CENTER FOR
Gender & Refugee
STUDIES

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August 7, 2020

Via Federal e-Rulemaking Portal
http://www.regulations.gov

Andrew Davidson
Asylum Division Chief, RAIO
U.S. Citizenship and Immigration Services
Department of Homeland Security

Lauren Alder Reid
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Executive Office for Immigration Review
Department of Justice

RE: Request for Comments: Security Bars and Processing (July 9, 2020);
RIN 1615-AC57/USCIS Docket No. 2020-0013; RIN 1125-AB08/A.G. Order No. 4747-2020
U.S. Citizenship and Immigration Services, Department of Homeland Security
Executive Office for Immigration Review, Department of Justice

Dear Mr. Davidson and Ms. Reid:

The Center for Gender & Refugee Studies (CGRS) submits this comment in response to USCIS Docket No. 2020-0013, 1615-AC57, *Request for Comments: Security Bars and Processing,* 85 Fed. Reg. 41201 (July 9, 2020) (hereinafter, Proposed Rule or Rule). Due to the length of the Rule and therefore the length of our comment, we include a table of contents to guide your review. We have also attached for your reference a number of the documents we cite, which we request that you review.

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I. **INTRODUCTION**

The present comment relates to the Joint Notice of Proposed Rulemaking by the Department of Justice (DOJ) and the Department of Homeland Security (DHS). The Rule would amend several regulations relevant to applications for asylum, withholding of removal under INA 241(b)(3), and protection under the Convention Against Torture (CAT). The amendments would have an impact on expedited removal screenings, asylum office interviews, and adjudications in full removal proceedings. The proposed changes are both procedural and substantive in nature and would have a profoundly destructive impact on the U.S. asylum system.

As experts in asylum law, we focus our comment particularly on the Rule's compliance with the international legal obligations of the United States. Due to the time constraints outlined below, we are not able to comment on every troubling aspect of the Rule. Our failure to comment on any particular element of the Rule should not be interpreted as our support for it. To the contrary, for the reasons set forth below, CGRS urges DOJ and DHS to abandon the Rule. It is our expert opinion that the Rule will

lead to refugees who are fleeing a range of abhorrent persecution that has long been recognized as meriting protection being needlessly returned or removed to extremely violent countries where they could be abused, sexually assaulted, or otherwise harmed, tortured, or killed.

II. EXPERTISE OF THE CENTER FOR GENDER & REFUGEE STUDIES

CGRS was founded in 1999 by Karen Musalo[1] following her groundbreaking legal victory in *Matter of Kasinga*[2] to meet the needs of asylum seekers fleeing gender-based violence. CGRS protects the fundamental human rights of refugee women, children, LGBTQ individuals, and others who flee persecution and torture in their home countries. CGRS is an internationally respected resource for gender asylum, renowned for our knowledge of the law and ability to combine sophisticated legal strategies with policy advocacy and human rights interventions. We take the lead on emerging issues, participate as counsel or *amicus curiae* in impact litigation to advance the rights of asylum seekers,[3] produce an extensive library of litigation support materials, maintain an unsurpassed database of asylum records and decisions, and work in coalitions with immigrant, refugee, LGBTQ, children's, and women's rights networks.[4] Since our founding, we have also engaged in international human rights work with a strong emphasis on El Salvador, Guatemala, Honduras, Mexico, and Haiti to address the underlying causes of forced migration that produce refugees—namely, violence and persecution committed with impunity when governments fail to protect their citizens.[5]

As a critical part of our mission, CGRS serves as a resource to decision makers to promote laws and public policies that recognize the legitimate asylum claims of those fleeing persecution, with particular expertise on women, children and LGBTQ refugees. Our goal is to create a U.S. framework of law and policy that responds to the rights of these groups and aligns with international law. It is in furtherance of our mission that we submit this comment.

III. THE AGENCIES DID NOT PROVIDE SUFFICIENT TIME TO COMMENT ON THE PROPOSED RULE

We begin by requesting the full 60-day period for public comment on the Rule. We joined thirty organizations on July 24, 2020 in requesting a minimum of 60 days to provide a comment, and incorporate that letter into this comment.[6]

In addition to the letter referenced above, we make the following observations in support of our request for the full 60-day period for public comment. Since we signed the letter of July 24th, the COVID-19

