I. About the Advocates for Human Rights

The Advocates for Human Rights (“AHR”) welcomes the opportunity to present comments on the Department of Justice’s (“DOJ”) and the Department of Homeland Security’s (“DHS”) (collectively, the “Departments”) Proposed Rule on Security Bars. The proposed rule is a thinly veiled attempt to use the COVID-19 pandemic to further the Administration’s unlawful, misguided and xenophobic immigration policies, which have continually taken aim at asylum seekers. We accordingly urge the Departments to withdraw this misguided and ill-considered proposal.

We first note that the 30-day comment period, occurring during an unprecedented restriction on movement and access due to the Coronavirus pandemic, provides an insufficient time to comment on these Proposed Rules. We joined numerous others in a request to extend the deadline for comments and are disappointed that The Administration has not granted such a request. Nonetheless, we submit the below comment with the hope that the Departments consider the concerns raised.

The Advocates for Human Rights is a nonprofit, nongovernmental organization headquartered in Minneapolis, Minnesota. Founded in 1983, The Advocates for Human Rights' mission is to implement international human rights standards to promote civil society and reinforce the rule of law. Holding Special Consultative Status at the United Nations, AHR regularly engages UN human rights mechanisms. AHR has provided free legal representation to asylum seekers for nearly four decades, working with more than 10,000 cases to assess, advise, and represent in asylum proceedings. In addition to legal representation, AHR also works with women’s and LGBTI human rights defenders worldwide to document persecution, repression, and death at the hands of state and non-state actors on account of their identities, and to train and support those activists as they advocate for accountability and safety. AHR is a global expert in women's human rights, particularly in the area of domestic violence, and partners with women’s human rights defenders to document threats to life and freedom faced by women due to government failure to protect people from human rights abuses. We have worked in Central and Eastern Europe, the former Soviet Union, the Caucasus, Central Asia, Mongolia, Morocco, Nepal, Mexico, Haiti, and the United States. At the request of government officials, embassies, and NGOs, we help draft laws that promote the safety of women. We have provided commentary on new and proposed domestic violence laws in nearly 30 countries. We have worked with host country partners to document violations of women's human rights, including domestic violence. We train police, prosecutors, lawyers, and judges to implement both new and existing laws on domestic violence. In addition, our Stop Violence Against Women website serves as a forum for information, advocacy, and change, and, working
II. The Proposed Rule Runs Afoul of Congressional Intent

Congress passed the Refugee Act in 1980 to implement our obligations under the Refugee Convention and to ensure protections for those seeking protection from persecution. A narrow exception for national security concerns was carved out where someone meets the definition of a refugee but may nonetheless be barred for protections. This narrow exception was meant to be just that—narrow. Yet, the proposed rule now seeks to utilize the exception to justify what will amount to a wholesale ban on anyone seeking asylum during the COVID-19 pandemic and a broad scope of other health issues. Because the proposed rule provides broad discretion to deny asylum and withholding protections based on travel from or transit through a country impacted by the health issues, based solely on a determination by an officer or immigration judge, the scope of cases that will be denied is enormous. This is far beyond the narrow exception anticipated by Congress and the international community in carving out the national security bar.

Indeed, as the Third Circuit has noted, Congress “did not intend this exception to cover aliens who conceivably could be such a danger or have the ability to pose such a danger (a category nearly anyone can fit).” Yusupov v. Att’y Gen., 518 F.3d 185, 201 (3d Cir. 2008). “Congress intended this exception to apply to individuals who . . . actually pose a danger to U.S. security.” The Proposed Rule’s standard is not sufficient. It states: “it is enough that the presence of disease in the countries through which the alien has traveled to reach the United States makes it reasonable to believe that the entry of aliens from that country presents a serious danger of introduction of the disease into the United States.”

The rule provides no explanation or evidence that introduction of a disease would meet the high standard anticipated by Congress, the courts and the international community. Moreover, because the proposed rule also extends to innumerable pandemics and health concerns, there is no way that the proposed language satisfies the standard that the migrant actually pose a threat, rather than those that conceivably could. The breadth of this rule goes too far, and must be struck due to this fatal flaw.

