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*Via electronic submission to eRulemaking Portal*

**RE: Amnesty International USA Comments on “Security Bars and Processing”**

Amnesty International USA submits the following comment in response to the joint Department of Homeland Security (DHS) / Department of Justice (DOJ) proposed rulemaking rendering applicants ineligible for asylum or withholding of removal on the basis of “national security” if they are exposed to, or come into contact with, a potentially vast array of communicable diseases, including COVID-19. Like the administration policy announced in March to exclude asylum-seekers and unaccompanied children based on supposed “public health” concerns, this proposed rule xenophobically portrays asylum-seekers as vectors of disease while failing to achieve its stated end of protecting public health. If implemented, the rule will lead to mass violations of our obligations to people seeking safety, potentially returning them to persecution and torture.

Amnesty International is the world’s largest grassroots human rights organization, comprising a global support base of millions of individual members, supporters, and activists in more than 150 countries and territories. A top priority for the U.S. section of Amnesty International for the past several years has been the protection of the right to seek asylum. Our opposition to the rule at hand is rooted in our expertise in the international human rights standards governing asylum law and our past engagement in research, policy, and litigation related to access to asylum in the United States and the wider region.

Our organization is deeply concerned about the impact of this proposed rule, which, if implemented, would rewrite U.S. asylum law to curtail eligibility for asylum and other lifesaving protections – and even the chance to apply for these protections - for the vast majority of people seeking safety here. It would engender mass refoulement, sending people seeking safety to persecution and torture. Cruelly, it would even potentially foreclose asylum claims brought by people exposed to dangers of contagion in U.S. immigration detention facilities. Rather than furthering any legitimate public health goal, the rule weaponizes specious public health

justifications to circumvent binding obligations to asylum-seekers under domestic and international law.

Medical and public health experts have explained that the administration's attempts to restrict asylum access do not help protect public health.<sup>1</sup> Instead of using a global pandemic as an excuse to evade its obligations to people seeking safety, as it has repeatedly tried to do, the administration should implement evidence-based measures that actually promote public health, including drastically reducing the detained population, ceasing deportations, and putting in place a safe processing regime for asylum-seekers and others in need of humanitarian protection at the border – measures which, to date, it has notably failed to undertake. Amnesty International urges the administration to withdraw this rule in full.

### **The Agencies Have Not Afforded the Public a Meaningful Opportunity to Comment**

As a preliminary matter, the agencies have not allowed the public sufficient opportunity to comment on this rule. If implemented, the rule would have a seismic impact on asylum access in the United States, making major changes to asylum eligibility criteria, threshold screenings, and protections for applicants who have established a clear probability of torture. The proposed rulemaking itself acknowledges that the changes it contemplates would be “fundamental” in nature.<sup>2</sup>

Typically, the administration should allow a comment period of *at least* 60 days following publication of the proposed rulemaking.<sup>3</sup> Here, despite the sweep and complexity of this new rule, the agencies have afforded the public only 30 days to comment. This is especially unjustified considering that the border has been virtually shut to asylum-seekers since the imposition of the extralegal “Title 42 processing” regime in March, which has led to unlawful mass expulsions of nearly everyone seeking safety here without any process; it is also particularly unfair to members of the public, who are currently grappling with the myriad challenges of managing work and life during a global pandemic. Yet not only have the agencies imposed an abnormally short deadline without any compelling justification for doing so, they have also, to date, failed to respond to a request for extension of the deadline signed by 30 organizations, including ours.<sup>4</sup>

Furthermore, as the agencies themselves acknowledge, this rulemaking is not even complete. The administration has issued a barrage of anti-asylum rules over the past several months, including a 181-page set of changes to every aspect of the asylum regime, published on June 15.<sup>5</sup> That proposed rulemaking and this one are – by the agencies' own admission – inconsistent with one another: the text accompanying this proposed rule notes that the agencies “acknowledge that these procedures for processing individuals in expedited removal proceedings

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<sup>1</sup> Human Rights First, “Leading Public Health Experts Gravely Concerned About New Proposal to Deny Asylum,” Aug. 6, 2020, <https://www.humanrightsfirst.org/press-release/leading-public-health-experts-gravely-concerned-about-new-proposal-deny-asylum>.