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[1] Bank of America Foundation Chair in International Law; Professor & Director, Center for Gender & Refugee Studies, University of California Hastings College of the Law.
[2] 21 I. & N. Dec. 357 (B.I.A. 1996).
[3] *See, e.g.*, *Innovation Law Lab v. Nielsen*, No.3:19-cv-00807-RS (N.D. Cal.)*, prelim. inj. stayed pending petition for cert., Wolf v. Innovation Law Lab*, -- S.Ct.--, 2020 WL 1161432 (Mar. 11, 2020) (Mem.); *Damus v. Nielsen*, 313 F. Supp. 3d 317 (D.D.C. Jul. 2, 2018); *Grace v. Barr*, --- F.3d ---- 2020 WL 4032652 (D.C. Cir. July 17, 2020); ; *U.T. v. Barr,* 1:20-cv-00116-EGS (D.D.C.); and *Matter of A-B*, 27 I. & N. Dec. 316 (A.G. 2018).
[4] *See, e.g.*, our Immigrant Women Too campaign.
[5] *See, e.g.*, Karen Musalo, *El Salvador – A Peace Worse Than War: Violence, Gender and a Failed Legal Response,* 30 Yale J. Law & Feminism 3 (2018); Karen Musalo and Blaine Bookey, *Crimes Without Punishment: An Update on Violence Against Women and Impunity in Guatemala*, 10 Hastings Race & Poverty L.J. 265 (2013).
[6] Letter Requesting Extension of Public Comment Period for Proposed Rule Making Fundamental Changes to Asylum Processing and the Immigration System, signed by the Center for Gender & Refugee Studies and 29 Other Organizations, July 24, 2020.

pandemic has continued to accelerate in the United States. Plans for reopening have been delayed by our host institution, the University of California Hastings College of the Law,[7] the City and County of San Francisco,[8] and the State of California.[9] Our campus remains partially closed and our staff is required to continue to telework. Many of us have family responsibilities which exacerbate the difficulties of working full-time from our homes. Elementary and secondary schools in our area will not be resuming in-person operations this month, so parents on our staff must find alternate arrangements to care for their children and support their education.

These factors have impeded our ability to analyze the Rule more thoroughly, research all potentially relevant international and domestic law sources, and provide fully responsive comments. If the comment period is extended, we reserve the right to expand our analysis and to resubmit a more complete comment with additional supporting documentation.

IV. THE PROPOSED RULE ABUSES THE RULEMAKING PROCESS

The Proposed Rule is a major one that would upend well-settled processes and long-established legal interpretations for adjudicating claims for protection. The Departments have not justified with evidence a curtailed comment period or the designation of the rule as not "major" or "significant." Rule 41214.

Bypassing the normal rulemaking process, the administration seeks to codify far-reaching and erroneous policies less than 100 days before a presidential election which numerous polls indicate the incumbent is likely to lose. The administration's haste to put this regulation in place is revealed by the unjustifiably short period provided for public comment, and the grouping into one Rule of several major substantive and procedural changes to the asylum system. The Departments describe the four changes made by the Rule as "fundamental." Rule 41201. Each one of these fundamental changes would justify a separate proposed Rule with a minimum of a 60 day comment period.

Furthermore, the Departments acknowledge that this Rule sets forth changes in expedited removal procedures that differ from changes in expedited removal procedures set forth in a Rule published just a few weeks earlier,[10] and request comment on how best to reconcile the two Rules. Rule 41211. Our specific comment on how to reconcile the two is to withdraw both. Our general comment is that these nearly simultaneous yet inconsistent Rules are an absurd waste of government and public time and resources, and provide yet more evidence of the Departments abusing the rulemaking process.

V. U.S. INTERNATIONAL LEGAL OBLIGATIONS TOWARDS ASYLUM SEEKERS DURING A PANDEMIC

A. International Refugee Protection Legal Framework

The relevant international legal obligations with which the United States must comply are found in the 1967 Protocol Relating to the Status of Refugees (Refugee Protocol) [11] and the 1984 CAT.[12] The United

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[7] *See* UC Hastings Law, COVID-19 Community Updates.
[8] *See* Reopening San Francisco.
[9] *See* California Department of Public Health COVID-19 Updates.
[10] *Rule on Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear* (85 Fed. Reg. 36264, June 15, 2020).
[11] 606 U.N.T.S. 267 (entry into force 4 Oct. 1967).
[12] 1465 U.N.T.S. 85 (entry into force 26 June 1987).

States acceded to the Refugee Protocol in 1968 with no relevant declarations or reservations. By doing so, the United States undertook to apply all substantive articles of the 1951 Convention Relating to the Status of Refugees.[13] The United States ratified CAT in 1994 with no relevant reservations, declarations, or understandings. These treaties have been implemented in domestic law in the Refugee Act of 1980 and the Foreign Affairs Reform and Restructuring Act of 1998, and accompanying regulations, respectively.

Under the Refugee Protocol, the United States is prohibited from returning persons to territories where their life or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion.[14] The corresponding provision in U.S. law incorporates the treaty obligation, stating that the Attorney General "may not remove" a person to a country if the Attorney General determines that the person's "life or freedom would be threatened in that country because of the [person's] race, religion, nationality, membership in a particular social group, or political opinion."[15] Of particular importance for the purpose of this comment, the exception to the *non-refoulement* obligation for reasons of national security is reflected in nearly identical language in the treaty[16] and in U.S. law.[17]

Under CAT, the United States shall not "expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture."[18] The corresponding regulation again incorporates the treaty obligation, providing that a person will be eligible for protection under CAT if he or she establishes "that it is more likely than not that he or she would be tortured if removed to the proposed country of removal."[19]

By becoming a State Party to these treaties, we have undertaken to carry out their terms in good faith.[20] Furthermore, the Supreme Court has explicitly recognized that in enacting the Refugee Act of 1980, Congress intended to bring U.S. law into conformance with international law.[21]

In relevant part, these treaties require the United States to achieve a specified result – the *non-refoulement* of the persons protected. This, in turn, requires the United States to be able to identify the persons who fall within the protected classes described in the treaties, persons who fear return to persecution or torture, and to apply any exceptions to this protection restrictively and in line with international guidance.

