ne-florida-coronavirus-thursday-july-30-20200730-w7q22rfsbrh7vlfgajawyprxbi-story.html.

[17] 85 Fed. Reg. (May 21, 2020).

In that rulemaking, the agency provided 150 days for the public to comment on a proposed rule, yet here, ironically in a proposed rule that is predicated on the seriousness of the COVID-19 pandemic, the agencies have given the public a meager 30-day comment period. On July 23, 2020, the Women's Refugee Commission submitted a letter to the agencies requesting an extension of the 30-day comment period that included 30 signatories;[18] to date there has been no response to that letter.

For this procedural reason alone, we urge the administration to rescind the proposed rule. If it wishes to reissue the proposed regulations, it should grant the public at least 60 days to have adequate time to provide comprehensive comments.[19] The purpose of notice and comment is to allow the public a meaningful opportunity to comment. The government should welcome suggestions from experts in the field; instead the length of the proposed rule coupled with the brevity of the comment period has left experts unable to comment on most of the substance of the proposed changes.

### B. The Proposed Rule Does Not Provide Adequate Data or Analysis

Throughout the NPRM, DHS and DOJ make sweeping statements, often supported by a single federal court of appeals case quoted without context, or given no support at all. Agencies are required to support rulemaking with reasoned analysis and, where applicable, relevant data. This NPRM is almost entirely devoid of relevant and necessary data to explain why these significant changes to accepted law are necessary.[20] Instead the NPRM states:

> neither DOJ nor DHS can quantify precisely the expected decrease in grants of relief. The full extent of the impacts on this population is unclear and would depend on the specific circumstances and personal characteristics of each alien, and neither DOJ nor DHS collects such data at such a level of granularity. Finally, the proposed changes may also result in fewer aliens being placed in 240 proceedings to the extent that DHS exercises its discretion to remove aliens to third countries. However, as these will be discretionary decisions, it is not possible to quantify the reduction.[21]

As discussed in greater detail below, this proposed rule would render almost every asylum seeker seeking protection at the border ineligible for asylum or withholding of removal. Thus, this statement in the NPRM that it would not be possible to "quantify the expected decrease in grants of relief" appears to be disingenuous, at least as to asylum seekers who present at the border. It should be relatively straightforward for the agencies to calculate the number of asylum seekers on

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[18] *See* Women's Refugee Commission, Letter Requesting Extension of Public Comment Period for Proposed Rule Making Fundamental Changes to Asylum Processing and the Immigration System, (Aug. 6, 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/.

[19] In other contexts, the administration has extended existing 60-day regulatory comment periods by an additional 60 day or more citing the coronavirus as the reason for additional time. *See* 85 Fed. R. (May 21, 2020).

[20] *See United States v. Nova Scotia Food Products Corp*, 568 F.2d 240, 251 (2d Cir. 1977) ("'It is not consonant with the purpose of a rulemaking proceeding to promulgate rules on the basis of inadequate data, or on data that (in) critical degree, is known only to the agency.'").

[21] *See* DHS and DOJ, 85 Fed. R. 41201, 41214 (proposed Jul. 9, 2020).

a monthly basis who have traveled through Mexico and thereby report on the numbers who would no longer be eligible for asylum or withholding of removal. The agencies could review credible fear interview (CFI) records to determine the subset of those who pass their CFIs to see what proportion pass based on a fear of torture rather than persecution to understand how many protection seekers might qualify for deferral under CAT, though, as discussed below, it will be virtually impossible even for those who have suffered torture, to meet the "more likely than not" standard that would be imposed at the CFI stage by the proposed rule.[22] The agencies should not rush to promulgate proposed regulations without performing the required data analysis first.

Moreover, the NPRM states that the departments "have determined that this rule will not have a significant economic impact on a substantial number of small entities" because only individuals and not entities can seek asylum. [23] However, "small entities" is defined to include "small businesses" and "small organizations,"—a term which also includes non-profit organizations.[24] In fact, the rule would have a devastating effect on thousands of solo and small business immigration practitioners as well as non-profit organizations that receive funding to assist asylum seekers.[25] Yet the rule does not acknowledge this impact, let alone provide analysis on the impact that closing off asylum would have on immigration firms and nonprofit organizations that may have to shutter their doors.

The NPRM also states, "This rule would not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign based enterprises in domestic and export markets."[26] And again, the NPRM states, "This proposed rule is a significant regulatory action under Executive Order 12866, though not an economically significant regulatory action."[27] At the same time that the NPRM claims repeatedly that the rule would not have significant economic impact, a primary justification for the rule in the NPRM is the alleged negative effect on the economy that asylum seekers have. The NPRM states:

> pandemics such as COVID–19 can inflict catastrophic damage to America's, and the world's, economy and thus, to the security of the United States. To the extent that such damage may have its origin with or be exacerbated by infected aliens seeking to enter the United States illegally or without proper documents, or seeking

[22] As discussed below, the wording in the proposed regulation that would preclude asylum and withholding seekers even within the United States from being granted relief if they exhibit symptoms or have come into contact with COVID-19 is worded so vaguely and gives so little guidance to adjudicators on how to apply this rule, that it may, in fact, be impossible for the agencies to estimate the proposed rule's effect on asylum seekers whose cases are pending. This inability to estimate the reach of the rule is a reason to rescind the rulemaking. The government should not issue a rule that has the potential to render the vast majority of asylum seekers ineligible for protection without having performed any analysis of the reach of the rule.

