Patterson Belknap Webb & Tyler LLP

1133 Avenue of the Americas New York, NY 10036-6710 212.336.2000 fax 212.336.2222 www.pbwt.com

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Muhammad U. Faridi
Partner
(212) 336-2874
mfaridi@pbwt.com

Via https://www.regulations.gov
& Federal Express

Lauren Alder Reid
Assistant Director
Office of Policy
Executive Office for Immigration Review
5107 Leesburg Pike, Suite 1800
Falls Church, VA 22041

Andrew Davidson
Asylum Division Chief
Refugee, Asylum, and International Affairs Directorate
U.S. Citizenship and Immigration Services
20 Massachusetts Ave NW
Washington, DC 20001

Re: **Comments on "Security Bars and Processing," 85 Fed. Reg. 41201 (July 9, 2020)**

Department of Homeland Security, Docket No. USCIS 2020-0013; RIN 1614-AC57

Department of Justice, Executive Office for Immigration, A.G. Order No. 4747-2020; RIN 1125-AB08

Dear Ms. Reid and Mr. Davidson:

We represent the National Citizenship and Immigration Services Council 119 ("Council 119"), and we write on its behalf to provide comments on the above-referenced proposed rule by the Department of Justice ("DOJ") and Department of Homeland Security ("DHS") seeking to make four fundamental changes to our nation's immigration procedures:

(1) providing that the "danger to the security of the United States" bars to eligibility for asylum and withholding of removal apply in the context of public health emergencies

related to the possible threat of introduction or further spread of international pandemics into the United States;

(2) making these bars applicable in "credible fear" screenings in the expedited removal process so that noncitizens subject to the bars can be removed without a hearing before an immigration judge;

(3) making changes to the process for screening for deferral of removal eligibility in the expedited removal process to similarly allow for the removal of noncitizens ineligible for deferral; and

(4) as to noncitizens determined to be ineligible for asylum and withholding of removal as dangers to the security of the United States during credible fear screenings but who nevertheless affirmatively establish that it is more likely than not that they will be tortured in the prospective country of removal, allowing DHS to, among other things, remove them to third countries where they purportedly would not face persecution or torture.

85 Fed. Reg. 41201 (the "Proposed Rule").

As detailed below, Council 119 opposes the Proposed Rule in its entirety.[1] It also objects to the inappropriately short 30-day comment period on a proposal that would so fundamentally alter the existing legal standards for asylum eligibility and protection of refugees in our country.

I. Executive Summary

The commitment to providing a safe haven to persecuted people is etched into our nation's identity. That commitment is perhaps best reflected in the sonnet enshrined at the pedestal of the colossal sculpture sitting in New York Harbor that has welcomed many generations of Americans: "*Give me your tired, your poor, / Your huddled masses yearning to breathe free, / The wretched refuse of your teeming shore. / Send these, the homeless, tempest-tost to me, / I lift my lamp beside the golden door!*"[2]

[1] This comment does not address every concern that Council 119 has with respect to the Proposed Rule but focuses on a few of the most problematic provisions.

[2] Emma Lazarus, *The New Colossus*, Nov. 2, 1883.

The promise of safety and an opportunity to build a permanent life without persecution is a part of our nation's moral fabric. This promise has been reinforced by our nation's laws, which, over the course of several decades, have established a standardized and agile system for identifying, vetting, and protecting refugees. That system endured for decades across multiple administrations, ensuring that refugees would not be returned to territories where they would be persecuted or tortured.

The cornerstone of that system are the requirements set forth in the 1951 Convention Related to the Status of Refugees (the "1951 Convention")—to which our country is bound through its signing of the 1967 United Nations Protocol Relating to the Status of Refugees, to which the United States—and the 1994 Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (the "CAT"). Together, these treaties and the statutes and regulations designed to implement them prohibit our country from (i) penalizing refugees for their illegal entry or stay in the country, (ii) discriminating against them on the basis of their race, religion, and national origination, and (iii) returning them to territories where they may be tortured or their lives or freedoms would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion.

But, in the last three years, the Executive Branch of our government has sought to dismantle our carefully crafted system of vetting asylum claims, and with it, America's position as a global leader in refugee protection. The Proposed Rule is part of that dismantling. It seeks to fundamentally change our nation's procedures for the processing of asylum applicants in four ways—each of which is problematic for numerous reasons.

First, it seeks to expand the national security bar to cover public health emergencies by requiring the denial of asylum and withholding relief to noncitizens for whom DHS determines that entry would pose a risk of further spreading infectious or highly contagious illnesses or diseases, because of declared public health emergencies in the United States or because of conditions in their country of origin or point of embarkation to the United States. This expansion of the national security bar to cover public health emergencies is contrary to the intent of Congress, which decided not to make public health issues such as communicable diseases a permanent bar to asylum and withholding relief. Moreover, as scores of public health officials have made clear, barring asylum-seekers serves no useful or effective public health purpose.[3]

[3] *See* Johanna Naples-Mitchell, *There is No Public Health Rationale for a Categorical Ban on Asylum-seekers*, Just Security, Apr. 17, 2020, https://www.justsecurity.org/69747/there-is-no-public-health-rationale-for-a-categorical-ban-on-asylum-seekers/.