Guidance on the procedures and criteria by which the United States may identify the beneficiaries of these treaty protections are found in Conclusions of the United Nations High Commissioner for Refugees

[13] 189 U.N.T.S. 137 (entry into force 22 April 1954).
[14] 1951 Convention Relating to the Status of Refugees, art. 33, binding on the United States by means of U.S. accession to the Refugee Protocol, art. 33(1).
[15] 8 U.S.C. 1231 (b)(3)(A).
[16] Refugee Convention, art. 33(2).
[17] 8 U.S.C. 1158 (b)(3)(B)(iv).
[18] CAT, art. 3.
[19] 8 C.F.R. 208.16 (c) (2).
[20] Vienna Convention on the Law of Treaties, art. 26. 1155 U.N.T.S. 331 (entry into force 27 Jan. 1980).
[21] *INS v. Cardoza-Fonseca,* 480 U.S. 421, 426 (1987).

(UNHCR) Executive Committee, the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection,*[22] and other UNHCR guidelines.

We therefore analyze this Rule from the perspective of whether the proposed changes to established procedures and to accepted interpretations of the national security bar will provide adequate safeguards against *refoulement.*

B. UNHCR's Specific Guidance on Refugee Protection and the Pandemic

We note first that UNHCR has issued the attached set of *Key Legal Considerations on access to territory for persons in need of international protection in the context of the COVID-19 response.*[23] One important conclusion drawn by UNHCR is that even in a pandemic, governments may not simply close borders citing health concerns without taking the rights of asylum seekers into account. UNHCR advises that:

> [I]mposing a blanket measure to preclude the admission of refugees or asylum-seekers, or of those of a particular nationality or nationalities, without evidence of a health risk and without measures to protect against *refoulement*, would be discriminatory and would not meet international standards, in particular as linked to the principle of *non-refoulement*.[24]

We are troubled that the Departments' approach is precisely the opposite of that recommended by UNHCR, and we note that the Rule makes no reference to this important and highly relevant guidance. We urge the Departments to review this document carefully and engage in consultations with UNHCR and the World Health Organization (WHO).[25] In this regard, we note that as a State Party to the Refugee Protocol, the United States has undertaken to cooperate with UNHCR, in particular by facilitating UNHCR's duty to supervise the application of the Protocol.[26] If the Departments choose not to follow UNHCR's guidance and/or to engage in such consultations, we request an explanation of why not.

C. Guidance from U.S. Public Health Experts on Safeguarding Public Health and Protecting Asylum Seekers

CGRS's Legal-Medical Advisor, Stuart Lustig, M.D., M.P.H., joined 170 public health and medical experts at leading public health schools, medical schools, hospitals and other U.S. institutions in the attached August 6, 2020 letter.[27] These experts urge the Departments to rescind the proposed rule and instead to use rational, evidence-based measures to safeguard both the health of the public and the lives of people

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[22] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, April 2019, HCR/1P/4/ENG/REV. 4, available at https://www.refworld.org/docid/5cb474b27.html [accessed 31 July 2020] (hereinafter *Handbook*).

[23] UN High Commissioner for Refugees (UNHCR), *Key Legal Considerations on access to territory for persons in need of international protection in the context of the COVID-19 response*, 16 March 2020, available at https://www.refworld.org/docid/5e7132834.html [accessed 3 August 2020].

[24] Id., para. 6.

[25] *See OHCHR, IOM, UNHCR and WHO joint press release: the rights and health of refugees, migrants and stateless must be protected in COVID-19 response*, 31 March 2020.

[26] Refugee Protocol, Art. II (1).

[27] *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 signed by 170 leaders of public health schools, medical schools, hospitals, and other U.S. institutions, 6 August 2020.

seeking protection from persecution and torture. The letter explains that the proposed Rule is not based on sound public health principles, and makes a number of recommendations for an alternative approach.

The signatories emphasize that:

> This proposed rule, like the March 20 CDC order, is xenophobia masquerading as a public health measure, and both must be rescinded. These policies undermine the credibility of public health practice and expertise in the United States, with devastating results for the safety and well-being of both asylum seekers and the American public. The United States can and must both safeguard public health during emergencies and uphold U.S. laws and treaties protecting the lives of those seeking safety and freedom here.[28]

We urge the Departments to read this letter and engage in expert consultations with Dr. Lustig and other experts in public health as well as asylum law experts such as CGRS and others. If the Departments choose not to follow the guidance outlined in this letter and/or to engage in such expert consultations, we request an explanation of why not.