[23] 85 Fed. R. 41214

[24] *See* 5 U.S.C.§§ 601(4) and 601(6).

[25] *See* Charity Navigator, https://www.charitynavigator.org/index.cfm?bay=content.view&cpid=4665, (listing highly rated nonprofit immigration and refugee organizations to which to donate.) *See also,* American Immigration Lawyers Association, *The 2019 AILA Marketplace Study A National Reference on the Economics of Immigration Law Practice*, at 9. Aila.org, Doc. No. 19110890, (Finding median hourly billing rate of private asylum attorneys to be $250).

[26] 85 Fed. R. 41214.

[27] *Id.*

> to apply for asylum or withholding of removal, the entry and presence of potentially infected aliens can rise to the level of a threat to the security of the United States.[28]

The agencies cannot have it both ways. It is irrational for the NPRM to simultaneously justify the promulgation of this proposed rule based on the purported effect of asylum seekers on the American economy, while stating elsewhere in the same NPRM that the rule would not have an economically significant effect. The very premise of the proposed rule is arbitrary; for these reasons the rulemaking should be withdrawn and, at a minimum, if it is reissued the agencies should provide data that justify the proposed changes.

## III. CLINIC STRONGLY OBJECTS TO THE SUBSTANCE OF THE PROPOSED RULES, WHICH WOULD RENDER MOST APPLICANTS FOR ASYLUM, WITHHOLDING OF REMOVAL, AND CONVENTION AGAINST TORTURE PROTECTION INELIGIBLE

Although CLINIC objects to the agencies' insufficient 30-day timeframe in which to submit a comment to the proposed rule, we submit this comment, nonetheless, because we feel compelled to object to the proposed regulations, which would render most applicants for protection ineligible.[29] Virtually all asylum seekers will have traveled through countries where COVID-19 is prevalent, thus virtually all asylum seekers would be barred. The proposed rule has five primary components each of which is discussed below.

### A. 8 CFR § 208.13 (c)(10); 8 CFR § 1208.13 (c)(10)—The Proposed Rule Would Improperly Require Denials of Asylum Applications Under the Pretense of Security

#### 1. The proposed rule improperly conflates a public health issue with security issues

The proposed rule seeks to turn a public health issue into a "security" issue. There is no authority in the Immigration and Nationality Act (INA) to create mandatory bars against asylum and withholding based on the possibility of having been exposed to an illness. The NPRM begins by devoting substantial space to general commentary about the risks posed by COVID-19 as well as information about the prevalence of COVID-19 in Mexico and Canada.[30] While the seriousness of the COVID-19 pandemic is beyond dispute, for months the United States has been the epicenter of the virus.[31] Rather than take responsibility for the mounting internal pandemic, the

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[28] 85 Fed. R. 41209.

[29] The proposed rule specifically would exclude not only those seeking the discretionary form of relief of asylum, but also those seeking mandatory forms of protection through INA § 241(b)(3) withholding of removal and withholding of removal under CAT. These comments frequently use the term "asylum seeker" but the reader should construe the term to encompass those seeking INA withholding and withholding under the Convention Against Torture as well if the rule discussed also affects those forms of protection.

[30] 85 Fed. R. 41201-41204.

[31] *See* Worldometer, COVID-19 cases, https://www.worldometers.info/coronavirus/?fbclid=IwAR1-P0m-uWAtaHUNHLI2cLt9uyh4EWbKObU5lbQfeikgeCZ0KLf2t0Te4rI#countries. The United States has more than ten times as many diagnosed COVID-19 cases as Mexico and almost 40 times as many cases as Canada.

administration has instead sought to scapegoat other countries such as China[32] and to blame the World Health Organization.[33] With this NPRM, the administration seeks to shift the blame for COVID-19 in the United States to Mexico and Canada, while escalating its assault on asylum seekers.[34] Moreover, the NPRM fails to acknowledge that the dangers it cites in refugee camps along the Mexican border[35] are entirely the result of U.S. policies such as metering, the inaccurately-named Migrant Protection Protocols, and now expulsions due to COVID-19.[36] The NPRM further cites potential harm to DHS personnel, particularly as the asylum seekers may be detained for a lengthy period of time, but fails to recognize that DHS has the authority to parole asylum seekers and provide them with case management but chooses not to do so.[37] The NPRM never discusses less draconian measures it could take to protect asylum seekers, DHS personnel, and other people in the U.S. interior, such as paroling asylum seekers into the United States and requiring them to self-quarantine for 14 days.[38]

The NPRM attempts to justify this unprecedented expansion of the concept of the security bar by haphazardly piecing together case law from the Board of Immigration Appeals (BIA) and the federal courts of appeals and an incomplete analysis of fragmented legislative history.[39] It states that the authorization for this proposed rule is INA §208(b)(2)(C) which allows the attorney general to impose additional bars by regulation that are "consistent with this section." Yet there is nothing in INA § 208 that discusses public health. All but one of the bars imposed in this section concern asylum seekers who have engaged in behavior that exhibits an intent to harm others—the persecutor bar, commission of a particularly serious crime in the United States, commission of a serious non-political crime abroad; a danger to the security of the United States, the terrorism bar, and commission of crimes including aggravated felonies.[40] The only bar in this section of the INA that does not require wrongdoing on the part of the asylum seeker is the firm resettlement bar, which is inapposite since asylum seekers subject to that statutory bar have found permanent safety in another country.[41] There are no bars for individuals who have not done something wrong or found safety elsewhere. It would not be "consistent" with this section of the INA to codify a health-related bar.