Second, the Proposed Rule would make these bars applicable at the initial credible fear screening stage for asylum-seekers in expedited removal proceedings, meaning that their claims would not be heard by an immigration judge. This change fails to appreciate that government officials charged with enforcing our immigration laws lack medical training to properly evaluate an asylum-seeker's medical condition or symptoms, or to properly assess the public health risk associated with an asylum-seeker's entry into the United States. Moreover, these types of issues should not be—and indeed cannot be—evaluated at the credible fear screening stage where the asylum-seekers are not afforded the types of due process rights that they are provided in hearings before immigration judges. Thus, the Proposed Rule, if implemented, would result in the deportation of individuals with meritorious asylum claims to places where they will be persecuted or tortured only because an immigration official lacking training in medicine and public health wrongly believes that the individual has a symptom of a communicable disease or poses a threat to public health in the United States.

Third, the Proposed Rule seeks to force those seeking protection under the CAT to demonstrate at the initial credible fear screening stage that they would more likely than not be tortured in their country of removal, which means that torture victims would have to prove their CAT claim immediately after they have completed an arduous journey to the United States. This change to the existing process serves no legitimate purpose, and it would force victims of torture—who often suffer from psychological harm from their trauma, such as denial, memory lapses, and inability to communicate—to prove the impossible at a time when they are the most incapable of doing so.

Fourth, in the event that torture victims somehow overcome insurmountable hurdles and manage to convince DHS at the credible fear screening stage that they will be tortured in their home country, the Proposed Rule allows DHS to deport them to a third country. That is so even though the torture victims may not have any relationship whatsoever to that third country, and all of the connections that they may have with individuals outside of their home country who may help them upstart their lives are to those residing in the United States.

At core, the measures that the Proposed Rule seeks to implement serve no public health purpose, nor do they advance our country's national security.[4] Rather, they are draconian and

[4] *See* "Public Health Experts Urge U.S. Officials to Withdraw Proposed Rule That Would Bar Refugees from Asylum and Other Humanitarian Protections in the U.S.", Letter to DHS Secretary Wolf and Attorney General Barr Signed by Leaders of Public Health Schools, Medical Schools, Hospitals, and Other U.S. Institutions, August 6, 2020, available at: https://www.publichealth.columbia.edu/public-

contrary to our country's moral fabric and longstanding tradition of providing safe haven to the persecuted. Simply put, the Proposed Rule serves no purpose other than to advance the Administration's political objective to shut down the U.S. asylum program—at whatever cost to human life.

Council 119's members are steadfast in their commitment to serving our country by continuing its proud tradition as a refuge for the persecuted while ensuring the safety and security of American citizens. The Proposed Rule betrays this tradition and would force Council 119's members to take actions that would violate their oath to uphold our nation's immigration laws as adopted by Congress. Accordingly, for the reasons set forth herein, Council 119 urges DOJ and DHS to immediately rescind the Proposed Rule and instead focus their efforts on advancing policies that ensure that refugees can find protection in the United States.

II. Council 119's Interest in the Proposed Rule

Council 119 is a labor organization that represents the interests of over 14,000 bargaining unit employees of United States Citizenship and Immigration Services ("USCIS") throughout the United States and abroad. Council 119's members are federal employees who are responsible for, among other things, adjudicating affirmative asylum claims, processing refugees overseas, performing "credible fear" and "reasonable fear" screenings, and providing relief for survivors of human trafficking and those who assist law enforcement.

Council 119 has a special interest in the Proposed Rule because its members are at the forefront of interviewing and adjudicating the claims of individuals seeking asylum in the United States. Council 119's members have first-hand knowledge as to how the Proposed Rule, if adopted, will impact asylum adjudications and pre-screening operations, as well as how it will comport with international and domestic laws concerning the protection of refugees.

This comment relies solely upon information that is publicly available, and it does not rely on any information that is law enforcement sensitive, classified, or protected under the

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health-now/news/public-health-experts-urge-us-officials-withdraw-proposed-rule-would-bar-refugees-asylum-and-and ; *see also* "Public Health Experts Urge U.S. Officials to Withdraw Order Enabling Mass Expulsion of Asylum-seekers," Letter to HHS Secretary Azar and CDC Director Redfield Signed by Leaders of Public Health Schools, Medical Schools, Hospitals, and Other U.S. Institutions, May 18, 2020, available at https://www.publichealth.columbia.edu/public-health-now/news/public-health-experts-urge-us-officials-withdraw-order-enabling-mass-expulsion-asylum-seekers

Privacy Act of 1974. It represents only the views of Council 119 on behalf of its members and does not represent the views of USCIS or USCIS employees in their official capacities.

III. The Proposed Rule Undermines Our Nation's Longstanding Commitment of Providing Safe Haven to the Persecuted

The Proposed Rule seeks to eviscerate the longstanding protections afforded to refugees by our country. Even before our country's founding, its lands served as a safe haven to those fleeing religious persecution in England and Holland.[5] Although the impact of these refugees' arrival is complex because of their treatment of the First Nations that already lived here,[6] it cannot be denied that they serve as a symbol of America's promise as a safe haven for the persecuted.