VI. THE FOUR CHANGES MADE BY THE RULE HAVE NO LEGAL OR PUBLIC HEALTH BASIS AND WILL RESULT IN *REFOULEMENT* OF REFUGEES TO PERSECUTION AND TORTURE

The Rule proposes four changes which it calls necessary and fundamental. We discuss each in turn.

A. The Rule Distorts the National Security Bar Beyond Recognition by Stretching it to Exclude Asylum Seekers Who Have Merely Traveled Through a Country Where a Disease Is Prevalent

First, the Rule would make an unprecedented and unwarranted change to the definition of the national security bar (where there are "reasonable grounds to believe" that the applicant is a "danger to the security of the United States"), by including asylum seekers whose entry poses a significant public health danger as further defined in the Rule. Rule 41215. The Rule compounds the error of this expanded definition by providing that the bar may be applied not only to individuals, but to classes of individuals such as those fleeing a specific country. Rule 41215.

In seeking to justify the expansion of the definition of national security to include public health, the Rule cites vague general language from one 2005 Attorney General decision[29] and one 2008 court of appeals opinion.[30] However, this reliance is both misplaced and misleading, as those cases concern the entirely different issue of terrorism and in no way give the government *carte blanche* to define national security in terms of public health.

In arguing for the view that the idea of national security should be read to encompass concerns beyond national defense and terrorism, the Departments acknowledge the contrary history of the Antiterrorism and Effective Death Penalty Act of 1996, but conclude that the statute's distinction between national security and the economy is not "informative." Rule 41209. This is yet another example of the

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[28] Id.

[29] *Matter of A-H-,* 23 I&N Dec. 774 (A.G. 2005).

[30] *Yusupov v. Att'y Gen.*, 518 F.3d 185 (3d Cir. 2008).

administration contradicting the clearly expressed will of Congress in order to impose asylum measures that violate U.S. treaty obligations.

The Departments should instead refer to the international law basis for the national security bar. As noted above, the provision of U.S. law at issue is taken nearly verbatim from article 33(2) of the Refugee Convention, which provides for an exception to the obligation of *non-refoulement* where there are "reasonable grounds for regarding" the applicant as a "danger to the security of the country" in which she is. Since the United States is a State Party to the Refugee Protocol, and since our statutory provision tracks the relevant treaty language, UNCHR's views on the scope of the national security bar should be taken into account. While UNHCR's guidelines are not legally binding on the United States, they are authoritative statements whose disregard requires justification.[31]

Given the intent of Congress to bring the United States into compliance with international law, we request that the Departments assess all relevant guidance from UNHCR with respect this Rule, and provide their legal reasoning as to the consistency or not of the proposed Rule with international guidance. We endeavor to point out as many sources as possible in this comment for reference purposes, but due to limited time, are not able to include them all, nor are we able to make more than preliminary comments on each of the four sweeping changes proposed in the Rule. To assist the Departments in understanding U.S. treaty obligations more fully, we reiterate our request that the government engage in consultations with UNHCR, CGRS, and other experts before finalizing the Rule. If such consultations do not occur, we request an explanation of why not.

According to UNHCR's *Advisory Opinion on the Scope of the National Security Exception Under Article 33(2) of the 1951 Convention Relating to the Status of Refugees*, attached, the exceptional nature of the national security bar calls for a restrictive interpretation, the danger posed to national security must be sufficient to justify *refoulement*, and *refoulement* must be proportionate to the danger presented.[32] The proposed Rule fails on all three counts.

1. Redefining national security in such an expansive and unwarranted manner means that the national security exception now swallows up the *non-refoulement* rule

It is a basic principle of law that, as an exception to a human rights protection, the national security bar must be interpreted restrictively. States do not have unlimited discretion to invoke national security reasons, nor may they define the exception so broadly as to engulf the protection of *non-refoulement*.[33] This is precisely what the Rule would do, particularly when coupled with its proposed application in the

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[31] Professor Walter Kälin has asserted that States Parties have a duty to take into account the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status,* guidelines and other positions when applying the 1951 Convention and 1967 Protocol. "'Taking into account' does not mean that these documents are legally binding. Rather, it means that they must not be dismissed as irrelevant but regarded as authoritative statements whose disregard requires justification." *See* W. Kälin, "Supervising the 1951 Convention relating to the Status of Refugees: Article 35 and beyond," in *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (ed. Erika Feller, Volker Türk and Frances Nicholson), at 627 (Cambridge University Press, 2003).

[32] 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*, 6 January 2006, available at https://www.refworld.org/docid/43de2da94.html [accessed 3 August 2020].

[33] Id., pp. 3-4.

context of expedited removal. Applicants would be barred for a specious reason and would instead be returned to persecution or torture.