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[32] *'World Suffering from China Virus, Will Soon Achieve Victory': Trump on Coronavirus Vaccine Progress*, THE ECONOMIC TIMES, Jul. 28, 2020, https://economictimes.indiatimes.com/news/international/world-news/world-suffering-from-china-virus-will-soon-achieve-victory-trump-on-coronavirus-vaccine-progress/videoshow/77214950.cms; *see also*, Marietta Vazquez, *Calling COVID-19 the "Wuhan Virus" or "China Virus" Is Inaccurate and Xenophobic*, Yale School of Medicine, Mar. 12, 2020, https://medicine.yale.edu/news-article/23074/.

[33] Emily Rauhala, et al, *Trump Administration Sends Letter Withdrawing U.S. from World Health Organization Over Coronavirus Response*, THE WASHINGTON POST, Jul. 7, 2020, https://www.washingtonpost.com/world/trump-united-states-withdrawal-world-health-organization-coronavirus/2020/07/07/ae0a25e4-b550-11ea-9a1d-d3db1cbe07ce_story.html.

[34] *See* NIJC Asylum Timeline *supra* note 2.

[3535] 85 Fed. R. 41204.

[36] *See* NIJC Asylum Timeline, *supra* note 2.

[37] *See* Jane C. Timm, This Obama-era pilot program kept asylum-seeking migrant families together. Trump canceled it., NBC News, June 24, 2018, https://www.nbcnews.com/storyline/immigration-border-crisis/obama-era-pilot-program-kept-asylum-seeking-migrant-families-together-n885896.

[38] CDC, Quarantine If You Might Be Sick Stay Home If You Might Have Been Exposed to COVID-19, (Jul. 22, 2020), https://www.cdc.gov/coronavirus/2019-ncov/if-you-are-sick/quarantine.html.

[39] 85 Fed. R. 41209.

[40] *See* IINA §208(b)(2)(A)(i)-(v); §208(b)(2)(B).

[41] *See* INA §208(b)(2)(A)(vi).

To justify this bar, the NPRM pulls one quotation from the Attorney General's decision in *Matter of A-H-*,[42] "the phrase ''danger to the security of the United States'' is best understood to mean a risk to the Nation's defense, foreign relations, or economic interests." However, that case concerned an asylum seeker who held a leadership position in the Islamic Salvation Front, an organization that was known to kill civilians.[43] The Attorney General found it appropriate to deny asylum as a matter of discretion due to "respondent's association with armed groups that have committed widespread acts of persecution and terrorism in Algeria."[44] The decision only refers to "economic interests" in a citation to INA § 219—Designation of Foreign Terrorist Organizations. Taken in context, it is clear that the inclusion of the term "economic interests" within the definition of "national security" means economic interests that could be targeted *by terrorists*. And, indeed, this is the context of the *A-H-* decision. There is nothing in this section of the INA, or in *Matter of A-H-* to support the NPRM's conclusion that the potential admission of a group of immigrants into the United States could, theoretically, affect the economy, and therefore every member of that group poses a security risk to the United States. Taken to its logical conclusion, every noncitizen could be seen as a threat to national security since every person present in the United States has some impact on the economy.

The NPRM further cites to a single federal decision, *Yusupov v. Att'y Gen*.,[45] for the proposition that the security bar could apply to any "non-trivial" risk.[46] *Yusupov*, like *A-H-*, is a case that addressed potential security risks posed by suspected terrorists.[47] There is simply nothing in this case, in which the respondent had been found with a cache of Osama bin Laden videos and had emailed about *jihad,* that would provide justification for excluding all asylum seekers who traveled through a country where COVID-19 was prevalent.

Despite the very different context of the *Yusupov* case, it is important to note that the Court of Appeals for the Third Circuit remanded the proceedings because the Department of Justice committed the same error in that case that it commits in this NPRM—conflating the plain language of the statute, which requires an individual to pose an actual threat, with a mere possibility that the individual may pose a threat:

> we 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 aliens who conceivably could be such a danger or have the ability to pose such a danger (a category nearly anyone can fit). Accordingly, the Attorney General's interpretation of "is a danger" as "may pose a danger" fails at the first step of the Chevron analysis.[48]

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[42] *Matter of A-H-*, 23 I&N Dec. 774, 788 (A.G. 2005).
[43] *Id.*
[44] *Id.* at 779.
[45] *Yusupov v. Att'y Gen*, 518 F.3d 185 (3d Cir. 2008), as amended (Mar. 27, 2008).
[46] 85 Fed. R. 412029.
[47] *Yusupov v. Att'y Gen*. at 193.
[48] *Id.* at 201.