<sup>2</sup> 85 Fed. Reg. 41201, “Security Bars and Processing” (July 9, 2020).

<sup>3</sup> <https://www.archives.gov/files/federal-%20register/executive-orders/pdf/12866.pdf>

<sup>4</sup> Women's Refugee Commission et al., “Letter Requesting Extension of Public Comment Period for Proposed Rule Making Fundamental Changes to Asylum Processing and the Immigration System,” Aug. 6, 2020, <https://www.womensrefugeecommission.org/research-resources/letter-requesting-extension-of-public-comment-period-for-proposed-rule-making-fundamental-changes-to-asylum-processing-and-the-immigration-system/>.

<sup>5</sup> For Amnesty International's comment challenging that rule, see “Amnesty International Comment Opposing Sweeping Changes to the US Asylum System,” July 15, 2020, <https://www.amnestyusa.org/amnesty-international-comment-opposing-sweeping-changes-to-the-asylum-system/>.

who are subject to the national security bar differ from the expedited removal proceedings” set forth in the June 15 proposed rulemaking.<sup>6</sup> The agencies promise to “reconcile the procedures” set forth in the two different rules and “request comment regarding how best to reconcile” them.<sup>7</sup> But the public should not be forced to engage in guesswork on how the agency would resolve contradictions created by its own sloppy rulemaking. By failing to publish a complete rule – and by publishing a rule that is admittedly in conflict with another proposed rule – the agencies have failed to provide the public a full proposed rule on which to comment. On this basis alone, the proposed rulemaking is unlawful and should be revoked.

### **The Rule Creates Unlawful Bars to Protection and Must Be Rescinded in Full**

Despite the limited timeframe and the incompleteness of the proposed rulemaking, we provide this comment to detail our strong objections to the rule, which would categorically foreclose asylum and withholding of removal for vast swaths of applicants and radically restrict access to protection under the Convention Against Torture, supposedly in the name of preserving public health. Not only is such a health-based bar plainly in violation of U.S. obligations to people seeking safety, it would also fail to achieve this stated objective.

- **New “Danger to the Security of the United States” Bars to Asylum and Withholding of Removal**

The rule creates an unprecedented new bar for applicants for asylum and withholding of removal on the basis that they are a “danger to the United States” if they came from, transited through, or exhibited symptoms “consistent with” a potentially vast array of communicable diseases.

Specifically, the rule would consider an applicant a danger to the United States,” and thus ineligible for asylum or withholding of removal, if they “exhibit symptoms consistent with being afflicted with” certain “contagious or infectious disease,” if they “ha[ve] come into contact with such disease,” or if they “ha[ve] come from a country, or a political subdivision or region of that country, or has embarked at a place, where such disease is prevalent or epidemic.” A communicable disease would trigger the bar either if it is the subject of a national emergency declaration under federal law or if DHS and DOJ have, in consultation with the Secretary of Health and Human Services (HHS), jointly determined that (1) a disease of public health significance is prevalent in a country or area through which the noncitizen transited or came from such that the noncitizen’s “physical presence” is a danger to the United States, or (2) if DHS and DOJ “designate the foreign country or countries . . . and the period of time or circumstances under which the [agencies] jointly deem it necessary for public health” that noncitizens “who either are still within the number of days equivalent to the longest known incubation and contagion period for the disease,” or “exhibit symptoms indicating they are afflicted with the disease,” are a danger to the security of the United States.<sup>8</sup>

The rule’s language is extremely convoluted and difficult to parse, but its implications are alarming: DHS and DOJ, two agencies with no public health or medical expertise, can potentially deem a vast set of “communicable diseases of public health significance” as “dangers” to the

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<sup>6</sup> 85 Fed. Reg. at 41211.

