



August 10, 2020

Department of Justice, Department of Homeland Security
Regulatory Coordination Division, Office of Policy and Strategy.
Via electronic submission

Re: Security Bars and Processing

USCIS Docket No: 2020-0013; A.G. Order No. 4747-2020

The City of New York (“the City”) submits this comment to oppose the U.S. Department of Justice’s (“DOJ”) and the Department of Homeland Security’s (“DHS”) Proposed Rule entitled “Security Bars and Processing” which was published in the Federal Register on July 9, 2020 (“Proposed Rule”).¹ The Mayor’s Office of Immigrant Affairs (“MOIA”), NYC Health and Hospitals (“H+H”), the Department of Health and Mental Hygiene (“DOHMH”), and the Department of Social Services (“DSS”) contributed to this comment.

The Proposed Rule unlawfully seeks to redefine the “danger to the security of the United States” bars to eligibility for asylum and withholding of removal under the guise of public health. DHS and DOJ seek to “clarify that they can categorically bar from eligibility for asylum, statutory withholding of removal and withholding of removal under the CAT regulations as dangers to the security of the United States [asylum seekers] who potentially risk bringing in deadly infectious disease to, or facilitating its spread within, the United States.”² Thus, under the Proposed Rule, any asylum seeker who recently came from or traveled through a country where any contagious or infectious disease (i.e., COVID-19) is prevalent or exhibits any symptom is categorically ineligible for asylum, even if they are not in fact infected and even if they are found to have a well-founded fear of persecution. Furthermore, the Proposed Rule would destroy critical due process protections for those seeking refuge in the United States by applying the eligibility bars to asylum and withholding of removal during the credible fear screening process. DHS and DOJ offer no explanation as to why asylum seekers in particular are singled out for this restriction and the agencies fail to consider alternative policies to mitigate against potential public health concerns, such as limiting the use of detention where infectious disease can spread rapidly and allowing asylum seekers to safely self-quarantine.

The Proposed Rule is yet another thinly veiled attack on asylum, carrying out the same anti-immigrant agenda as the Migrant Protection Protocol (“MPP”), the Third Country Transit Bar,³ and several other recent Proposed and Interim Final Rules.⁴ With its expansive sweep and

¹ Security Bars and Processing, 85 FR 41201 (July 9, 2020).

² 85 FR 41208.

³ This interim final rule was recently vacated in its entirety for the federal administration’s failure to follow the notice-and-comment requirements of the APA. *See Capitol Area Immigrants’ Rights Coalition, et al v. Trump*, No. 19-cv-02117-TJK, (D.D.C. Jun. 30, 2020).

⁴ *See* comment in opposition to Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 FR 36264 (Jun. 15, 2020) at <https://www1.nyc.gov/assets/immigrants/downloads/pdf/comments/Procedures-for-Asylum-and-Withholding-of->

overbroad discretion to non-health related agencies to make health-related decisions, the Proposed Rule could have the practical effect of completely shutting down our decades-old asylum system. This rule serves no public health purpose and would instead send the most vulnerable back to countries where they may face persecution, torture, or even death.⁵

New York City's Opposition to the Proposed Rule

The City enjoys a proud legacy as the ultimate city of immigrants. For generations, people from around the world have come here to seek refuge and make a better life for themselves and their families. New York City and State are major destinations for asylum seekers.⁶ Almost 40% of the City's population, around 3.1 million people, are immigrants. This immigrant population is deeply tied to the City as a whole, with nearly 60% of New Yorkers living in households that have at least one immigrant.⁷

Immigrants have been on the frontlines of the fight against the spread of COVID-19 in New York City. Immigrants make up 58% of the essential workers that help all New Yorkers