The Third Circuit found that the national security ground for denying protection is drawn directly from Article 33.2 of the 1951 Refugee Convention, which provides an exception to a state's obligation to avoid the refoulement of a refugee when there are reasonable grounds for regarding [the refugee] as a danger to the security of the country.[49] The U.S. Senate ratified the Refugee Protocol in 1968, which incorporates the substantive provisions of the Refugee Convention.[50] Congress incorporated these treaty obligations into the INA through the Refugee Act of 1980.[51] The court reviewed foreign court decisions and the work of international law scholars and concluded that the exception requires a reasonable belief that a danger is serious and actual[52] and encompasses only serious acts.[53]

The Refugee Act's legislative history shows that Congress enacted the national security exception "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."[54] The UN High Commissioner for Refugees (UNHCR) made clear in an advisory opinion 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."[55] The same exception was, in subsequent legislation, applied to asylum.[56] When Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), it could have defined national security issues to include public health concerns, but it did not do so. Instead, the INA contains "Health-related grounds" of inadmissibility at INA § 212(a)(1) for anyone seeking a visa or admission into the United States. Notably, Congress could have added similar language to INA § 208 or INA § 241, imposing bars on those seeking asylum or withholding of removal, but it did not do so.

From 1987 through 2010, Human Immunodeficiency Virus (HIV) was the only specific illness codified in the INA as a communicable disease of public health significance.[57] Yet, the HIV ban did not apply to asylum seekers or those seeking withholding of removal because the grounds of inadmissibility do not apply to these applicants for protection.[58] It was only at that point that asylum seekers were applying to adjust status to lawful permanent residence that they had to seek a waiver to overcome the HIV ban. Two different waivers were available for HIV-positive foreign nationals seeking admission as a lawful permanent residents: (1) a waiver under INA §212(g) that

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[49] *Id.* at 202–03.
[50] *Id.* at 202–03.
[51] *Id. See also* H.R. Conf. Rep. No. 96-781, at 20 (1980).
[52] *Id.* at n. 29.
[53] *Id.* at n. 30.
[54] H.R. Conf. Rep. No. 96-781, at 20 (1980).
[55] UN High Commissioner for Refugees (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* 5 (Jan. 6, 2006) https://www.refworld.org/docid/43de2da94.html. While arguably, the COVID-19 pandemic itself rises to this level of danger, there is nothing in the NPRM that explains why, specifically, asylum seekers pose a specific risk to the public health.
[56] Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996 Public Law 104–208, 110 Stat. 3009–691 (Sept. 30, 1996).
[57] *See* Pub. L. 100–71, section 518, 101 Stat. 475 (July 11, 1987) repealed by Tom Lantos and Henry Hyde United States Global Leadership Against HIV/AIDS, Tuberculosis, and Malaria Reauthorization Act of 2008, Pub. L. 110–293, section 305, 122 Stat. 2963 (July 30, 2008).
[58] Linda Tam, AIDS Legal Referral Panel (ALRP), *Immigration and HIV,* at 9, 11, https://www.alrp.org/wp-content/uploads/AIDS-Law-Chapter-10.-Immigration.pdf.

required a qualifying relative, and (2) a waiver based on a showing of family unity, humanitarian grounds and public interest.[59] Asylees and refugees were able to apply for a waiver based on family unity/humanitarian grounds/public interest consideration— other applicants needed to apply for the more limited waiver under § 212(g).[60] To be eligible for a 212(g) waiver, the applicant must have had a qualifying relative, such as a spouse or parent who is a U.S. citizen or lawful permanent resident.[61] Singling out asylum seekers for punishment due to public health concerns, rather than recognizing their unique vulnerabilities[62] and treating them with greater humanitarian concern, is an extraordinary departure from decades of U.S. immigration policy, commitment to international law, and Congressional intent.

**2. The proposed rule would endanger public health**

The proposed rule, as written, is so vague and so broad as to be impossible to uniformly implement. On its face, it appears that any individual who exhibits any potential symptom of any communicable or contagious illness would automatically be barred from asylum and withholding. Specifically, the proposed rule states:

> the Attorney General may consider whether the alien exhibits symptoms consistent with being afflicted with any contagious or infectious disease or has come into contact with such a disease, or whether the alien or class of aliens is coming from a country, or a political subdivision or region of a country, or has embarked at a place, where such disease is prevalent or epidemic (or had come from that country, subdivision, or region, or had embarked at that place, during a period in which the disease was prevalent or epidemic there). . .[63]

A literal reading of this section would mean that asylum and withholding seekers would be barred not only if they traveled through a foreign country where COVID-19 was prevalent, but also if they themselves exhibited symptoms "consistent" with COVID-19 or had come into contact with the disease. Incredibly, this provision would seemingly require immigration judges and asylum officers to deny applications if an applicant coughed, had a fever, or otherwise exhibited a symptom "consistent" with COVID-19. It would be completely inappropriate for adjudicators with no medical training to assess whether or not an applicant is exhibiting symptoms of COVID-19 or any other contagious or infectious disease.