III. The Proposed Rule Violates Obligations Under International law

A ban on asylum seekers and torture victims on the basis of health concerns violates the U.S. government’s domestic and international legal obligations.

The Traveaux Preparatois of the Refugee Convention make clear that the signatories—notably, at the behest of the U.S.—believed health-related grounds cannot be used to deny asylum. The US representative sought to have the Convention explicitly state that “a refugee
might not be expelled on grounds of indigence or ill health.”¹ The Representative further expressed concerns that “the term ‘public order’ could be used as a pretext for getting rid of any refugee on the ground that he was . . . an undesirable person.”² Furthermore, the US representative “felt that refugees should not be expelled . . . because they had been sick or indigent; they should be expelled only on the grounds that they had committed crimes.”³ The Committee itself made this comment: “The phrase ‘public order’ would not, however, permit the deportation of aliens on ‘social grounds’ such as indigence or illness.”⁴ When the United States ratified the Refugee Protocol in 1968, the Secretary of State noted that, “[a]s refugees are by definition without a homeland, deportation of a refugee is a particularly serious measure, and it would not be humanitarian to deport a refugee for reasons of health.” Indeed, the Department of State and the Department of Health, Education and Welfare explicitly rejected a proposed reservation to the Refugee Protocol that would have allowed denials based on “health related grounds.”⁵

The UNHCR also has made clear in an advisory opinion submitted in U.S. Federal Court that, in order to lawfully trigger the national security section exception to nonrefoulement, the danger must be equivalent to “a serious danger to the foundations or the very existence of the State.” The hypothetical and overly broad health- and economy-related justifications proposed in this rule are a far cry from the serious danger to the foundations or the very existence of the United States. Indeed, this Administration on numerous occasions has indicated that the pandemic is less serious than the seasonal flu⁶.

Furthermore, the UNHCR has made clear that a sufficient inquiry to make a national security determination requires an individual assessment of the danger posed by the refugee in question.⁷ Yet, the instant proposed rule seeks to bar whole classes of asylum-seekers based on the opinion of the adjudicator that their symptoms are indicative of the disease or based on the fact that the individual could have been exposed to the disease. The proposed rule seeks to bar individuals, not based on an individual assessment, but on “conditions in their country of origin or point of embarkation to the United States” that would constitute this alleged national security threat. By its very definition, a pandemic impacts numerous countries. Seeking to allow a bar based on perceived risk that an applicant was exposed to a pandemic health concern amounts to a wholesale ban on nearly all asylum seekers. Moreover, the proposed rule provides only for an

² Travaux at 222
³ Travaux at 222
⁴ It should be noted that “public order” has a different meaning in many civil law countries. It is more akin to “public policy” and has a specific legal definition, which is quite different from the common law interpretation (which is more akin to the absence of public disorder) (Travaux 226). This was discussed in the travaux préparatoires, but I don’t think there was any attempt to actually resolve this in the Convention.
⁶ See https://www.washingtonpost.com/politics/2020/03/12/trump-coronavirus-timeline/?arc404=true
⁷ https://www.refworld.org/docid/43de2da94.html
“assessment” of this perceived risk by an asylum officer conducting a CFI, which is an insufficient forum to meet the standards outlined by UNHCR.

Making clear that COVID-19 is not an excuse to bar asylum-seekers, the UNHCR has issued guidance in April and May on the situation—which numerous countries, including those with lower rates of infection than the U.S. have followed. Perhaps most importantly, the document urges that explicit exemptions to border closures be given to asylum-seekers. The document further states: “Where a general exemption is not in place, at a minimum, access to territory should be granted in individual cases ensuring compliance with the principle of non-refoulement.” The document also warns that border closures can spread the disease as irregular movements may increase, which are harder for authorities to monitor and contain. As of April 2020, over 20 countries in Europe had exceptions to border closures for asylum seekers. Such legal guidance issued by the UNHCR makes clear that states may not put in place measures that categorically deny people seeking protection an effective opportunity to seek asylum. “[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 . . . would be discriminatory and would not meet international standards.”