[Removal-Credible-Fear-and-Reasonable-Fear-Review-NYC-MOIA-Comment.pdf](#); comment in opposition to Procedures for Asylum and Bars to Asylum Eligibility, 84 FR 69640 (Dec 19, 2019) at <https://www1.nyc.gov/assets/immigrants/downloads/pdf/comments/NYC-Comment-Procedures-for-Asylum-and-Bars-to-Asylum-Eligibility.pdf>; comment in opposition to Asylum Application, Interview, and Employment Authorization for Applicants, 84 Fed. Reg. 62374 (Nov. 14, 2019) at <https://www1.nyc.gov/assets/immigrants/downloads/pdf/comments/DHS-Docket-No-USCIS-2019-0011-NYC-Comment.pdf>; comment in opposition to U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements, 84 FR 67243 (Dec. 9, 2019) at <https://www1.nyc.gov/assets/immigrants/downloads/pdf/comments/us-citizenship-and-immigration-services-fee-schedule-comment-20191230.pdf>; comment in opposition to Removal of 30-Day Processing Provision for Asylum Applicant-Related Form I-765, 84 FR 47248 (Sep. 9, 2019) at <https://www1.nyc.gov/assets/immigrants/downloads/pdf/comments/Comment-re-EAD-Asylees-11-8-19-CSB-Signed.pdf>; comment in opposition to Asylum Eligibility and Procedural Modifications, 84 FR 33829 (Jul. 16, 2019); 83 Fed. Reg. 55934 (Nov. 9, 2019); 84 Fed. Reg. 62280 (Nov. 14, 2019), 84 Fed. Reg. 67243 (Dec. 9, 2019); *Policy Guidance for Implementation of the Migrant Protection Protocols* (Jan. 25, 2019) available at https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf.

⁵ Elizabeth G. Kennedy & Alison Parker, *Deported to Danger United States Deportation Policies Expose Salvadorans to Death and Abuse*, Human Rights Watch (Feb. 5, 2020), available at <https://www.hrw.org/report/2020/02/05/deported-danger/united-states-deportation-policies-expose-salvadorans-death-and> (finding that at least 138 Salvadorans were killed and over 70 were severely abused after being deported from the U.S. from 2013 to 2019).

⁶ A significant proportion of those individuals granted asylum in any given year reside in the City and New York State (the State). In FY17, 1,510 individuals granted affirmative asylum reside in the State. Nadwa Mossad, *Refugees and Asylees: 2017*, DHS Off. of Immig. Statistics (Mar. 2019), https://www.dhs.gov/sites/default/files/publications/Refugees_Asylees_2017.pdf. In addition, the State and City are major destinations for children asylum seekers. In FY18, 2,837 unaccompanied immigrant children were released from federal custody to adult sponsors in the State, more than the vast majority of other states. Off. of Refugee Resettlement, *Unaccompanied Alien Children Released to Sponsors by State* (last updated Nov. 29, 2018), <https://tinyurl.com/UAC-state>.

⁷ New York City Mayor's Office of Immigrant Affairs, *State of Our Immigrant City: MOIA Annual Report for Calendar Year 2019*, 12, available at <https://www1.nyc.gov/assets/immigrants/downloads/pdf/MOIA-Annual-Report-for-2019.pdf> ("MOIA Annual Report 2019").

meet basic needs like food and health care.⁸ In New York City, immigrants make up 53% of nurses, 81.5% of home health aides, 65.5% of cooks, 53.4% of janitors and building cleaners, and 87.0% of laundry and dry-cleaning workers.⁹ Many of these essential workers are asylees, refugees, and undocumented immigrants. In New York State, 11,400 refugees work in our healthcare industry.¹⁰

As local government, we play a vital role in welcoming immigrants and connecting our most vulnerable residents to services and resources. The City has taken great strides to support those fleeing persecution as they establish safe, stable homes in the City.¹¹ This mayoral Administration and the New York City Council have made unprecedented investments in legal assistance for immigrants—especially for those most vulnerable like asylum seekers.¹² We know that policies that welcome and integrate immigrants, including those fleeing persecution, make the City safer¹³, stronger, and more prosperous.¹⁴ Furthermore, immigrants enrich the City with invaluable cultural and human contributions; they are our neighbors, community leaders, and family members.