<sup>7</sup> *Id.*

<sup>8</sup> 85 Fed. Reg. 41215; proposed 8 C.F.R. § 208.13/1208.13 & 8 C.F.R. § 208.16/1208.16.

United States, and thereby deny people protection on that basis. Troublingly, unlike many other unlawful bars the administration has sought to impose, this unprecedented invocation of the national security exception would foreclose not only asylum, but even withholding of removal – which the United States has in the past consistently acknowledged is a mandatory form of protection, meant to comply with its non-derogable obligations to prohibit and prevent returns to possible persecution.<sup>9</sup>

The proposed rule is a patently unjustified use of the narrow, limited national security exception to asylum and withholding of removal. Under the Immigration and Nationality Act (INA), an individual is ineligible for asylum and withholding of removal if there are reasonable grounds to regard the individual as a “danger to the security of the United States.”<sup>10</sup> But this provision was never intended to, and has never been used to, bar asylum seekers based on public health grounds. When the United States ratified the 1967 Protocol relating to the Status of Refugees – which incorporates the substantive guarantees contained in the 1951 Convention – it made clear that it understood that deporting refugees for “reasons of health” would violate the prohibition against expulsion or return of a person to a place where their life or freedom would be threatened.<sup>11</sup>

Further, Congress codified these treaty obligations to protect refugees against *refoulement* in the Refugee Act of 1980, including the national security exception, “with the understanding that it is based directly upon the language of the Protocol and it is intended that the provision be construed consistent with the Protocol.”<sup>12</sup> The Refugee Convention articulates certain narrow bases for excluding individuals from international protection, including where they pose a threat to the security of the United States.<sup>13</sup> The UN Refugee Agency (UNHCR) has clarified that this narrow national-security based exclusion ground must be interpreted “restrictively” and considered on a case-by-case basis.<sup>14</sup> The risk posed by the individual must be a “serious danger to the foundations or the very existence” of the country of asylum, and their deportation “should be considered a measure of last resort,” only where no other means can counter the danger they posed.<sup>15</sup> Read in context with the other bars to asylum and withholding of removal in the INA, this ground requires an individualized determination that the applicant actually poses a danger; it cannot be used to create a blanket determination that whole groups might potentially pose a danger.

Under this proposed rule, however, seemingly anyone who was exposed or potentially came into contact with a communicable disease could be categorically excluded from protection on this basis. Given that the proposed rule empowers DHS and DOJ to designate lists of countries where

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<sup>9</sup> Dara Lind, “Leaked Border Patrol Memo Tells Agents to Send Migrants Back Immediately, Ignoring Asylum Law,” ProPublica, Apr. 2, 2020, <https://www.propublica.org/article/leaked-border-patrol-memo-tells-agents-to-send-migrants-back-immediately-ignoring-asylum-law>.

<sup>10</sup> 8 U.S.C § 1158(b)(2)(A)(iv); 8 U.S.C § 1231(b)(3)(B)(iv).

<sup>11</sup> <https://books.google.com/books?id=09Xg93YBnXEC&lpg=PR8&ots=VjAyyGjg&dq=%22among%20the%20rights%20which%20the%20Protocol%20would%20guarantee%20to%20refugees%20is%20the%20prohibition%22&pg=PR8#v=onepage&q&f=false>

<sup>12</sup> H.R. Conf. Rep. No. 96-781, at 20 (1980).

<sup>13</sup> Refugee Convention art. 33(2).

<sup>14</sup> UNHCR, Advisory Opinion from the Office of the United Nations High Commissioner for Refugees on the Scope of the National Security Exception Under Article 33(2) of the 1951 Convention Relating to the Status of Refugees, Jan. 6, 2006, available at <https://www.refworld.org/docid/43de2da94.html>.