The mid-19th century brought millions more refugees to America's doorstep.[7] Between 1847 and 1851, an estimated two million Irish fled starvation and disease wrought by the Great Famine, with 840,000 passing through the port of New York and many more arriving by way of Canada.[8] During the same period, German political refugees fleeing reactionary reprisals in the wake of the 1848 Revolution came to America seeking freedom of thought and expression.[9]

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[5] See William Bradford, *Of Plymouth Plantation* (Harold Paget ed. 2006); Jeremy Dupertuis Bangs, Strangers and Pilgrims, Travellers and Sojourners: Leiden and the Foundations of Plymouth Plantation, vii, 7, 605, 614, 630 (2009).

[6] *See*, e.g., David J. Silverman, This Land is Their Land: The Wampanoag Indians, Plymouth Colony, and the Troubled History of Thanksgiving (2019).

[7] While U.S. policy during the 19th century did not draw a distinction between immigrants and refugees, historians have characterized groups whose emigration during this period was motivated by persecution, oppression, or natural disaster as refugees. See Philip A. Holman, *Refugee Resettlement in the United States, in Refugees in America in the 1990s: A Reference Handbook* 3, 5 (David W. Haines ed., 1996).

[8] Timothy J. Meagher, *The Columbia Guide to Irish American History* 77 (2005). See generally William A. Spray, et al., *Fleeing the Famine, North America and Irish Refugees*, 1845-1851 (Margaret M. Mulrooney ed., 2003). Many historians refer to these Irish migrants as refugees because their plight had roots in British colonial repression and conditions of serfdom. See, e.g., Meagher, at 66-71 (discussing various historians' assignment of culpability for the famine's devastation to British colonial rule).

[9] *See generally* Adolf Eduard Zucker, The Forty-Eighters: Political Refugees of the German Revolution of 1848 (1967).

Our nation's treatment of refugees, however, is not unblemished, as demonstrated by American policy toward Jewish refugees during World War II.[10] Although the United States accepted approximately 250,000 refugees fleeing Nazi persecution prior to the country's entry into World War II, it refused to accept more as Nazi Germany increased its atrocities.[11] American indifference to refugees fleeing German aggression is perhaps best reflected in the United States' denial of entry in 1939 to the St. Louis, an ocean liner carrying 907 German-Jewish refugees stranded off the coast of Miami.[12] The ship returned to Europe where many of its occupants met their fate—254 would die in the Holocaust.[13]

In many ways, our nation's refugee policy since World War II has sought to rectify our wartime humanitarian failures. Immediately after the war, the United States played a leading role in the formation and funding of international aid organizations such as the United Nations International Children's Emergency Fund and the World Food Programme, both of which provide support for refugees and displaced persons.[14] In response to reports that Jewish survivors of the Holocaust were kept in poor conditions in Allied-occupied Germany, President Harry S. Truman directed the issuance of 40,000 visas to resettle the survivors in the United States.[15] Congress also took action by enacting the Displaced Persons Act of 1948, which allowed for the admission of 415,000 displaced persons by the end of 1952.[16]

American compassion toward refugees following World War II was not limited to Holocaust survivors. In 1953, Congress enacted the Refugee Relief Act, which, along with its amendments, authorized the admission of 214,000 refugees, including escapees from Communist-dominated countries.[17] The Refugee-Escapee Act that followed in 1957 allowed for

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[10] Richard Breitman & Alan M. Kraut, American Refugee Policy and European Jewry, 1933-1945, 1-10 (1988).

[11] Holman, *supra* note 4, at 5 (citing Congressional Research Service 1991:556).

[12] The American Jewish Joint Distribution Committee, Minutes of the Meeting of the Executive Committee (June 5, 1939), *available at* https://archives.jdc.org/wp-content/uploads/2018/06/stlouis_minutesjune-5-1939.pdf.

[13] *Id.*

[14] *See* Maggie Black, The Children and the Nations: The Story of UNICEF, 25-35 (1986); Bryan L. McDonald, *Food Power: The Rise and Fall of the Postwar American Food System* 143 (2017).

[15] *See* Gil Loescher & John A. Scanlan, *Calculated Kindness: Refugees and America's Half-Open Door 1945-Present* 4-6 (1986).

[16] Displaced Persons Act of 1948, ch. 647, Pub. L. No. 80-774, 62 Stat. 1009; Holman, *supra* note 4, at 5.

[17] Refugee Relief Act of 1953, Pub. L. No. 83-203, 67 Stat. 400; Holman, *supra* note 4, at 5.

the resettlement of "refugee-escapees," persons fleeing persecution in Communist or Middle Eastern countries.[18] In the next three decades, the United States welcomed refugees escaping violence, conflict, persecution, or natural disaster, at times in waves of hundreds of thousands, from the Azores,[19] Cuba, Southeast Asia, Eastern Europe, the Soviet Union, and Afghanistan.[20]