Restricting asylum on the pretense of public health threatens public trust in our public health system and would widen the existing disparities that already exist among immigrant communities in New York City. DOHMH strives to protect and promote the health of all New Yorkers, including through outreach to immigrant communities, enrollment assistance for appropriate health and social service programs, promoting access to care regardless of immigration status, and fighting stigma against marginalized communities. Negative rhetoric and restrictive immigration policies have been shown to widen health disparities and instill fear in

⁸ *MOIA Annual Report 2019*; Declaration of Sabrina Fong, Deputy Director of Research and Policy Advisor, New York City Mayor’s Office of Immigrant Affairs, *Department of Homeland Security, et al., v. New York, et al.*, No. 19A785 (U.S. April 13, 2020), available at: https://www.supremecourt.gov/DocketPDF/19/19A785/141515/20200413153014307_19A785%20Motion%20to%20Temporarily%20Lift%20or%20Modify%20Stay.pdf.

⁹ *Id.*

¹⁰ Refugee Workers on the Frontlines and as Essential Workers, *New American Economy* (April 23, 2020), available at: <https://research.newamericaneconomy.org/report/refugee-on-the-frontlines-covid-19/>

¹¹ See e.g., <https://www.nbcnewyork.com/news/local/syria-refugee-new-york-mayor-bill-de-blasio-immigrant/1274304/>; <https://www.nytimes.com/2016/09/20/opinion/our-immigrants-our-strength.html>.

¹² New York City Office of Civil Justice, *2019 Annual Report*, available at https://www1.nyc.gov/assets/hra/downloads/pdf/services/civiljustice/OCJ_Annual_Report_2019.pdf.

¹³ Mike Males, *White Residents of Urban Sanctuary Counties are Safer From Deadly Violence Than White Residents in Non-Sanctuary Counties*, http://www.cjci.org/uploads/cjci/documents/white_residents_of_urban_sanctuary_counties.pdf?utm_content=%7BURIENCODE%5bFIRST_NAME%5d%7D&utm_source=VerticalResponse&utm_medium=Email&utm_term=CJCJ%27s%20report&utm_campaign=New%20Report%3A%20Sanctuary%20Counties%20Safer%20for%20White%20Residents (2017); see TCR Staff, *You’re Safer in a ‘Sanctuary City,’ says New Study*, <https://thecrimereport.org/2017/12/13/youre-safer-in-a-sanctuary-city-says-new-study/> (2017); Tom K. Wong, *The Effects of Sanctuary Policies on Crime and the Economy*, <https://www.americanprogress.org/issues/immigration/reports/2017/01/26/297366/the-effects-of-sanctuary-policies-on-crime-and-the-economy/> (2017).

¹⁴ See *Immigrants as Economic Contributors: Immigrant Tax Contributions and Spending Power*, *Immigration Forum* (September 6, 2018), <https://immigrationforum.org/article/immigrants-as-economic-contributors-immigrant-tax-contributions-and-spending-power/>; *From Struggle to Resilience: The Economic Impact of Refugees in America*, *New American Economy*, (June 19, 2017), <https://research.newamericaneconomy.org/report/from-struggle-to-resilience-the-economic-impact-of-refugees-in-america/>.

communities that already face barriers to maintaining or improving their health.¹⁵ The Proposed Rule, while purporting to protect the health of Americans, threatens to do the opposite, driving vulnerable communities further into the shadows and discouraging patients from seeking care in the midst of a public health emergency. It runs counter to the mission of the City as well as our DOHMH and H+H public health system. It would also make efforts to help immigrant communities most impacted by the pandemic even more difficult.

Additional barriers for asylum seekers undermine the City's commitment to immigrants and are inconsistent with the City's and the country's core values. As such, the City opposes regulations and policies, such as the Proposed Rule, that unnecessarily and unfairly restrict asylum and other humanitarian protections.