<sup>15</sup> *Id.*

communicable diseases are prevalent, such that noncitizens coming from or transiting through those countries would be categorically deemed a “danger to the security of the United States,” the rule could lead to, for example, a blanket ban on any asylum-seeker who transited through Mexico from being able to apply for asylum or withholding of removal on the basis that Mexico is experiencing community spread of COVID-19. Such a categorical use of the national security exception to asylum and withholding of removal is unjustified and utterly at odds with U.S. treaty obligations, which require careful, individualized consideration and restrictive application of this exclusion ground.

Furthermore, the rule is not even consistent with the text of the national security exception as set forth in the statute. The statutory exception to asylum and withholding of removal define danger in the present tense: whether the noncitizen *is*, presently, a danger to the United States.<sup>16</sup> However, defining “danger to the security of the United States” in terms of long-past exposure to a communicable disease such as COVID-19 (or another disease of short duration) is contrary to the text of the relevant asylum and withholding bars. The “danger to the security of the United States” bar must be read consistently with neighboring bars to relief set out in the respective statutes, which generally describe either the commission of past acts considered to be sufficiently grave to render an applicant undeserving of protection or other immutable characteristics.<sup>17</sup>

Defining “danger to the security of the United States” to encompass a condition – like potential COVID-19 infection – that lasts only a matter of weeks is inconsistent with this statutory context. It also ignores that asylum hearings, whether as part of an affirmative application or as a defense to removal, routinely take place months, if not years, after an individual enters the United States. A person who has a communicable disease such as COVID-19 when they enter the country would likely have long since recovered by the time their hearing occurs. Likewise, there is no logical relationship between the applicant’s long-past presence in a country where COVID-19 exists and their supposed current danger to the United States at the time of their asylum hearing. Similarly, the happenstance of whether an individual happens to have COVID-19 or another communicable disease covered by this rule at the particular moment of their affirmative or defensive hearing should not determine their eligibility for asylum or withholding. Notably, the rule is silent on what happens if an individual who is excluded from protection later tests negative for the disease that was the basis for their exclusion – even if they demonstrably no longer pose a “danger,” they could still face removal on this basis.

Finally, as implemented, the rule would lead to deeply unfair, absurd, and certainly unlawful results. Adjudicators, who are not required to have any background or training in medical or public health issues, would be tasked to guess whether asylum-seekers are exhibiting symptoms “consistent with” a communicable disease and deny them lifesaving protections on that basis. Given that cough and fever are two common symptoms of the novel coronavirus – and are also generalized symptoms common to many diseases – the rule may well lead to a situation where anyone exhibiting either of these symptoms would be denied asylum and withholding of removal. Similarly, as discussed above, the rule would empower DHS and DOJ to place asylum and

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<sup>16</sup> 8 U.S.C § 1158(b)(2)(A)(iv); 8 U.S.C § 1231(b)(3)(B)(iv).

<sup>17</sup> See 8 U.S.C § 1158(b)(2)(A) (describing bars to asylum if the applicant committed past persecution, a particularly serious crime, a serious non-political crime outside the United States, is a danger to national security, has been involved in “terrorist activity,” or was firmly resettled); 8 U.S.C § 1231(b)(3)(B) (describing the same bars to withholding of removal, with the exception of the firm resettlement bar).

withholding out of reach for anyone who comes from a country deemed to have prevalent or epidemic spread of covered communicable diseases, potentially excluding broad swaths of people regardless of whether they actually have the disease.

Troublingly, the rule would also potentially exclude people who contract COVID-19 or another covered communicable disease after entering the United States, which currently leads in COVID-19 cases worldwide. As Amnesty International has documented, thousands of asylum-seekers are being held in tinderbox conditions in detention facilities, where DHS has utterly failed to take appropriate steps to reduce and mitigate spread.<sup>18</sup> Because of U.S. policy choices subjecting them to these dangers, they could now be excluded from protection because of dangers to which the administration has exposed them. Similarly, essential workers – including healthcare workers – who have pending asylum applications could be denied protection because their lifesaving work in the United States has exposed them to the virus.