2. The national security bar requires a high threshold and is limited to acts such as espionage and terrorism

A "danger" under article 33(2) must be to the security of country where the applicant is. There must also be reasonable grounds for considering that the individual constitutes such a danger. The term "danger to the security of the country" implies a high threshold; the drafters of the Refugee Convention, which included a delegation from the United States, were concerned only with significant threats.[34] Moreover, the threat must concern well-understood and accepted areas of national security such as attempts to overthrow the government of the country of asylum, or acts of terror and espionage.[35] Demonstrating both the degree of seriousness required, and the limitation of the bar to matters of true national security, UNHCR cites a leading international refugee law scholar, Atle Grahl-Madsen, explaining that:

> [T]he security of the country is invoked against acts of a rather serious nature endangering directly or indirectly the constitution, government, the territorial integrity, the independence, or the external peace of the country concerned.[36]

Even if public health were correctly considered to form a basis for the national security bar, which it is not, the proposed Rule is absurdly over-expansive. The Rule does not meet the test of requiring reasonable grounds for considering that an asylum-seeker does in fact constitute a danger. There is no requirement that the asylum seeker even has an illness; the Rule would bar entire classes of people, including those who have merely passed through a country where an illness is prevalent. This is an arbitrary and capricious use of the national security bar, which the Departments must reject.

3. The overbroad redefinition of national security fails the test of proportionality

Lastly, *refoulement* under the national security bar must be proportionate to the danger presented. To justify proportionality in the context of article 33(2), there must be a rational connection between *refoulement* and the elimination of the danger posed, *refoulement* must be the last possible resort to eliminate the danger, and the danger to the United States must outweigh the risk to the refugee.[37] The proposed Rule fails all three of the proportionality tests.

a. *Refoulement* that will occur as a result of this Rule is not rationally connected to alleviating a true threat to national security

There is no rational connection between the *refoulement* imposed by this Rule and eliminating a national security threat to the United States, because if the applicant merely transited an affected country but is not suffering from an illness in the first place, there is no danger at all. Even if she is suffering from an illness, rejecting her at the border means that she will in all likelihood end up living in precarious conditions in northern Mexico, like many of the asylum seekers subject to the Migrant Protection Protocols. It is foolhardy as well as callous for the United States to contribute to those

[34] Id., p. 4.
[35] Id., p. 5.
[36] Id., p. 5, internal citations omitted.
[37] Id., p. 7.

numbers. Crowding asylum seekers together without adequate health care or other resources may well lead to outbreaks of disease at the U.S. doorstep that would not have happened if asylum seekers had been allowed to enter the United States and proceed to their destinations. It also has the potential of further undermining the U.S. - Mexico relationship, which is an outcome more likely to endanger the security of the United States than the admission of certain asylum seekers who may have an infectious but curable disease.

b. Options other than *refoulement* are available to address public health concerns

Nor is *refoulement* the last possible resort in responding to understandable public health concerns. As noted above, public health experts and UNHCR have repeatedly urged adoption of an array of science-based options for protecting asylum seekers while also safeguarding the health of DHS officers, other asylum seekers, local communities, and the general public. There is simply no reason to take the extreme actions proposed in the Rule when more effective and less harmful measures are available. We again urge the Departments to avail themselves of the expertise of independent public health professionals in the United States as well as of UNHCR, which is assisting many countries in responding to the demands of refugee protection during the pandemic.

c. Return to persecution or torture because of potential exposure to a treatable disease is a disproportionate response

Finally, the gravity of the danger posed by an asylum seeker who has an infectious disease does not outweigh the possible consequences of her *refoulement*. An asylum seeker who needs medical care can be treated in the United States without running the risk of persecution or torture if she is returned to her country.

Further illustrating the disproportionate nature of this Rule, the provision allowing classes of individuals to be barred violates the requirement that claims to asylum should be adjudicated individually, on a case-by-case basis. The only exception to the requirement of a case-by-case analysis is in situations where for practical reasons due to large numbers, it is not possible to carry out an individual determination for each person. In such cases, authorities may therefore engage in group determination, whereby each member of the group is regarded *prima facie* as a refugee. In other words, a categorical application may only be made in favor of the applicant, not to her detriment.[38] UNHCR specifically advises that even in situations of mass influx, individual screening for any potential exclusion grounds is required.[39]

Another defect of the class-based approach to exclusion from protection is that barring groups of asylum seekers from a particular country discriminates on the basis of nationality, in violation of article 3 of the Refugee Convention.

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[38] *See* UNHCR, *Guidelines on International Protection No. 11 : Prima Facie Recognition of Refugee Status,* 24 June 2015, HR/GIP/15/11, available at https://www.refworld.org/docid/555c335a4.html [accessed 5 August 2020]; *see also, Handbook*, para. 44.

[39] UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 September 2003, HCR/GIP/03/05, available at https://www.refworld.org/docid/3f5857684.html [accessed 4 August 2020], para. 30.