I. The Proposed Rule is Unlawful

Individuals fleeing persecution are protected under U.S. and international law.¹⁶ Under federal law, any noncitizen who is physically present in the United States or who arrives in the United States, regardless of their status, may apply for asylum.¹⁷ Thus, anyone arriving at ports of entry or between ports of entry has a right to apply for asylum in the U.S.¹⁸ Similarly, Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT") provides that "[n]o State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."¹⁹

Removal of an individual who has a well-founded fear of persecution or who establishes that they will more likely than not face torture in the proposed country of removal is an extraordinary measure that should be reserved for the most limited circumstances. As the United Nations High Commissioner for Refugees ("UNCHR") has held, "[t]o send the refugee back into the hands of his or her persecutors must be the only available means to eliminate the danger to the security of the country."²⁰ Therefore, the "national security" bar to asylum and parallel bar to withholding of removal under CAT are meant to be construed as narrow exceptions to asylum eligibility and CAT relief.²¹

National security concerns in this context – when used as a valid basis for denying humanitarian relief to those seeking refuge in this country – do not include and should not be conflated with public health. The national security bars have not included public health

¹⁵ Morey, B.N. Mechanisms by Which Anti-Immigrant Stigma Exacerbates Racial/Ethnic Health Disparities. *American Journal of Public Health*. 108(4): 460-463. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5846442/>

¹⁶ 8 USC §1158(a)(1); 1951 Convention relating to the Status of Refugees, 189 U.N.T.S. 137, entered into force April 22, 1954.

¹⁷ 8 USC §1158(a)(1).

¹⁸ *E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242 (9th Cir. 2020).

¹⁹ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3(1), December 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 84.

²⁰ 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*, January 6, 2006, available at: <https://www.refworld.org/docid/43de2da94.html>.

²¹ 8 U.S.C. 1158(b)(2)(C); 8 U.S.C. 1231(b)(3)(B).

historically, but rather refer to terrorists or politically subversive actors whose dangerous activities could cause nontrivial harm to U.S. defense, foreign relations, or economic interests.²² Indeed, Congress has already created separate health-related inadmissibility bars which deny visas and admission to individuals “determined...to have a communicable disease of public health significance.”²³ If Congress intended to subject asylum seekers to the health-related bars, it would have done so.²⁴

However, under the Proposed Rule, asylum seekers can be denied asylum if they originated in or traveled through a country where a contagious disease is prevalent, even if they have a well-founded fear of persecution. If the Proposed Rule were to go into effect now, it would act as a categorical ban on asylum as nearly every country in the world has confirmed cases of COVID-19.²⁵ The Proposed Rule would produce absurd results, such as removing individuals who are not ill to a country where they will face persecution *and* an epidemic. Moreover, in addition to applying a blanket ban on asylum to those who came “from a country, or a political subdivision or region of a country, or has embarked at a place, where such disease is prevalent or epidemic”, the Proposed Rule would also require automatic, mandatory denial of asylum to anyone exhibiting “symptoms consistent with being afflicted with any contagious or infectious disease or has come into contact with such a disease.”²⁶ The logical conclusion of this rule would mean that even an asylum seeker who only came into contact with the disease in the U.S., such as through incarceration at an ICE detention facility, would be denied the protection she desperately needs.²⁷ While the agencies may promulgate regulations to “establish additional

²² *Matter of A-H-*, 23 I&N Dec. 774, 788 (AG 2005).

²³ 8 USC §1182(a)(1)(A)(i).

²⁴ When the United States ratified the Refugee Protocol in 1968, the Secretary of State in a letter transmitting the Protocol to the President for signature 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.” See Sec. of State, Letter of Submittal to the President re: Protocol Relating to the Status of Refugee, July 25, 1968, available at <https://rb.gy/eoz65s>. Indeed, the Department of State and the Department of Health, Education and Welfare explicitly rejected a proposed reservation to the Refugee Protocol on “health related grounds.” (Dep’t of Health, Edu., and Welfare, Memorandum for Ambassador Graham Martin re: Protocol Relating to the Status of Refugee, July 22, 1968; Dep’t of Health, Edu., and Welfare, Letter to Ambassador Graham Martin re: Protocol Relating to the Status of Refugee, July 16, 1968 - on file).