It is not as though the U.S. must sacrifice health and safety of the nation to fulfill these international obligations; reasonable alternatives exist and have been provided by experts. For example, states may use health measures such as testing or quarantine, as needed, so long as “such measures [do] not result in denying [asylum seekers] an effective opportunity to seek asylum or result in refoulement.” Indeed, the UNHCR document offers many alternative ways to process asylum-seekers to reduce the burden. I think a good argument would be that the US has not tried everything possible to prevent the spread of COVID-19 in the asylum context before resorting to the extreme measures in the regulations. The UK, for example, is allowing online asylum applications, and Germany is doing mail-in only applications. Austria is doing videoconference interviews and several European countries are releasing asylum-seekers from detention and not placing new arrivals in detention. Notwithstanding such reasonable alternatives, the instant rule ignores UNHCR guidance. It not only does away with reasonable measures such as testing and quarantine, but does so in furtherance of a policy that would result in refoulement.

The Refugee Act's legislative history shows that Congress enacted the provisions, including the national security exclusion ground, “with the understanding that it is based directly upon the language of the Protocol and it is intended that the provision be construed consistent with the Protocol.” The present proposal is at odds with the Convention and its Protocols, as well as the interpretive guidance of the UNHCR for reasonable alternatives. It seeks to change, by regulation, a position long-held and championed by the United States: that no one should be denied protections and sent to face persecution and torture solely due to public health concerns and without due process of law.

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8 https://www.refworld.org/docid/5e7132834.html
IV. The Proposed Rule Violates the Due Process Rights of Asylum Seekers and Seeks to Improperly Utilize Rulemaking to Change the Statutory Standards for CAT and Asylum

We further oppose the changes because they violate due process rights of migrants by improperly placing the burden on the applicant to prove that they are not a danger to security as an initial hurdle at the CFI stage, rather than requiring—as per precedent and law for all other mandatory bars in asylum and withholding cases—the applicant to rebut assertions that they are a danger to security after a credible fear finding, with the opportunity to present the case and facts to an asylum officer and/or immigration judge in full proceedings with legal representation. The proposed changes would flip the standard of proof such that an applicant for asylum is required to disprove that there is a significant possibility that the alien is subject to the bar (in other words, disprove the assumption that they are a danger to security due to public health) and demonstrate that there is a significant possibility that he or she can establish eligibility for asylum. For example, the proposed rule states: “If, however, an alien is unable to establish a significant possibility of eligibility for asylum because of the ‘danger to the security of the United States’ bar, then the asylum officer will make a negative credible fear finding . . . .” Mandatory bar determinations are never to be made by asylum officers to bar an applicant at the credible fear stage. At that stage, the applicant is simply required to make a credible fear showing (or a showing of reasonable fear if in withholding only proceedings). If and when such a determination is made, the applicant then has the right to present the full facts of their case to and immigration judge. This is the only way to provide a reasonable opportunity for the applicant to rebut any allegations that they are subject to a mandatory bar. While the Departments note that this “leads to considerable inefficiencies for the United States Government,” they fail to analyze the due process concerns with the proposed change, especially because many asylum seekers in expedited removal proceedings are detained, cannot access counsel, may not have access to interpretation in their best language, and are likely to be suffering from trauma or other harms due the recentness of arrival and escape from harm. Further, the Departments offer no evidence to support the assertion that following due process in asylum cases leads to inefficiencies, or how the proposed change would remedy that, other than improperly denying bona fide claims.

The proposed rule would permit removal of individuals to third countries before the adjudication of their application(s). This provision would also allow DHS to remove asylum seekers to third countries before an immigration judge has even entered an order of removal in their cases. Currently, DHS may attempt to remove an individual to a third country after an immigration judge has found the person to be removable from the United States and entered a removal order against them, but simultaneously withheld or deferred that order of removal because the person is more likely than not to suffer persecution or torture if returned to the country of removal. Under the proposed regulation, DHS could subject asylum seekers, particularly those in detention, to repeated attempts to deport them to third countries before an immigration judge has even determined whether they are subject to removal and entered a removal order against them. This change would essentially subvert due process rights of asylum seekers and torture victims to present their case and have it assessed by a judge before being
removed. This provision raises particularly grave concerns because it would, on the unlawfully broad interpretation of the “national security” exception, foreclose asylum seekers from receiving withholding of removal, which courts have recognized as a mandatory form of relief.