In sum, the proposed expansion of the concept of national security as a bar to asylum and withholding of removal is contrary to Congressional intent in enacting bars to asylum eligibility as well as to UNHCR's interpretation of our treaty obligations under the Refugee Protocol. It is incorrect and inappropriate to introduce public health concerns into the national security bar analysis. It is also unnecessary, as there is a clear framework for dealing with such concerns that has been set forth by UNHCR, WHO, and numerous public health experts in the United States.

We note that the Departments solicit comment on the nature of the consultation that they should engage in with the Secretary of Health and Human Services (HHS) under this section of the Rule to determine which diseases; which country, countries, or regions of countries of origin or transit; and which periods of time or circumstances for the applicant's presence would render an applicant ineligible due to the bar. Rule 41212. With respect to consultation, we reiterate our above request that the Departments consult with UNHCR, WHO, and public health experts prior to finalizing the Rule. If the final Rule is implemented in any form, the Departments should engage in ongoing consultations with the same sources, and report publicly on the information used to make such decisions. Consultation with HHS alone would pose too great a risk that political pressures will taint the interpretation of U.S. legal obligations, as evidenced by the Centers for Disease Control and Prevention's Interim Final Rule and Order issued on March 20, 2020.[40]

B. The Rule Subverts the Credible Fear Screening Process to Apply the Newly Redefined National Security Bar in an Impermissible Attempt to Speed up Denials of Claims

The second change proposed by the Rule is to consider application of the newly redefined national security bar during credible fear screenings conducted as part of expedited removal. Rule 41216. The Rule justifies this change by asserting that the current pandemic:

> highlights the fact that the existing expedited removal procedures require the Departments to engage in redundant and inefficient screening mechanisms to remove aliens who would not be able to establish eligibility for asylum and withholding of removal in the first place.

Rule 41210. This astonishing admission reveals the pretextual nature of the administration's supposed concern with public health in the guise of national security. This proposed Rule, the recently proposed *Rule on Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear* (85 Fed. Reg. 36264, June 15, 2020), and a number of other administration actions strike directly at the expedited removal process. Expedited removal is a long-established, Congressionally-mandated, court-approved set of definitions and procedures that were carefully crafted and painstakingly negotiated to allow for prompt removal of persons with no claim to protection while honoring domestic and international law obligations to asylum seekers. As the Court of Appeals for the District of Columbia Circuit explained in a recent opinion, one goal of the expedited removal statute was to ensure efficient removal of applicants with no authorization to remain in the United States.[41] However, the Court went on to emphasize that:

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[40] *Control of Communicable Diseases; Foreign Quarantine; Suspension of Introduction of Persons into the United States From Designated Foreign Countries or Places for Public Health Purposes*, 85 Fed. Reg. 16559 (March 24, 2020); and *Order Suspending Introduction of Persons From a Country Where a Communicable Disease Exists*, 85 Fed. Reg. 16567 (March 24, 2020).

[41] *Grace,* 2020 WL 4032652, at *13.

> The statute has a second, equally important goal: ensuring that individuals with valid asylum claims are not returned to countries where they could face persecution. Both purposes are evident in the system's design and are confirmed throughout the legislative history on which the government relies.[42]

In light of the twin goals of credible fear screening in expedited removal, we again express our concern regarding the repeated emphasis throughout the Rule on efficiency, at the expense of minimum procedural safeguards which are critical in reducing the risk of *refoulement.* This proposed Rule claims to be justified on the grounds that it will allow for more rapid processing of claims. However, the vast majority of these rapidly processed claims are likely to be denials. While an efficient asylum process is beneficial to both asylum seekers and the government, it must also be fair. UNHCR has advised that "fair and efficient procedures are an essential element in the full and inclusive application of the Convention."[43] The proposed Rule, in contrast, pre-judges a potentially enormous swath of claims on specious public health grounds, leaving asylum officers little to do but fill out the paperwork for *refoulement*.

It cannot be emphasized enough that the initial screening done during expedited removal is intended to be overly inclusive precisely to avoid *refoulement*, since it is the only inquiry that the government will make into the applicant's claim of fear before removal. Because the credible fear screening process lacks many of the procedural safeguards associated with a full merits hearing in immigration court, Congress intended for the screening standard to be more generous. It is inherent in the nature of a preliminary screening process that some people who are found to have a credible fear will not be able to establish that they meet the standards for asylum, withholding, or protection under CAT. This is not a flaw in the credible fear screening process, rather an indication that is it working precisely as intended.[44]

For the same reason – that credible fear screening is a preliminary inquiry lacking basic procedural safeguards – asylum officers do not consider any possible bars to asylum at that stage. Such a complex determination is left to the full merits hearing in immigration court. UNHCR specifically warns that exclusion decisions should not be dealt with in accelerated procedures such as expedited removal, so that a full factual and legal assessment of the case can be made.[45] Even in a full merits hearing, UNHCR advises that any consideration of factors that would exclude a person from refugee status not be

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[42] Id.

[43] UNHCR, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, 31 May 2001, EC/GC/01/12, available at https://www.refworld.org/docid/3b36f2fca.html [accessed 3 August 2020], para. 5.