The United States also began to undertake international treaty obligations related to resettlement of refugees who set foot on American soil. In 1968, the United States ratified the 1967 Protocol Relating to the Status of Refugees, a treaty drafted by the U.N. High Commissioner for Refugees ("UNHCR").[21] Through the 1967 Protocol, the United States became bound by the substantive provisions of an earlier treaty, the 1951 Convention,[22] agreeing that it would not: (i) discriminate against refugees on the basis of race, religion, or nationality; (ii) penalize refugees for their illegal entry or stay in the country; or (iii) engage in "refoulement"—to "expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion."[23] The United States reaffirmed its commitment to non-refoulement with its ratification in 1994 of the CAT.[24] Article 3(1) of the CAT provides: "No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."[25]

Embracing its role as a global leader in refugee protection, the United States has effectuated these international commitments by developing a sophisticated system for vetting claims for asylum. Beginning in 1972, the Immigration and Naturalization Service (the "INS") used existing procedures, such as parole, stays of deportation, and adjustment of status, to allow

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[18] Refugee-Escapee Act of 1957, Pub. L. No. 85-316, 71 Stat. 639; Holman, *supra* note 4, at 6

[19] Carl J. Bon Tempo, *Americans at the Gate: The United States and Refugees During the Cold War* 107-15 (2008).

[20] *See* USCIS, *Refugee Timeline*, https://www.uscis.gov/history-and-genealogy/our-history/refugee-timeline.

[21] U.N. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267.

[22] Joan Fitzpatrick, *The International Dimension of U.S. Refugee Law*, 15 Berkeley J. Int'l L. 1, 1 n.1 (1997).

[23] *Id.* at 2.

[24] *See* U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, S. Treaty Doc. No. 100-20, at 20 (1988).

[25] *Id.*

foreign nationals who feared persecution in their homeland to remain in the country.[26] The Refugee Act of 1980 created the first statutory basis for asylum in the United States[27] and codified the 1951 Convention's principle of non-refoulement.[28] Then, in 1990, the INS established an Asylum Corps, comprised of professional asylum officers trained in international law and having access to information on international human rights.[29] This specialized training allows asylum officers to more accurately and efficiently assess asylum claims. Recognizing the value of this approach, Congress authorized funding to double the number of asylum officers in 1994.[30] The asylum program was further modified in 1995 and 1996 to allow asylum officers to process expedited removal of persons who cannot demonstrate a credible fear of persecution.[31]

Since the creation of USCIS in 2003, the responsibility for maintaining an asylum system in accordance with international and domestic law has rested with USCIS's Asylum Division, which reviews claims of three categories of asylum-seekers: (1) those not in removal proceedings who affirmatively apply for asylum, referred to as the "affirmative" asylum process; (2) those subject to expedited removal who indicate an intention to apply for asylum or a fear of return to their home country; and (3) those who have already been ordered removed or convicted of certain crimes but express a fear of return to their home country. In the first instance, the Division is tasked with adjudicating "affirmative" asylum applications. In the second instance, the Division determines whether the individual has a "credible fear" of persecution or torture.[32] If the Division so determines, the individual may apply for asylum or withholding of removal as a defense to removal in a formal removal proceeding before an immigration judge. In the third instance, the Division must determine whether an individual who has already been ordered removed or convicted of certain crimes but expresses a fear of return to the removal country has

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[26] *See* USCIS, *Refugee Timeline*, https://www.uscis.gov/history-and-genealogy/our-history/refugeetimeline.

[27] The Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102; Tom K. Wong, *The Politics of Immigration: Partisanship, Demographic Change, and American National Identity* 52-53 (2017).

[28] *Compare* U.N. Convention Relating to the Status of Refugees art. 33(1), 189 U.N.T.S. 137, *with* 8 U.S.C. § 1231(b)(3)(A).

[29] Gregg A. Beyer, *Reforming Affirmative Asylum Processing in the United States: Challenges and Opportunities*, 9 Am. U. Int'l L. Rev. & Pol'y 43 (1994); *see also* 8 C.F.R. § 208.1(b); *Am. Baptist Churches v. Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991).

[30] Steven Greenhouse, *U.S. Moves to Halt Abuses in Political Asylum Program*, N.Y. Times, Dec. 3, 1994, p. 8.

[31] *See* 8 U.S.C. § 1225(b)(1)(B)(iii).

[32] *See* 8 U.S.C. § 1225(b)(1)(B); see also 8 C.F.R. §§ 208.30, 235.3.

a "reasonable fear" of persecution or torture in that country.[33] If the Division determines as such, the individual is referred to an immigration judge for withholding-only proceedings, in which the individual may seek withholding of removal under INA § 241(b)(3) (codified as 8 U.S.C. § 1231(b)(3)) or withholding of removal under regulations implementing CAT obligations. This agile process strikes an appropriate balance between offering protection to qualified asylum-seekers, enforcing applicable laws, addressing national security concerns, and combatting fraud and abuse.

American leadership in refugee protection and the effectiveness of our processes for dealing with displaced people are perhaps best reflected in the sheer number of refugees—nearly 5 million representing well over 70 nationalities[34]—successfully absorbed into the United States since World War II. Forging new lives out of turmoil and trauma, refugees have contributed much to the fabric of American life and are integral to our success as a nation of immigrants.