Similarly, the proposed rule would require torture victims who are determined to be subject to the national security bar at the initial screening stage to show that they are “more likely than not” to be tortured. The “more likely than not” standard is not a screening standard; it is the showing a person seeking protection under the Convention Against Torture must meet after presenting testimony and evidence during full merits hearing before an immigration judge. This change in process improperly violates the due process rights of torture victims to present their case. However, even if a person meets this extraordinarily elevated standard and establishes that they would be tortured if returned to their country, the proposed rule would empower DHS to remove that person to a third country (unless the person shows that she is more likely than not to be tortured in the third country) without allowing the person an opportunity to seek protection in the United States.

The proposed rule essentially elevates the screening standard set by Congress and impermissibly shifts the order of operations such that it would be virtually impossible for any asylum seekers to pass the credible fear process and have an opportunity to request asylum before a U.S. immigration judge. Congress made clear that the credible fear standard must be set low so that “there should be no danger that an alien with a genuine asylum claim” would be summarily “returned to persecution.” Yet, this rule goes further by finding that even those aliens with genuine claims will be unable to obtain protections or be heard by an immigration judge because it will be nearly impossible to disprove the broad interpretation of the “national security bar,” which the Departments now seek to apply at the screening stage. As the principal sponsor of the bill, Senator Orrin Hatch, explained when the expedited removal process was enacted, the credible fear standard is “a low screening standard for admission into the usual full asylum process.”

Although DHS is rarely able to locate a country willing to accept third-country nationals, these efforts to remove an asylum seeker to a third country would seriously disrupt an asylum seeker’s attempts to find legal counsel and prepare their requests for humanitarian protection in the United States. Furthermore, we note that the need to seek and coordinate with third countries to accept asylum seekers denied due to health concerns will cause additional administrative inconvenience rather than, as noted as justification throughout, alleviating it. Moreover, in our experience, it is has been nearly impossible to find third-countries to accept applicants—in one case, it has been 20 years and numerous inquiries without any country agreeing to accept the client. Yet, the proposed rule provides no analysis as to what will happen in such instances or how the public health is served by this elongated and harmful process if it will inevitably result in the individual remaining in the United States for a sufficient period to seek a third country—which would be much longer than the contagious and incubation periods of most diseases.

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V. The Proposed Rule Includes Reference to The Contested Third-Country Travel Ban as Both Attempted Justification and

Furthermore, we note that the proposed rule references the third-country-transit ban. The Departments reference the travel ban both as a justification for the proposed rule, and also appear to incorporate the ban into the new standard. This is improper because a) the legitimacy of the ban is under review in Federal Courts and has been vacated by at least one; and b) the proposed rule alleges to relate only to bars based on nationality security concerns and provides no notice that the third-country-transit ban is again being considered for incorporation as a regulation. In particular, we note the following language: “The rule proposes to amend 8 CFR 208.30(e)(5)(iii) to provide that if an alien is not able to establish that he or she has a credible fear because of being subject to the third-country-transit asylum bar . . . .” (emphasis added). This bar cannot be incorporated by virtue of being mentioned in this rule, and certainly cannot form the basis for justifying the proposed procedural changes, given its disputed legality. The inclusion of such should raise sufficient questions as to the legitimacy of this proposed rule such that it should be wholly withdraw lest it be struck down upon judicial review.