[44] *See generally*, United States Commission on International Religious Freedom, Report on Asylum Seekers in Expedited Removal, 2005, available at https://www.uscirf.gov/reports-briefs/special-reports/uscirfs-expedited-removal-study. *See also* Karen Musalo, *Expedited Removal*, 28 *Hum. Rts.* 12 (2001), available at https://repository.uchastings.edu/faculty_scholarship/567.

[45] UNHCR, *Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 September 2003, HCR/GIP/03/05, available at https://www.refworld.org/docid/3f5857684.html [accessed 5 August 2020], para. 31. *See also* UNHCR, *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 September 2003, available at https://www.refworld.org/docid/3f5857d24.html [accessed 5 August 2020], para. 99. For additional analysis of procedural issues, see Geoff Gilbert, Cambridge University Press, *Current Issues in the Application of the Exclusion Clauses*, June 2003, available at https://www.refworld.org/docid/470a33ba0.html [accessed 5 August 2020].

investigated until after the determination of whether she meets the refugee definition.[46] True administrative efficiency is served by not looking at bars until the agency has found that the applicant is indeed a refugee. If the applicant does not meet the refugee definition, there is no need to decide if she falls within one of the bars.

The Departments even acknowledge that bars are "generally not" applied at the credible fear stage. Rule 41207. However, they erroneously support the departure proposed here by citing to one exception – the third country transit bar. But, like the proposed national security bar at issue here, the transit bar is unlawful and has been vacated.[47]

C. The Rule Violates the Expedited Removal Process by Requiring Torture Survivors to Prove their Full Case in Limited Credible Fear Screenings in an Unjustified Attempt to Deny Claims More Quickly

The third change would "streamline" screening for deferral of removal claims under the Convention Against Torture by requiring an applicant, while still in the expedited removal process, to establish that it is more likely than not that she would be tortured in the prospective country of removal. Rule 41216. As the Rule explains, this would require that the applicant "meet, at the credible fear stage, their ultimate burden to demonstrate eligibility for deferral of removal." Rule 41210.

This third change again makes clear that the effect of the Rule will be to eliminate protection entirely for the great majority of asylum seekers. To recap, the Rule first vastly expands the scope of the national security bar, thus rendering both individual applicants and entire classes of applicants ineligible for asylum and withholding of removal. The Rule then allows the bar to be applied in credible fear screenings, with the likely result that most applicants will be found ineligible on the basis of only a preliminary interview. This third portion of the Rule mandates that the final remaining category of protection, deferral of removal under CAT, will not be considered in a full merits hearing. Instead, the applicant must meet the "more likely than not" burden in a cursory initial screening. She must meet this burden while detained, without the benefit of time to learn what information will be required, to collect the necessary evidence, to seek to obtain counsel or even to attend a know-your-rights presentation.

As noted above, the expedited removal protection screening standard is intended to be generous. Requiring applicants to meet the "ultimate burden" defeats Congressional intent in crafting the expedited removal process. The purpose of a credible fear screening is to be over-inclusive. The risk of mistaken *refoulement* is too great if asylum officers must apply the "more likely than not" test in the time-limited context of a credible fear interview. Additionally, the asserted benefit of efficiency will not be met because the few applicants who do manage to meet this test must still have their deferral claim reviewed *de novo* by an immigration judge if placed in a section 240 removal proceeding. Rule 41216.

Contrary to the Departments' assertion, the Rule does not "reasonably balance the various interests at stake." Rule 41213. Asylum seekers have an interest, and indeed a right, not to be returned to persecution or torture. The obligation to ensure that does not happen rests with the government. We remind the Departments that recognition of refugee status is a declarative, not a constitutive act. A person becomes a refugee as soon as she fulfills the criteria in the definition. Recognition of her status

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[46] UNHCR 2003 Exclusion Guidelines, supra, para. 31; *Handbook,* para 31.

[47] *See Capital Area Immigrants' Rights Coal. v. Trump*, --- F.Supp.3d ----, 2020 WL 3542481 (D.D.C. June 30, 2020); *see also E. Bay Sanctuary Covenant v. Barr*, 964 F.3d 832 (9th Cir. 2020), *stayed pending appeal* 140 S.Ct. 3 (2019).

does not therefore make her a refugee but declares her to be one.[48] The Departments must bear in mind that if the government's procedures are deficient, refugees may not be recognized but their removal will still amount to *refoulement*.

Requiring that the ultimate standard now used in merits proceedings be employed in expedited removal proceedings makes it more likely that asylum officers will err, and that *refoulement* will occur. Similarly, review by an immigration judge, which is also time-limited, will be an insufficient mechanism to catch the errors made by asylum officers.

In that regard, we also note, and object, to removing the ability of the Asylum Office to reconsider a negative credible fear determination after an immigration judge has concurred with the determination. This eliminates a vital safeguard against mistaken decisions, which will become more prevalent due to the increased burden the Rule places on credible fear screenings. Reconsideration has been a lifesaver in certain cases, and there are many examples where an applicant's credible fear claim was reconsidered and then she was ultimately granted asylum or other protection.