Today, the world is in the throes of a migration crisis that is unprecedented in its scale.[35] In 2018, there were 70.8 million individuals forcibly displaced from their homes.[36] This displacement spans the globe, from the Middle East to Africa to Asia to Central America—the latter being a region that has a legacy of violence and fragile institutions resulting in part from the civil wars of the 1980s.[37] Now, perhaps more than ever, America needs to continue its longstanding commitment to offering protection, freedom, and opportunity to the vulnerable and persecuted.[38]

Despite the pressing need to afford protection to refugees fleeing violence and persecution, America's refugee resettlement and asylum systems are under siege. Over the last three years, our Executive Branch has implemented a barrage of measures whose impact and intent are to dismantle the pillars of our defining role as a refuge for the world's persecuted, its

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[33] *See* 8 C.F.R. §§ 238.1, 241.8, 208.31.

[34] David W. Haines, *Safe Haven? A History of Refugees in America* 4 (2010).

[35] *See* UNHCR, *Global Trends: Forced Displacement in 2019* [hereinafter *"Global Trends"*] at 4 (June 20, 2019), *available at* https://www.unhcr.org/5ee200e37.pdf.

[36] *Id.* at 2.

[37] *Id*. at 2-3, 7.

[38] *See* Examining the Syrian Humanitarian Crisis from the Ground (Part II) Before the Subcomm. on the Middle East and North Africa of the House Comm. on Foreign Affairs, 114th Cong. 114-115 (2017) (written testimony of Leon Rodriguez, Director, U.S. Citizenship and Immigration Servs., Dep't of Homeland Security), http://docs.house.gov/meetings/.

"huddled masses yearning to breathe free."[39] After temporarily suspending the U.S. Refugee Admissions Program altogether at the start of 2017,[40] the Administration has increasingly slashed the number of refugees who can be resettled in the country each year—from 50,000 in Fiscal Year 2017 (a decrease of more than 50% from 2016) to 45,000 in Fiscal Year 2018, 30,000 in Fiscal Year 2019, and 18,000 in Fiscal Year 2020[41]—and has actually admitted far fewer.[42]

At our southern border, America's asylum system has fared no better. It began in 2018 with what has been dubbed as "Asylum Ban 1.0," which banned those entering through the southern border from accessing asylum protections.[43] Then, last year, the Administration promulgated and implemented what it euphemistically referred to as the "Migrant Protection Protocols,"[44] which require asylum-seekers to remain in Mexico pending adjudication of their asylum application, often under life-threatening conditions and without access to legal and supportive services.[45] The same year, the Administration implemented the "Third Country Transit Bar," a rule categorically denying asylum to almost anyone crossing into the United States through the southern border without first having applied for and been denied asylum in any country through which they transited.[46] Lastly, it also began to implement the so-called Asylum Cooperative Agreements with the Northern Triangle countries of Guatemala, Honduras,

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[39] Emma Lazarus, *The New Colossus*, Nov. 2, 1883.

[40] *See* Executive Order Protecting the Nation from Foreign Terrorist Entry into the United States (Mar. 6, 2017) (discussing E.O. 13769 of Jan. 27, 2017), *available at* https://www.whitehouse.gov/presidential-actions/executive-order-protecting-nation-foreign-terrorist-entry-unitedstates-2/.

[41] Michael D. Shear and Zolan Kanno-Youngs, *U.S. Cuts Refugee Program Again, Placing Cap at 18,000 People*, N.Y. Times, Sep. 27, 2019 at A16.

[42] For example, "[j]ust 22,491 refugees were resettled in the U.S. in fiscal year 2018, roughly half the 45,000 cap." Deborah Amos, *2018 Was Year of Drastic Cuts to U.S. Refugee Admissions*, NPR, *available at* https://www.npr.org, Dec. 27, 2018.

[43] 83 Fed. Reg. 55934 (Nov. 9, 2018).

[44] Dep't of Homeland Sec., Press Release, Migrant Protection Protocols (Jan. 24, 2019), available at https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols.

[45] The risks faced by migrants under MPP have been well documented. *See, e.g.*, Human Rights First, *Report: Orders from Above: Massive Human Rights Abuses Under Trump Administration Return to Mexico Policy*, Oct. 2019; Jonathan Blitzer, *How the U.S. Asylum System is Keeping Migrants at Risk in Mexico*, The New Yorker, Oct. 1, 2019.

[46] Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829-45 (Jul. 16, 2019) (codified at 28 C.F.R. Pt. 208).

and El Salvador. Under these agreements, rather than have their asylum claims heard, refugees from the Northern Triangle countries are permanently removed to other Northern Triangle countries—which are themselves some of the most dangerous countries on earth and are the source of large numbers of refugees.

The Proposed Rule seeks to give DHS and DOJ the authority to use the ongoing COVID-19 pandemic as a pretext to permanently bar asylum-seekers from obtaining asylum and withholding of removal. Put simply, if implemented, the Proposed Rule would allow for the immediate deportation of anyone who government officials—who lack any training in medicine or public health—decide is from a disease-ridden country or anyone that exhibits symptoms of a communicable disease. The deportation of asylum-seekers based on purported public health concerns to places where they may be persecuted is contrary to our longstanding tradition of providing a safe haven to the persecuted. The Proposed Rule should not be adopted.