²⁵ See *COVID-19 Map*, Johns Hopkins Coronavirus Research Center, <https://coronavirus.jhu.edu/map.html> (last accessed Aug. 6, 2020)

²⁶ 85 FR 41215 (“In determining whether there are reasonable grounds for regarding an alien or a class of aliens as a danger to the security of the United States under section 208(b)(2)(A)(iv) of the Act, the Secretary of Homeland Security may consider whether the alien exhibits symptoms consistent with being afflicted with any contagious or infectious disease *or* has come into contact with such disease, *or* whether the alien or class of aliens is coming 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 (or had come from that country, subdivision, or region, or had embarked at that place, during a period in which the disease was prevalent or epidemic there)”)(emphasis added).

²⁷ This is not an unlikely scenario given the spread of COVID-19 throughout ICE detention facilities. As of July 28, 2020, 3,868 people detained in ICE facilities have tested positive for COVID-19. ICE Guidance on COVID-19, U.S. Immigration and Customs Enforcement, <https://www.ice.gov/coronavirus> (last accessed July 28, 2020). See also, Priscilla Alvarez, *Nearly 75% of detainees at US immigration facility in Virginia have coronavirus*, CNN (July 23, 2020), available at: <https://www.cnn.com/2020/07/23/politics/immigration-ice-detention-coronavirus-farmville/index.html>. See also, *Early Experiences with COVID-19 at ICE Detention Facilities*, DHS OIG (June 18, 2020), available at: <https://www.oig.dhs.gov/sites/default/files/assets/2020-06/OIG-20-42-Jun20.pdf> (“facilities reported concerns with their inability to practice social distancing among detainees, and to isolate or quarantine individuals who may be infected with COVID-19”); Lorenzo Zazueta-Castro, *CBP, ICE employees now plaintiffs in*

limitations and conditions” on asylum eligibility, those regulations must be consistent with the statute.²⁸ The Proposed Rule is premised upon an attenuated logic that has no basis in law and the legitimate public health concerns could be addressed with accepted and proven public health practices, such as quarantining entrants to this country for 14 days.

The DHS and DOJ make the unprecedented argument that because a pandemic can cause devastating economic effects on the U.S. and because “danger to the security of the United States” can include within its meaning a risk to the Nation’s “economic interests,”²⁹ all asylum seekers who are from or who passed through countries where DHS and DOJ have determined a “communicable disease of public health significance” is “prevalent” can be considered dangers to U.S. national security.³⁰ The economic effects related to the spread of a pandemic cannot simply be attributed to granting asylum to one individual. That connection is too attenuated to support the conclusion that an individual poses a nontrivial risk to the security of the United States, even where they are not carrying an infectious disease. Moreover, the Proposed Rule is not limited to the current COVID-19 pandemic, allowing DHS and DOJ to categorically bar asylum seekers from countries where they have determined a “communicable disease of public health significance,” including treatable diseases, is “prevalent.”³¹ It strains credulity to imagine that an asylum seeker from a country where Gonorrhea³² is prevalent could be deemed a national security risk.

In response to the ongoing COVID-19 pandemic, UNHCR explained that while “States are entitled to take measures to ascertain and manage risks to public health...imposing 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.”³³ The Proposed Rule, which sets up a categorical bar, would do just that. This new definition for the national security bars contravenes the intent of both international and federal law.

II. The Proposed Rule has no relation to public health

There is no public health rationale for denying admission to individuals based on legal status, and thus, there is no rationale for the Proposed Rule.³⁴ Diseases affect everyone,

hazard pay lawsuit, The Monitor (July 23, 2020), available at: <https://www.themonitor.com/2020/07/23/cbp-ice-employees-now-plaintiffs-hazard-pay-lawsuit/> (Conditions in DHS facilities have become so dangerous that ICE and CBP employees have filed suit for hazard pay)

²⁸ 8 U.S.C. 1158(b)(2)(C)

²⁹ *Matter of A-H-*, 23 I&N Dec. 774, 788 (AG 2005).