[59] *Id.* at 19.
[60] *Id.*
[61] All applicants had to demonstrate that: (1) the danger to the public health is minimal, (2) the possibility of the spread of infection is minimal; and (3) no expense will be incurred by any government agency, without that agency's prior consent. *Id.* at 21.
[62] Not only were asylees permitted to submit a waiver without the qualifying relative limitation, but also legacy Immigration and Nationalization Service issued a memo in 1996 describing circumstances under which people living with HIV might *qualify* for asylum based on the persecution they could suffer on account of their membership in the particular social group of HIV-positive people. Immigration Equality, *People Living with HIV* (Last updated: June 3, 2020) https://immigrationequality.org/legal/legal-help/people-living-with-hiv/.
[63] Proposed § 208.13(c)(1).

The proposed rule could also result in noncitizens who contracted COVID-19 or even were exposed to the virus while in DHS custody,[64] to be mandatorily barred from seeking asylum or withholding. Since the rule is written in such sweeping terms as to even bar those who have "come into contact" with the virus, individuals who attended an immigration court hearing, and later learned that someone else in the courthouse tested positive for COVID-19, would also face a mandatory bar.

Equally troubling, the proposed rule would provide a disincentive for asylum seekers who may have been exposed to COVID-19 to self-quarantine. Currently, if an individual is scheduled for an asylum interview or for an immigration court hearing, he or she may seek a continuance based on the possibility that they may have COVID-19 themselves or that they may have been exposed through another person. For example, the USCIS COVID-19 page has the following information about asylum interviews, "If you are feeling sick, please do not come to the office. Applicants can follow the instructions on your appointment notice to reschedule your appointment for when you are healthy. There is no penalty for rescheduling your appointment if you are sick."[65] However, if the proposed rule is published as written, an asylum seeker who felt sick would be put in the untenable position of choosing between the viability of their own case by attending their interview potentially exposing others to COVID-19.

The "Detailed Discussion of the Proposed Regulatory Changes" section of the NPRM does not, in fact, give any further details about the need or reasoning for any of the particular sections, including this one. Instead, it simply recites the proposed rule and then states, "The Departments solicit comment on the nature of the consultation that the Secretary and the Attorney General should engage in with the Secretary of Health and Human Services."[66] However, as discussed above, the very concept of linking "national security" which Congress intended to apply to terrorists, with public health is fundamentally flawed and this rulemaking must be withdrawn.

### B. 8 CFR § 208.16(d)(2); 8 CFR § 1208.16(d)(2)—The Proposed Rule Would Improperly Require Denials of Applications for Withholding of Removal Under the INA and CAT

The NPRM provides little justification for extending the newly created security bar to those seeking withholding under the INA § 241(b)(3) and under CAT. We therefore incorporate by reference all points made in Section A above into this section—the proposed rule improperly creates so-called security bars that are not authorized by the INA and in doing so will actually endanger public health. All of the reasons CLINIC gives for not imposing these bars on asylum seekers are applicable to those seeking withholding under the INA or CAT, and, in fact the bars are even more egregious in the context of these mandatory forms of relief.

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[64] Alisa Reznick, *'You Can Either Be a Survivor or Die': COVID-19 Cases Surge in ICE Detention*, NPR WNYC, Jul. 1, 2020, https://www.npr.org/2020/07/01/871625210/you-can-either-be-a-survivor-or-die-covid-19-cases-surge-in-ice-detention. ("'There's no way to be safely detained during a pandemic.'")

[65] USCIS, USCIS Response to COVID-19, Last Reviewed/Updated: 07/24/2020, https://www.uscis.gov/about-us/uscis-response-to-covid-19.

[66] 85 Fed. R. 41212.

As with the asylum bar, the withholding bar improperly relies on a section of the INA that does not authorize the proposed rule. INA § 241(b)(3)(B) contains limited bars to the mandatory form of relief of withholding of removal, namely: the persecutor bar, particularly serious crime bar, serious nonpolitical crime bar, and the security bar. As discussed under the proposed asylum bar above, there is no reason to believe that Congress intended to extend the security bar to a class of people who may have been exposed to COVID-19 or another infectious disease.

During the past three years the administration has systematically sought to dismantle the asylum system.[67] In many cases, the agencies inaccurately claimed that the new rules continued to meet international legal obligations by continuing to make protection under withholding of removal and CAT available, even though those forms of relief are more difficult to win, provide fewer protections, and often lead to permanent family separations.[68] The proposed rule must be rescinded because there is no justification for denying mandatory protection from persecution and torture based on the possibility of exposure to an illness.

### C. 8 CFR § 208.16(f); 8 CFR § 1208.16(f)---The Proposed Rule Would Improperly Allow the U.S. Government to Remove Those Seeking Protection in the United States to Third Countries

Unlike withholding of removal under the INA and under CAT, deferral of removal under CAT does not have a security bar. Therefore, there is no section of the statute the administration could cite in order to prevent those who fear torture in their country of origin from being granted deferral of removal in the United States. Thus applicants for asylum or withholding of removal who are inside the United States and not subject to expedited removal, but found to be barred from these forms of relief by the proposed rule, could only seek deferral of removal under CAT before an immigration judge. This form of relief is extremely limited, and even those who "win" can be detained after winning protection or be removed to a third country; the deferral of removal is only to the country for which they have proven a fear of torture.