IV. There Is No Basis to Expand the National Security Bar to Cover Public Health Emergencies

The Proposed Rule seeks to expand the national security bar to cover public health emergencies by requiring the denial of asylum and withholding relief to noncitizens for whom DHS determines that entry would pose a risk of further spreading infectious or highly contagious illnesses or diseases, because of declared public health emergencies in the United States or because of conditions in their country of origin or point of embarkation to the United States. This change to existing asylum law is problematic for several reasons.

First, the expansion of the national security bar to cover public health emergencies is contrary to the intent of Congress. Congress has already established a mechanism for addressing public health concerns with respect to foreign nationals seeking admission to the United States who exhibit symptoms of disease. Specifically, in INA § 212(a)(1), Congress decreed that "any alien . . . who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services) to have a communicable disease of public health significance" is ineligible for admission into the United States. Importantly, the application of this ground of inadmissibility requires an individualized determination that a person *has* a communicable disease of public health significance in accordance with regulations prescribed by the Secretary of Health and Human Services. This requirement may be waived in certain circumstances under INA § 212(g).

While ensuring the public health in the United States through INA § 212, Congress also determined that the fulfillment of our nonrefoulement obligations under the 1951 Refugee Convention and the CAT was of such fundamental importance, that it chose not to make the health-related grounds of inadmissibility bars to asylum or exceptions to withholding of removal. Instead, Congress adopted other narrowly tailored bars to asylum and exceptions to withholding of removal. Clearly, if Congress had intended to prevent individuals with communicable diseases of public health significance from being eligible for asylum or withholding of removal, it could have chosen to incorporate the health-related grounds of inadmissibility at INA § 212(a)(1) into the bars to asylum and exceptions to withholding of removal. That Congress deliberately chose not to do so renders invalid DHS's and DOJ's strained construction of the "danger to the security of the United States" provisions of INA §§ 208(b)(2)(A)(iv) and 241(b)(3)(B)(iv).

That Congress did not mandate health-related bars to asylum and withholding does not mean that Congress left our government with no mechanisms by which to prevent the spread of communicable diseases such as COVID-19 in the United States by persons applying for protection from persecution or torture. Nothing in the INA prevents DOJ and DHS from testing individuals arriving at ports of entry or encountered between ports of entry for communicable diseases; providing personal protective equipment (e.g., masks) to such individuals and immigration professionals encountering them; providing medical treatment to such individuals who are determined to have a communicable disease; and providing safe and humane facilities in which to temporarily quarantine such individuals if necessary to prevent the spread of a communicable disease.

Second, as numerous public health experts have stated, barring asylum seekers on public health grounds does not actually serve any valid public health purpose. For instance, on May 18, 2020, 57 leaders of public health schools, medical schools, hospitals, and other U.S. institutions working at the forefront of the response to COVID-19 wrote a letter to the Secretary of the Department of Health and Human Services and the Director of Centers for Disease Control and Prevention ("CDC").[47] The letter objected to the prelude to the Proposed Rule—a government order that used the imprimatur of the CDC to enable the mass expulsion of asylum seekers and unaccompanied children seeking to enter our country via land. As the experts declared, "There

[47] *See* Letter to Alex Azar and Robert R. Redfield from 57 experts, dated May 18, 2020, available at https://www.publichealth.columbia.edu/public-health-now/news/public-health-experts-urge-us-officials-withdraw-order-enabling-mass-expulsion-asylum-seekers.

is no public health rationale for denying admission to individuals based on legal status."[48] Moreover, the experts wholesale debunked the government's rationale for the order, which is the same justification that DHS and DOJ have proffered for the Proposed Rule:

> The order's stated justification is that the migrants and asylum seekers who are subject to it would normally be held by Customs and Border Protection (CBP) in 'congregate settings' for prolonged periods of time. However, instead of holding individuals in facilities widely recognized as dangerous and unsanitary, CBP has the discretion and legal authority to parole adults and families seeking asylum or other legal protection, and the government could facilitate the expeditious release of unaccompanied children from custody. A recent study found that of several hundred asylum seekers currently at the Mexico-U.S. border, 92 percent have family or friends they could live with in the United States. Allowing individuals to shelter in place with family or friends would reduce the need for quarantine facilities, resolving another concern stated in the CDC order.[49]

Similarly, on March 25, 2020, Physicians for Human Rights and Doctors Without Borders, among others, released a statement calling on the Administration to not turn away asylum-seekers from our border based on public health concerns raised by COVID-19.[50] The statement noted that the Administration's policy "is predicated on the false assumption that the only possible alternative to turning away asylum-seekers is detaining them in unsafe, overcrowded border facilities for lengthy periods of time. In fact, CBP could instead expeditiously parole those seeking asylum into the United States, where the vast majority have ties to families, friends, or faith-based communities."[51] Further, "[s]cientific and medical research indicates that social distancing and home isolation are the measures most effective in limiting the spread of the outbreak; there is no evidence that a ban on asylum seekers would improve public health."[52]

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[48] *Id.*

[49] *Id.*

[50] This statement is available at https://phr.org/wp-content/uploads/2020/03/COVID-19-and-the-Border_updated-032520.pdf.