Given how alarmingly vague and broad the exception to protection created by this rule is, it would unquestionably lead to countless wrongful denials. As the UN Refugee Agency observed in the context of the COVID-19 pandemic, “blanket measures” that restrict access to asylum are impermissible and cannot be justified.<sup>19</sup> Yet this rule is just that: a blanket measure that invokes specious public health justifications to restrict asylum and withholding of removal for vast swaths of people. By linking asylum and public health in this manner, the proposed rule hearkens back to an ugly and xenophobic tradition of treating immigrants and asylum-seekers as vectors of disease.<sup>20</sup>

- **Threshold screenings**

Alarmingly, the rule would apply this bar at the threshold screening stage, potentially depriving the vast majority of people seeking asylum the opportunity to ever apply for it.

In the expedited removal process, people who express a fear of persecution or intent to apply for asylum are entitled to an initial interview before an asylum officer, known as a credible fear interview.<sup>21</sup> Historically, if an adjudicator determines that the applicant has established a credible fear of persecution upon removal, but that a bar to asylum or withholding of removal applies, the applicant is nevertheless referred to full removal proceedings for further consideration of the claim.<sup>22</sup>

Not only would this sweeping new rule unjustly foreclose asylum or withholding of removal on the merits, it would also foreclose even the opportunity to apply for these forms of relief at the threshold screening stage. The proposed rule would require adjudicators to enter negative credible fear determinations if the bar applies – in other words, for anyone who has passed through a country where a covered disease is prevalent, who exhibits symptoms of such a disease, or who possibly came into contact with such a disease. For example, if, as discussed

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<sup>18</sup> Amnesty International, “We Are Adrift, About to Sink: The Looming Crisis of COVID-19 in Immigration Detention Centers,” April 2020, <https://www.amnesty.org/en/documents/amr51/2095/2020/en/>.

<sup>19</sup> UNHCR, “Legal Considerations on access to territory for persons in need of international protection in the context of the COVID-19 response,” March 16, 2020, <https://www.refworld.org/docid/5e7132834.html>.

<sup>20</sup> Sonia Shah, “The Pandemic of Xenophobia and Scapegoating,” Time Magazine, March 7, 2020, <https://time.com/5776279/pandemic-xenophobia-scapegoating/>.

<sup>21</sup> 8 U.S.C. § 1225(b)(1)(A).

<sup>22</sup> 8 C.F.R. § 1208.30.

above, DHS and DOJ jointly decided that Mexico is a hotbed of COVID-19, any asylum-seeker who transited through the country on their way to the United States could be foreclosed from even the chance to seek asylum. Similarly, asylum-seekers with coughs, colds, or fevers could be deemed “symptomatic” of COVID-19 and denied the opportunity to apply for asylum on this basis. Under this rule, asylum-seekers who could establish eligibility for asylum or the even higher showing required for withholding of removal would be foreclosed from protection and deported to places where their lives are at risk, solely as a result of this bar.

Applying this bar at the threshold screening stage is not only cruel and wrongful, it is also illogical. Credible fear screenings are a mechanism for assessing the likelihood that the applicant can establish eligibility for asylum at the ultimate hearing: by statute, the term “credible fear of persecution” is defined as “a significant possibility . . . that the [applicant] *could establish* asylum eligibility under Section 1158” of the INA in full proceedings.<sup>23</sup> Thus, it violates the expedited removal statute to deny credible fear based on an applicant’s symptoms of, or risk of infection with a covered communicable disease at the the time of the credible fear interview, given that the applicant will likely have recovered months or years later, when the ultimate asylum hearing is held. In other words, there is always a possibility that a public health-based ground applied during the threshold screening will no longer be applicable at the full hearing. Therefore, the application of this proposed bar at the credible fear stage runs contrary to the statute.