Even with the very limited relief provided by deferral of removal, the proposed rule would impose further burdens. Under the proposed rule, the United States government could remove an applicant seeking deferral of removal, to a third country *before* adjudicating the case.[69] The INA is an intricate statute that allows the United States to remove noncitizens after an immigration judge has entered an order of removal or after the noncitizen has been issued an expedited removal order; there is no authority in the INA to remove individuals seeking protection before a removal order has been issued.

The agencies seem to recognize that many people who have fled torture in their country would not want to seek protection in the United States if making such a protection application could result in their being sent to any country in the world other than one in which they can meet their burden of proof that they would be persecuted or tortured there, because the rule goes on to

[67] *See* NIJC Asylum Timeline *supra* note 2.
[68] *See* CLINIC Asylum Comment, at 9-10, *supra* note 3.
[69] Proposed 8 CFR § 208.16(f).

set forth an elaborate procedural scheme under which those seeking deferral could withdraw their application.[70]

For those fleeing torture and seeking entry at the border, applicants would have to meet a nearly impossible standard. The proposed rule states:

> If the immigration judge concurs with the determinations of the asylum officer that the alien does not have a credible fear of persecution or torture or a reasonable fear of persecution or torture and that the alien has not affirmatively established that it is more likely than not that he or she would be tortured in the prospective country of removal. . .[71]

the asylum seeker shall be removed. Thus, the only way for an asylum seeker who has traveled through a country where COVID-19 is prevalent to avoid removal from the United States would be to meet the ultimate, "more likely than not" standard at their initial fear screening.

The NPRM states that the proposed rule "would restore DHS's ability in the expedited removal process to remove such aliens to third countries rather than having to place them in 240 proceedings."[72] Yet it does not cite a need that the third country be safe. The proposed rule is therefore in direct conflict with the Safe Third Country Provision of the INA.[73] Moreover, straining credulity, the NPRM explains that the agencies believe that INA § 235 does not require *any* screening for withholding or CAT protection, yet fails to acknowledge that the vast majority of those who receive withholding and CAT screenings at the border, have received screenings for these lesser forms of relief as a direct result of policies this administration has imposed that render asylum seekers ineligible for asylum.[74] The current proposed rule would be yet another policy rendering those fleeing harm mandatorily barred from asylum and now withholding of removal, leaving them only eligible to apply for deferral of removal under CAT. The rule would then, simultaneously, put CAT deferral out of reach for virtually everyone at the border, and force those within the Unites States to play a game of roulette in which they could be removed to virtually any country in the world unless they withdraw their application for CAT deferral. This proposed rule that would leave the U.S. government providing essentially no protection to those fleeing persecution or torture must be rescinded.

### D. 8 CFR § 230(e); 8 CFR § 1230(e)—The Proposed Rule Would Improperly Apply These New Bars in Credible Fear and Reasonable Fear Interviews

[70] Proposed 8 CFR § 208.16(f) (2)(i)(ii).
[71] Proposed 8 CFR § 1208.30(g)(2)(iv)(A)
[72] 85 Fed. R. 41211.
[73] INA § 208(a)(2)(A).
[74] *See O.A. v. Trump*, 404 F.Supp.3d 109, 151 (D.D.C. 2019) (finding Asylum Ban 1.0 which sought to deny asylum to those enter between ports of entry exceeded "the authority that Congress conferred on the [Departments] to 'establish additional limitations and conditions' on asylum that are 'consistent with' [INA § 208, INA § 208(b)(2)(C)]" and, thus, the rule was "'not in accordance with law' and 'in excess of statutory . . . authority); *E. Bay Sanctuary Covenant v. Barr*, No. 19-16487, 2020 WL 3637585,(9th Cir. July 6, 2020) (finding Third Country Transit Ban, which sought to deny asylum to those who had not applied for asylum in a country of transit en route to the United States to be unlawful.)

The proposed rule would apply the new public health/security bars in credible fear and reasonable fear interviews. Preventing asylum seekers from even having the opportunity to describe the harm they fear to an adjudicator directly contravenes the express will of Congress in establishing the expedited removal system.[75]

The expedited removal process became law with the enactment of IIRIRA.[76] Noncitizens who arrive at a port of entry without valid documents, or those who have not been in the United States for two years prior to apprehension are subject to the expedited removal framework.[77] Asylum seekers who are subject to expedited removal, can obtain a credible fear interview by an asylum officer if they voice a fear of returning to their country of origin.[78] Concerned by the limited access to due process that those subject to expedited removal would receive, Congress intentionally set the threshold for passing a credible fear interview low; an asylum seeker need only demonstrate a "significant possibility" of establishing eligibility for asylum to be permitted a full hearing in immigration court.[79]

Despite this intentionally low standard, which Congress designed to filter out economic migrants from asylum seekers, USCIS has changed the credible fear process substantially throughout the years via changes to the Credible Fear Lesson Plan for asylum officers and internal policy guidance.[80] Under the proposed rule, asylum officers would generally never reach the Congressionally defined "significant possibility" standard because they would apply the security bar once the asylum seeker indicates they have been in a country, such as Mexico, where COVID-19 is "prevalent." The proposed rule would essentially write the "significant possibility" crafted by Congress and set forth at INA § 235(b)(1)(B)(v) out of the statute.