[51] *Id.*

[52] *Id.*

Instead of adopting a draconian policy such as that set forth in the Proposed Rule, DHS and DOJ should follow the steps outlined in UNHCR's "Practical Recommendations and Good Practice to Address Protection Concerns in the Context of the COVID-19 Pandemic," which provides a reasonable and measured approach to protecting the public health while ensuring that persecuted people are provided a safe haven.[53]

Simply put, there is no valid legal or factual basis for the Proposed Rule's provision mandating the expulsion of asylum seekers on the ground that they may compromise the public health in the United States. As demonstrated, at core, the Proposed Rule is not actually designed to protect our country from the risk of communicable diseases, but to advance the Administration's anti-immigrant agenda. That much is demonstrated by the fact that the Administration attempted to close our country's borders on grounds of disease control even before COVID-19 was known risk.[54] Those efforts belie the Administration's justification for the Proposed Rule.

V. The Application of the Public Health Bar During the Credible Fear Screening Stage Is Contrary to Our International Treaty Obligations

The Proposed Rule would make the public health bars applicable at the initial credible fear screening stage for asylum seekers in expedited removal proceedings. That means that asylum-seekers who may otherwise be able to establish a valid claim to asylum and withholding protection in proceedings before an immigration judge would be subject to deportation immediately after their credible fear interview. This change to our nation's immigration laws all but guarantees a violation of our international treaty obligations under the 1951 Convention and the CAT.

That is so, first, because the Proposed Rule seeks to provide wide discretion to DHS and DOJ to determine whether an individual is "exhibiting symptoms" of a communicable disease such as COVID-19. This is problematic for several reasons. With limited testing resources and varying degrees of testing accuracy,[55] it is unclear how these agencies will determine whether an

[53] This publication is available at https://data2.unhcr.org/en/documents/details/75453.

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

[55] *See* Deborah Becker, "How Accurate Is Coronavirus Testing? It Depends On The Test You Take," WBUR, July 30, 2020, available at: https://www.wbur.org/commonhealth/2020/07/30/shira-doron-covid-

individual is suffering from a communicable disease. If CBP, ICE, and USCIS officials are to use their discretion in determining whether someone is exhibiting symptoms, this raises not only serious due process concerns, but it also would place those in charge of administering and enforcing America's immigration laws in the precarious situation of potentially engaging in the unauthorized practice of medicine. More fundamentally, the Proposed Rule fails to appreciate that government officials charged with enforcing our immigration laws lack medical training to properly evaluate an asylum seeker's medical condition or symptoms, or to properly assess the public health risk associated with an asylum seeker's entry into the United States. These types of complex and fact-intensive issues are not designed to be adjudged at the credible fear screening stage where asylum-seekers are not afforded the types of rights that they are provided in hearings before immigration judges. Accordingly, if the Proposed Rule is implemented, it would result in the deportation of individuals with meritorious asylum claims to places where they will be persecuted or tortured only because an immigration official conducing a credible fear screening made an erroneous determination—either because of lack of medical or public health training or the nature of the credible fear screening process—that the asylum-seeker has a communicable disease or poses a threat to public health in the United States. That would result in a violation of the nonrefouler obligation set forth in the 1951 Convention and the CAT.

Second, the Proposed Rule would result in a violation of the 1951 Convention's non-discrimination provision. Under the Proposed Rule, DHS can categorically bar from eligibility for asylum and withholding entire classes of individuals who come from specific countries where certain diseases is prevalent. Thus, under the Proposed Rule, individuals who may not suffer from any disease could be rendered ineligible for asylum and withholding protection only if they come from a country where a particular disease is prevalent. This would result in the discrimination of individuals on the basis of their national origin, in violation of our international treaty obligations.

Accordingly, the Proposed Rule should not be adopted because it would render our country noncompliant with our international treaty obligations.

19-testing-types-accuracy; *See also* "Coronavirus Testing Basics", U.S. Food and Drug Administration (FDA), July 16, 2020, available at: https://www.fda.gov/consumers/consumer-updates/coronavirus-testing-basics

VI. There Is No Valid Basis for the Proposed Rule's Provisions Affecting Torture Victims

The Proposed Rule seeks to force those seeking protection under the CAT to demonstrate at the initial credible fear screening stage that they would more likely than not be tortured in their country of removal. And if they are somehow able to meet out this stringent requirement at the credible fear screening stage, the Proposed Rule would allow for their immediate deportation to a third country where presumably they would not be tortured. These departures from our longstanding law are draconian, and there is no valid basis for them.

For one, the Proposed Rule fails to appreciate that individuals seeking protection under the CAT typically have been victims of torture in the past and thus suffer from severe psychological trauma—such as denial, memory lapses, and inability to communicate. Moreover, many of them undergo an arduous journey before reaching the United States. Our country's existing law recognizes the challenges faced by individuals seeking protection under the CAT, and thus requires them to meet out the requirements of their CAT claim in proceedings where they are afforded certain due process rights. The Proposed Rule, however, ignores these realities. It would require torture victims to prove their CAT claims at the credible fear screening stage where they lack the protections afforded to them in hearings before immigration judges. And to the extent a torture victim is able to meet out the requirements for her or his CAT claim, under the Proposed Rule, that individual could be deported to a third country based on the assumption that she or he will not be tortured there. Again, this provision fails to recognize the reality that the torture victim may not have any relationship whatsoever to that third country, and all of the connections that the victim may have with individuals outside of her or his home country—who may help the victim re-start her or his life—are to those residing in the United States.