³⁰ 85 FR 41211-2.

³¹ *Id.*

³² The definition of “communicable disease of public health significance” includes Gonorrhea. 42 CFR 34.2(b)(3).

³³ 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* (March 16, 2020), available at: <https://www.refworld.org/docid/5e7132834.html>.

³⁴ Letter to HHS Secretary Azar and CDC Director Redfield signed by leaders of public health schools, medical schools, hospitals, and other U.S. institutions, Public Health Experts Urge U.S. Officials to Withdraw Order Enabling Mass Expulsion of Asylum Seekers, May 18, 2020, available at: <https://www.publichealth.columbia.edu/public-health-now/news/public-health-experts-urge-us-officials-withdraw-order-enabling-mass-expulsion-asylum-seekers>.

regardless of immigration status. Under the Proposed Rule, an asylum seeker may be mandatorily denied asylum for transiting through a country deemed by DOJ and DHS to have an outbreak of an infectious disease, while tourists, students, or business travelers who travel from or passing through that same country are not banned from entering the U.S. The Proposed Rule singles out asylum seekers for disparate treatment under the pretext of public health and fails to explain the nexus between grants of asylum or withholding of removal and the spread of infectious disease. Moreover, the Proposed Rule does not offer any explanation as to why abandoning our humanitarian commitments is necessary over alternative measures to mitigate against the spread of infectious disease, which will vary by disease and could include vaccination, physical distancing, use of face coverings, and other prophylaxis; testing; isolating and quarantining as appropriate; care and treatment; and limiting the use of detention.³⁵

The Proposed Rule also fails to consider the negative public health consequences of sending those fleeing persecution back to countries where they may face violence, torture, or death. Public health would be harmed not only by putting those fleeing persecution and torture back in harm's way, but by increasing removals which spread disease. Those seeking safety are even more vulnerable during the current COVID-19 pandemic, particularly those who have disabilities and older adults and people with underlying medical conditions that put them at increased risk of severe COVID-19 illness if infected. As has been documented during the COVID-19 pandemic, the deportations carried out by federal agencies have significantly fueled the global spread of infectious disease.³⁶ Now, the Proposed Rule seeks to penalize those fleeing persecution and violence for the agencies' contributions in increasing the infection numbers in other countries.

Moreover, the Proposed Rule is not a necessary policy to prevent the spread of COVID-19, as regardless of potential exposure, asylum seekers could self-quarantine in the U.S. for fourteen days, the amount of time recommended by the Centers for Disease Control and Prevention, rather than being subject to a permanent bar to asylum and withholding of removal. Indeed, public health experts have called for "evidence-based public health measures to process asylum seekers and other persons crossing the U.S. border" rather than imposing a blanket ban on people seeking asylum.³⁷

Additionally, the Proposed Rule reaches far beyond preventing the specific threat of the spread of a highly contagious disease that has reached global pandemic scale, such as COVID-

³⁵ See Id. ("Rather than detaining asylum seekers in congregate settings, allow asylum seekers to wait for their court hearings with their families or other contacts in the United States through parole, case management and other alternatives to detention").

³⁶ Barbara Marcolini, Emily Kassie, Dmitriy Khavin and Drew Jordan, *How ICE Helped Spread the Coronavirus*, New York Times (July 10, 2020), available at: <https://www.nytimes.com/video/us/100000007122997/ice-deportations-coronavirus-video.html?referringSource=articleShare>.

³⁷ *Public Health Measures to Safely Manage Asylum Seekers and Children at the Border* (May 2020), <https://www.humanrightsfirst.org/sites/default/files/PublicHealthMeasuresattheBorder.05.18.2020.pdf> ("Rather than imposing a ban or suspension on people seeking protection from harm, U.S. authorities should use measures recommended by public health experts to process asylum seekers and all other travelers crossing the U.S. border. . . . These public health measures should include measures such as social distancing, appropriate masks, disinfectants, and sanitation supplies, as well as the use of parole to family and friends rather than detention in congregate settings; and – when and if required of people crossing the southern border – self-quarantine at destination locations instead of mass quarantine by CBP in congregate settings.")