The legislative history confirms Congress's intention to ensure *bona fide* asylum seekers' access to protection. The Judiciary Committee report to the House version of the bill explained that:

> Under this system, there should be no danger that an alien with a genuine asylum claim will be returned to persecution. The initial screening, which should take place in the form of a confidential interview, will focus on two questions: is the alien telling the truth; and does the alien have some characteristic that would qualify the

[75] One justification in the NPRM for not allowing asylum seekers into the United States if they are coming from a country where COVID-19 is prevalent, is that their admission into the country could endanger the safety of DHS officers. 85 Fed. R. 41208 Yet the NPRM does not address the same potential risk if asylum seekers, already inside the United States, are denied protection because of their potential symptoms or exposure to COVID-19. If such asylum seekers actually have COVID-19, and DHS chooses to detain them, DHS personnel will be potentially exposed through their detention and eventually through their removal. Clearly the only rational response to a pandemic like COVID-19 is for all DHS personnel to be given appropriate personal protective equipment and for them to treat every person with whom they come into contact—regardless of their immigration status—as being potentially contagious.
[76] *See* INA § 235.
[77] 8 CFR § 235.3(b).
[78] 8 CFR § 235.3(b)(4).
[79] *See* INA § 235 (b)(1)(v).
[80] *See* CLINIC and AILA Updated Credible Fear Lesson Plans Comparison Chart,(May 2019), https://www.aila.org/infonet/updated-credible-fear-lesson-plans-comparison.

> alien as a refugee. As in other cases, the asylum officer should attempt to elicit all facts relevant to the applicant's claim.[81]

Senator Hatch stated:

> The credible fear standard applied at the screening stage would be whether, taking into account the alien's credibility, there is a significant possibility that the alien would be eligible for asylum. The Senate bill had provided for a determination of whether the asylum claim was 'manifestly unfounded,' while the House bill applied a 'significant possibility' standard coupled with an inquiry into whether there was a substantial likelihood that the alien's statements were true. The conference report struck a compromise by rejecting the higher standard of credibility included in the House bill. The standard adopted in the conference report is intended to be a low screening standard for admission into the usual full asylum process.[82]

Given the low screening threshold Congress initially prescribed, the proposed rule flies in the face of Congress's clearly expressed intent and makes a travesty of the "significant possibility" standard required under the INA. Instead, the NPRM instructs:

> The proposed screening process would proceed as follows. For an alien subject to expedited removal, DHS will ascertain whether the alien seeks protection, consistent with INA 235(b)(1)(A)(ii), 8 U.S.C. 1225(b)(1)(A)(ii). All such aliens will continue to go before an asylum officer for screening, consistent with INA 235(b)(1)(B), 8 U.S.C. 1225(b)(1)(B). The asylum officer will ask threshold questions to elicit whether an alien is ineligible for asylum pursuant to the "danger to the security of the United States" bar.[83]

Thus, if the U.S. government determines that COVID-19 is prevalent in Mexico, and an asylum officer is screening asylum seekers at the Mexican border, presumably, the entire credible fear interview could consist of a single question about whether the applicant has traveled through Mexico. The onus would then be on the asylum seeker to "affirmatively raise" a "fear of torture" and must then meet the more likely than not standard to either be placed in INA § 240 proceedings or be removed to a third country.[84] This is not a meaningful screening system and offers almost no protection to those fleeing harm.

The NPRM cites the "considerable inefficiencies" involved in not applying the bars to asylum and withholding during credible fear interviews.[85] But the purpose of credible fear interviews is not to be maximally "efficient;" it is to ensure that the United States never returns a bona fide asylum seeker to a country where they fear persecution. Of course, nothing would be more "efficient" in this context than eliminating asylum altogether, but Congress has set forth a

[81] 142 Cong. Rec. 25347 (1996).
[82] H.R. Rep. No. 104-469, at 158 (1996).
[83] 85 Fed. R. 41213.
[84] *Id.*
[85] 85 Fed. R. 41207.

system to provide protection to those fleeing persecution and torture that the agencies cannot simply write out of the statute.

The only people fleeing persecution and torture who would ever make it past the initial screening interview would be those who could "meet, at the credible fear stage, their ultimate burden to demonstrate eligibility for deferral of removal under the CAT regulations—i.e., that it is more likely than not that they would be tortured in the country of removal."[86] That is, not only would those seeking protection be shut out of any screening for asylum, withholding of removal under the INA, and withholding of removal under CAT, even those who claim a fear of torture in their home country would have to meet the full evidentiary burden of a removal hearing, in an expedited removal interview that takes place within days of their being apprehended and almost certainly without counsel. Under the proposed rule, even if the applicant is able to meet the full "more likely than not" standard in a credible fear interview, if DHS places the individual in removal proceedings rather than summarily removing them to a third country, they will be required to prove their CAT claim again de novo before the court.[87]

This section of the proposed rule will also adversely affect global public health. If an asylum seeker is barred from seeking protection in the United States because the U.S. government reasonably concludes that the individual had an infectious disease that would endanger the U.S. public health, it is hard to imagine how the U.S. government could justify removing that "dangerous" person to a third country, especially a less developed country that would have fewer resources to treat a serious illness. The proposed rule must be rescinded.