The failure to recognize these basic and difficult realities affecting torture victims demonstrates the lengths that the Administration will go to implement its anti-immigrant objectives.

VII. The Proposed Rule Is Rife with Ambiguities and Would Have Deleterious Effects on the Most Vulnerable People in Our World

The Proposed Rule lacks clarity and is rife with ambiguities that could lead to devastating consequences for asylum-seekers and refugees. For one, the Proposed Rule is unclear as to which countries it will be applied to and for how long. It is also unclear as to who will make

these decisions and what criteria will be used. Moreover, the Proposed Rule is ambiguous as to whether it would apply to asylum-seekers already in the United States or who are already detained in detention facilities—many of which have suffered rampant outbreaks of COVID-19 as a result of our government's own failings. The failure to address these issues will make the rule's application arbitrary and capricious.

If adopted, the Proposed Rule would also cause harm to a substantial number of people who are deserving of our country's protection—which we are capable of providing without increasing the risk of spreading communicable diseases throughout the United States. As noted by Human Rights First, the Proposed Rule would have the following harmful effects:

- Bar from asylum (and the lesser withholding of removal relief) asylum-seeking nurses, doctors, health aides, cleaners and other essential personnel who have 'come into contact with' COVID-19 while risking their lives in the pandemic response in the United States;

- Bar asylum-seekers from refugee protections who have fallen ill from COVID-19 while in the United States waiting for an asylum hearing, including asylum-seekers who contract coronavirus in ICE detention centers[56];

- Bar asylum-seekers from refugee protection merely because they recently came from a country other than the United States where COVID-19 is prevalent, even if they have a well-founded fear of persecution;

[56] *See* Emily Kassie and Barbara Marcolini, "'It Was Like a Time Bomb': How ICE Helped Spread the Coronavirus: An investigation by The New York Times and The Marshall Project reveals how Immigration and Customs Enforcement became a spreader of the coronavirus." *New York* Times, July 10, 2020, Available at: https://www.nytimes.com/2020/07/10/us/ice-coronavirus-deportation.html ; *See also* "COVID-19 escalating in ICE detention centers as states hit highest daily records - and ICE deportation flights into Northern Triangle continue," International Rescue Committee, August 3, 2020, Available at: https://www.rescue.org/press-release/covid-19-escalating-ice-detention-centers-states-hit-highest-daily-records-and-ice ; *See also* "The Hidden Curve: Estimating the Spread of COVID-19 among People in ICE Detention," Vera Institute of Justice, Available at: https://www.vera.org/the-hidden-curve-covid-19-in-ice-detention ; *See also* Kate Morrissey, "Advocates with mask donation turned away from San Diego immigration detention center," Los Angeles Times, April 25, 2020, Available at: https://www.latimes.com/california/story/2020-04-25/advocates-with-mask-donation-turned-away-from-san-diego-immigration-detention-center

- Block asylum-seekers coming to U.S. airports, land ports of entry, or after crossing the border from requesting protection, if they were recently in a country where DHS and DOJ have determined COVID-19 is prevalent even if they are not in fact infected; and

- Allow the Administration to potentially extend the ban to other diseases, including treatable conditions like gonorrhea, syphilis and TB, to block even more asylum-seekers.[57]

Additionally, the Proposed Rule demonstrates a callous disregard of human life. For example, under the Proposed Rule, an asylum-seeker with COVID-19 would be deported even though the deportation is likely to exacerbate the person's condition and may also increase the potential for a spread of the virus in the destination country. As a result, our government may not only be announcing the death sentence for the infected person but would also be complicit in the spread of the virus in countries that may lack the resources necessary to control the spread of the disease.

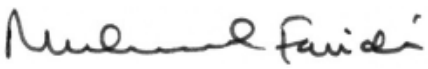
Moreover, the Proposed Rule would require the deportation of individuals who may be suffering from a disease only on a temporary basis. These individuals would be deported even if the illness could be cured with or without medical intervention. Simply put, there is no justification for this type of a policy that so fundamentally lacks human empathy towards some of the most vulnerable people in the world.

VIII. Conclusion

Council 119's members are duty bound to protect vulnerable asylum-seekers from persecution or torture. However, under the Proposed Rule, they would face a conflict between the directives of their departmental leaders to follow the new rules and adherence to our nation's legal and moral commitment to not return refugees to territories where they will face persecution. Asylum officers should not be forced to honor rules that are fundamentally contrary to the moral fabric of our nation and our international treaty and statutory obligations. For the foregoing reasons above, Council 119 opposes the Proposed Rule.

[57] *See* "Trump Administration Expands Public Health Pretext to Block Asylum-Seekers," *Human Rights First*, July 08, 2020, available at: https://www.humanrightsfirst.org/press-release/trump-administration-expands-public-health-pretext-block-asylum-seekers

Very truly yours,



Muhammad U. Faridi

cc: Danielle Spooner, President, National Citizenship and Immigration Services Council 119

Michael A. Knowles, Special Representative, National Citizenship and Immigration Services Council 119