Our client, Rochelle (not her real name), is one such example. She was initially found not to have a credible fear of persecution or torture in Haiti. After an arduous journey, she found herself in a remote detention center traumatized and without access to counsel or any resources in Haitian Creole, the only language she speaks. Moreover, during the interview, she had trouble understanding the interpreter and was not afforded the opportunity to fully testify to her past harms and fears. After she received a negative fear determination, we became aware of her case and represented her in the immigration judge review. However, we had only recently taken on the case and had not yet done a full fact investigation. The immigration judge did not permit counsel to robustly participate in the hearing in any event and ultimately affirmed. Subsequently, with Haitian Creole speaking attorney staff, we were able to uncover more details regarding Rochelle's claim and successfully request reconsideration by USCIS. She was eventually granted asylum by an immigration judge.

The Rule does not discuss this proposed change so the reason for its elimination is unclear. However, it serves as an important corrective to mistaken *refoulement*, and should not be eliminated without discussion or explanation.

The Rule distorts the purpose of a preliminary screening beyond all recognition and attempts to subvert the procedures set out by Congress.

D. The Rule Impermissibly Allows for Removal Even of Those Who Have Established that it is More Likely Than Not That They Will be Tortured

As a final change, the Rule provides that even those asylum seekers who fully meet the ultimate burden to establish their claim for deferral of removal under CAT in the credible fear interview may still not get their day in court. Instead, DHS seeks the discretion to remove such an applicant to a third country in lieu of placing her in section 240 proceedings. To avoid this fate, the applicant must affirmatively establish that it is more likely than not that she will face persecution or torture in that third country. Rule 41217.

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[48] *Handbook*, para. 28.

This provision of the Rule is notable for how clearly it demonstrates the administration's intent to remove all avenues of protection in the United States. A truly efficient process would have an immigration judge sign off on the Asylum Office's deferral determination without further inquiry. Yet this Rule, if taken at face value, requires DHS to determine if the applicant faces a substantial risk of torture in another country or countries. However, since this is to be done in the context of the credible fear screening, not in immigration court, there is no realistic possibility that the applicant will be able to forestall her removal to a random third country where she most likely has never been before or has no real ties. There would no basis for her to be able to know, much less affirmatively establish, her risk of persecution or torture in some indefinite number of countries where DHS may seek to remove her. It is not even clear how she is supposed to know which country or countries DHS is considering for her removal, since the usual immigration court procedures would not be required.

In a similar policy that CGRS is challenging in court, people seeking asylum may be removed to Guatemala, El Salvador or Honduras pursuant to Asylum Cooperative Agreements (ACA) with those countries.[49] The ACA removal process also provides that the asylum seeker can avoid removal to those countries, but only on affirmatively expressing a fear and on showing they are more likely than not to suffer persecution or torture there, the ultimate standard generally applied in full removal proceedings far beyond the reduced threshold in credible or reasonable fear screenings. However, reports indicate that DHS does not in fact even inform asylum seekers subject to ACA removal of the country to which they are being removed, meaning they could not possibly register a meaningful objection.[50] Experience with ACA removals shows that DHS will not be able to capably manage the prosecutorial discretion being sought, and *refoulement* will result.

Our expert opinion in this matter is bolstered by the Ninth Circuit Court of Appeals' decision in our challenge to the Migration Protection Protocols (MPP).[51] Under that policy, applicants must similarly affirmatively assert and then establish that it is more likely than not that they would be persecuted or tortured, in the case of MPP, in Mexico. Despite DHS assertions that MPP screening procedures meet U.S. treaty obligations, the court found for example that the screening "does not comply with the United States' anti-*refoulement* obligations."[52] The Rule fails to address the court's decision or the shortcomings of the MPP program and does not explain how the system now proposed would bring the United States into compliance with international law and U.S. statutory requirements.

VII. CONCLUSION

In conclusion, we wish to emphasize that this comment was prepared with an insufficient amount of time, and does not reflect the full scope of our objections to the Rule, nor the breadth of legal authority which supports complete repudiation of the Rule.

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[49] *U.T. v. Barr*, No. 1:20-cv-00116 (D.D.C.).

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

[51] *Innovation Law Lab v. Wolf,* 951 F.3d 1073 (9th Cir. 2020).

[52] Id. at 1093.

We urge the Departments to withdraw this Rule in its entirety. The single most objectionable aspect of the Rule is its disregard for U.S. obligations under international law and the potentially fatal consequences for individuals the laws were intended to protect. In order to remedy this profound flaw, we strongly recommend that the Departments engage in consultations with UNHCR, WHO, CGRS, and other public health and asylum law experts in order to make use of expertise that is apparently lacking in the government.

Thank you for the opportunity to submit comments on the proposed Rule. Should you have any questions, please contact Kate Jastram at jastramkate@uchastings.edu or 415-636-8454.

Sincerely,

Kate Jastram
Director of Policy & Advocacy