### E. 8 CFR § 1208.30(g)(2)(iv)(A)—The Proposed Rule Would Eliminate an Important Protection for Asylum Seekers in the Credible Fear Process

The proposed rule amends 8 CFR § 1208.30(g)(2)(iv)(A) significantly. The rule currently reads:

> If the immigration judge concurs with the determination of the asylum officer that the alien does not have a credible fear of persecution or torture, the case shall be returned to the Service for removal of the alien. The immigration judge's decision is final and may not be appealed. *The Service, however, may reconsider a negative credible fear finding that has been concurred upon by an immigration judge after providing notice of its reconsideration to the immigration judge*. [Emphasis added].

With no explanation whatsoever in the NPRM, the proposed rule would amend the same section of the regulation to read as follows:

> If the immigration judge concurs with the determinations of the asylum officer that the alien does not have a credible fear of persecution or torture or a reasonable fear of persecution or torture and that the alien has not affirmatively established that it is more likely than not that he or she would be tortured in the prospective country

[86] 85 Fed. R. 41210.
[87] Proposed 8 CFR § 208.30(e)(5)(B)(1).

> of removal, after having reviewed the asylum officer's reasonable fear findings under the reasonable fear standard (as defined in § 1208.31(c), except that the bar to eligibility for withholding of removal under section 241(b)(3)(B)(iv) of the Act shall be considered), and the officer's finding regarding whether the alien is more likely than not to be tortured under the more likely than not standard, then the case shall be returned to the Department of Homeland Security for removal of the alien. The immigration judge's decision is final and may not be appealed.

The proposed rule would therefore strip Asylum Officers of the authority to reconsider the Asylum Office's initial determination in credible and reasonable fear interviews once an immigration judge has approved that initial determination. Through CLINIC's work with the CARA project at the Dilley family detention center, we have seen firsthand the vital role that asylum officers' ability to consider a request for reconsideration can play. Though this method of review has been used sparingly, there are times when new evidence comes to light after the initial adjudication, that clarifies that the asylum seeker does have a significant possibility of prevailing on their claim. As discussed above, asylum seekers must generally present their claims in credible fear interviews shortly after arriving in the United States. At this point, they have often experienced arduous journeys and may have medical issues. Moreover, for the many asylum seekers who have experienced sexual assault, torture, or other traumatic events, they may be unable to share these details with government officials immediately. Eliminating the possibility of having an asylum officer reconsider a credible fear denial will result in bona fide asylum seekers being returned to their country of feared harm.

The removal of this vital procedural protection would substantially alter the rights of asylum seekers in expedited removal. Yet, the NPRM offers no explanation—none—of why the agencies are choosing to make this significant change. CLINIC is very concerned that the agencies would seek to remove an important protection for asylum seekers through stealth. Removing the ability to seek Reconsideration from an Asylum Officer is in no way connected to the purported public health objective of the proposed rule. Since the NPRM does not explain that the agencies are making this change, many organizations and individual commenters could miss this significant proposed change, thus the agencies have not properly presented the change for public comment.

## IV. CONCLUSION

The proposed rule would be an extraordinary departure from decades of asylum law and appears to be a means for the administration to target asylum seekers yet again, this time under the pretext of public health.[88] The United States has a duty under international and domestic law to administer a meaningful asylum system. This proposed rule would dismantle the system adopted by Congress through the INA, and implemented through decades of established practice through

[88] Historically, public health concerns have been a pretext for U.S. immigration officials to discriminate against immigrants based on prevailing racial and class stereotypes. An absolute bar against asylum seekers rooted in public health and infectious diseases "generate[s] and underscore[s] stereotypes" of asylum seekers "as impure and infectious." Howard Markel and Alexandra Minna Stern, *The Foreignness of Germs: The Persistent Association of Immigrants and Disease in American Society*, 80 The Milibank Quarterly 757, 765 (2002) (detailing the invasive and dehumanizing medical inspection incoming immigrants had to endure at the hands of U.S. medical officials.)

regulations and case law. The proposed rule, citing no relevant data or legal authority, would shut out virtually all individuals fleeing persecution or torture. It is especially cynical that the agencies are using a pandemic that has caused so much harm and suffering throughout the world, as a pretext to implement an anti-immigrant, anti-asylum agenda.

Pope Francis has said that the COVID-19 pandemic, "has shown us that, especially in times of need, we depend on our solidarity with others. In a new way, it is inviting us to place our lives at the service of others. It should make us aware of global injustice and wake us up to the cry of the poor and of our gravely diseased planet."[89] The proposed rules would exacerbate this global injustice by forcing the world's most vulnerable to remain in danger and would impose further burdens on the health care systems of developing countries. The United States has a moral obligation, in addition to its legal obligations, to provide safety; the proposed rules should be withdrawn in their entirety.

Thank you for your consideration of these comments. Please do not hesitate to contact Jill Marie Bussey, Director of Advocacy, at jbussey@cliniclegal.org, with any questions or concerns about our recommendations.

Sincerely,

Anna Gallagher
Executive Director

[89] Devin Watkins, *Pope Pens Preface to Book on Hope in the Covid-19 Pandemic*, VATICAN NEWS, Jul. 28, 2020, https://www.vaticannews.va/en/pope/news/2020-07/pope-francis-book-preface-faith-in-coronavirus.html,