VI. The Proposed Rule Exploits the COVID Pandemic and Creates an Impermissibly Broad and Far-Reaching Bar

In addition to the numerous legal flaws in this proposed rule, The Advocates opposes the rule because the entire underlying premise—that this pandemic (not to mention all imaginable future health crises) constitute a national security risk sufficient to deny otherwise bona fide asylum seekers and torture victims. The agencies unlawfully single out individuals without U.S. legal status and provide no basis for their discriminatory and sweeping conclusion other than to point to the deaths and rising rate of infection caused by COVID-19. This is entirely suspect given the Administration’s continued admonishments that the pandemic has not a significant health issue and that the U.S. is already seeing numbers decline\(^{12}\)—this, without such draconian bars being implemented.

Instead, the proposed rule seeks to exploit public health emergencies (including COVID-19) to deem asylum seekers (both categorically and on an individual basis) a threat to national security and mandatorily bar them from asylum and all other forms of relief. In addition, the rule gives DHS and DOJ expansive authority to declare other entirely treatable diseases, including sexually transmitted infections like gonorrhea, as national security threats and mandatorily deny asylum as a result. The breadth of this list in and of itself is abhorrent, but the fact that it lacks any clear explanation of how it will be implemented—other than discretionary determinations by officers who are not medically trained—reveals its true underpinnings as an effort to stop migration rather than a good faith effort to protect the U.S.

The proposed subsection (c)(10) creates an additional ground to deny asylum to certain individuals, on grounds that they pose a threat to the security of the United States, who “exhibit

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symptoms consistent with being afflicted with” certain diseases (as defined under the section), who have “come into contact with” such diseases, or who have recently come from or passed through a country when such diseases was prevalent there. The diseases potentially covered by the regulation are significantly broad.

As attempted justification, the Departments quote the March 20, 2020 CDC order barring asylum seekers at the border, noting that medical experts believe that the spread of COVID-19 at asylum camps and shelters along the U.S. border is inevitable. Yet, they neglect to mention that the reason asylum seekers are trapped in shelters and refugee camps is the U.S. government’s unlawful policies of metering and the Migrant Protection Protocols (“MPP”).

The proposed rule’s broad scope would lead to absurd mandatory denials of asylum on the opinion of asylum offices—not medical professionals—that one either has symptoms, has been in contact with someone infected, or traveled through a country with any range of diseases. Given the widespread outbreak of COVID-19 across the world and in the United States itself, and particularly in immigration detention centers, the proposed rule would likely result in near automatic, mandatory denials of asylum to detained asylum seekers because of their likely exposure to COVID-19. In addition, asylum-seeking health care workers and other essential personnel working to combat COVID-19 (or other diseases designated as threats to national security) would also be barred from asylum because of their potential exposure. Indeed, any asylum seeker who develops symptoms of or is exposed to a covered disease while in the United States would be subject to this mandatory bar to asylum. The rule does not set limitations in its application to individuals based on the time period in which the person was infected or exposed to the disease and provides no guidelines to immigration judges/DHS officers making these determinations.

The rule’s extraordinarily expansive scope would also empower the departments to categorically deny humanitarian protections to asylum seekers based on their travel route to the United States without regard to whether an individual was actually infected or exposed to a communicable disease of concern. There is no evidence that an analysis of precautions taken by the applicant would be considered, for example. An asylum seeker who transits briefly through a country (even for an airport layover) that DHS/DOJ have determined is experiencing an outbreak of a covered disease would be mandatorily denied asylum. This, despite the fact that tourists, students, or business travelers from or passing through that same country are not banned from entering the United States.

Public health experts and the UNHCR have recommended public health measures to safely manage asylum seekers and children at the border, including through alternatives to detention. Yet, the Department instead chooses to paint with a broad brush to deny humanitarian protections. Given the significant alternatives to such draconian actions—and the pattern of policies aimed at restricting asylum protections under the current Administration—the only conclusion is that this proposal is not a good faith effort to protect public health, but a cruel

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13 https://www.humanrightsfirst.org/sites/default/files/PublicHealthMeasuresattheBorder.05.18.2020.pdf
and unlawful attempt to exploit fears as an opportunity to further unlawful and bigoted policies. Therefore, it must be withdrawn.

We remain available should you have any questions or need further information.

Sincerely,

Michele Garnett-McKenzie  
Deputy Director, The Advocates for Human Rights