If the adjudicator determines at the threshold screening stage that this bar applies, the only way to surmount it, and receive a positive credible fear determination, is if the applicant manages to establish that it is more likely than not that they will face torture if returned to their country of origin. This is a ludicrously high evidentiary requirement at the threshold stage – in fact, it is the same showing required to win relief on the merits.<sup>24</sup> But the credible fear screening standard is meant to be generous precisely because asylum-seekers are screened in exceedingly challenging circumstances, their claims assessed during cursory interviews, generally without the benefit of counsel or legal orientation, often over the telephone; requiring them to meet this high evidentiary standard at a threshold stage is unreasonable and unrealistic.

Furthermore, experience demonstrates that this exception would not serve as a meaningful safeguard. Under the border expulsions regime, people who affirmatively express a fear of torture are allowed to apply for protection only if they can establish a “reasonably believable” claim that they will face torture if removed.<sup>25</sup> From March through May 2020, after the policy went into effect, only four people managed to pass these fear-of-torture screenings, demonstrating how prohibitively high this even higher evidentiary bar will be.<sup>26</sup> The threshold screening regime proposed in this rule envisions a process in which even the opportunity to seek asylum or other humanitarian relief would be out of reach for nearly everyone who applies for it, leading to mass violations of *refoulement*.

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<sup>23</sup> 8 U.S.C. § 1225(b)(1)(B)(v).

<sup>24</sup> 8 C.F.R. § 1208.17(a).

<sup>25</sup> Dara Lind, “Leaked Border Patrol Memo Tells Agents to Send Migrants Back Immediately, Ignoring Asylum Law,” ProPublica, Apr. 2, 2020, <https://www.propublica.org/article/leaked-border-patrol-memo-tells-agents-to-send-migrants-back-immediately-ignoring-asylum-law>.

<sup>26</sup> Camilo Montoya-Galvez, “U.S. ramps up mass expulsions of migrants as border crossings rise,” CBS News, June 13, 2020, <https://www.cbsnews.com/news/us-ramps-up-mass-expulsions-migrants-border-crossings-rise-coronavirus-restrictions/>.

- **Third-country removal process**

Finally, the proposed regulations create an alarming new process that would give DHS authority to remove asylum-seekers to third countries, even if they may face persecution there. Under the proposed rules, DHS could remove the few asylum-seekers for whom the new national security bar applies, but who manage to establish that it is more likely than not they will face torture in their country of removal, to third countries unless they are able to prove that their life or freedom would be threatened on account of a protected ground in that third country. Furthermore, DHS could remove these individuals to third countries before their application for relief is adjudicated, even though the proposed rules contemplate that a judge would consider applicability of the new health bar *de novo* during these proceedings. Requiring an applicant to prove that they will not face persecution in a third country is unreasonable, particularly given that they may not be familiar with the third country and that DHS may attempt to remove them to multiple third countries, including where they could potentially face “chain refoulement” to their countries of origin.

The United States’ obligation to avoid *refoulement*, or the forcible transfer or return of people to places where they would face persecution or torture, applies not just to returns to one’s country of origin or last residence but to forcible transfer to any country or territory where one may face such grave harm.<sup>27</sup> By contemplating transfers of people to third countries unless *they* manage to prove – uncounseled, and potentially with no information about where they are being transferred – that they will not face persecution there, the process envisioned here actively enables *refoulement*.

For all these reasons, Amnesty International USA urges DHS and DOJ to immediately rescind this unlawful rule, and demands that the administration immediately cease weaponizing public health to circumvent its binding obligations to people seeking protection under U.S. and international law.

Sincerely,



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<sup>27</sup> “Amnesty International Public Statement: Halt the ‘Remain in Mexico’ Plan,” April 15, 2019, <https://www.amnesty.org/download/Documents/AMR5101722019ENGLISH.PDF>.