19. The Proposed Rule is not in fact limited to the current COVID-19 pandemic, but to any disease that has “triggered an ongoing declaration of a public health emergency” under federal law or that DHS and DOJ, in “consultation” with Health and Human Services (“HHS”), determine is a “communicable disease of public health significance” under 42 CFR 34.2(b) that is prevalent or epidemic in a particular country or political subdivision.³⁸ As mentioned above, “[c]ommunicable disease of public health significance” under 42 CFR 34.2(b) includes illnesses that are treatable such as sexually transmitted diseases and Hansen’s Disease.³⁹ Diseases of public health concern could include diseases of varying modes of transmission, infectiousness, and incubation and infectious periods, resulting in the wholesale exclusion of people who may have had little or no risk of infection or of being infectious upon arrival to the U.S. The Proposed Rule does not address why this extraordinarily broad scope is necessary to protect public health.

Furthermore, the Proposed Rule fails to describe the nature of HHS’s consultative role or why DHS and DOJ would be the more appropriate departments, as opposed to HHS, to make determinations about what constitutes a “communicable disease of public health significance.” Indeed, U.S. Citizenship and Immigration Services’ own policy manual indicates, “[b]ecause medical knowledge and public health concerns can and do change over time, Congress gave the Department of Health and Human Services (HHS) the authority to designate by regulations which conditions make a person inadmissible on health-related grounds.”⁴⁰ The Proposed Rule allows too much discretion to DHS and DOJ, which are not health agencies. This structure further supports the conclusion that the Proposed Rule does not serve a public health goal but rather a political goal of curtailing asylum by any means.

III. The Changes to the CFI process and withholding and deferral under CAT undermine due process and deprive asylum seekers of meaningful opportunity to have their claims adjudicated

If implemented, the Proposed Rule would deprive those fleeing persecution of any meaningful, fair opportunity to have their claims adjudicated, with the ultimate goal of expediently expelling from the U.S. virtually all who attempt to seek shelter from harm. First, the rule would change the existing law so that the national security bars to asylum, including the new public health bar, will be applied at the initial fear screening stage, when asylum seekers are often detained and thus cannot easily access counsel. Having applied this overly expansive bar at the outset, the rule also seeks to impermissibly raise the credible fear standard asylum seekers must meet to be allowed to continue pursuing their claims in the U.S. Finally, even if an asylum seeker manages to meet this elevated standard, the rule would authorize DHS to remove her to a third country, without regard to the COVID-19 pandemic situation there, from where she must pursue her claim. No matter how strong the need for protection from persecution and torture, the end result is the same—expulsion from the U.S. after an initial screening.

³⁸ 85 FR 41212.

³⁹ 42 CFR 34.2(b)(3)-(5); *See Hansen's Disease (Leprosy)*, Centers for Disease Control and Prevention, available at <https://www.cdc.gov/leprosy/index.html> (last accessed July 22, 2020) (“Leprosy was once feared as a highly contagious and devastating disease, but now we know it doesn’t spread easily and treatment is very effective.”)

⁴⁰ USCIS Policy Manual, Vol. 8, Part B Chapter 1 <https://www.uscis.gov/policy-manual/volume-8-part-b-chapter-1>

Under the current regulations governing the credible fear interview (“CFI”) screenings, as long as an asylum seeker establishes that there is a “significant possibility” that she can demonstrate eligibility for asylum in a future hearing before an immigration judge, she must be allowed to pursue her case in a full removal hearing with the attendant due process guarantees. This initial screening was purposely designed by Congress to follow “a low screening standard”⁴¹ such that “there should be no danger” that an asylum seeker be “returned to persecution.”⁴²

Yet, in clear contravention to Congressional intent, the Proposed Rule seeks to turn this initial screening phase, where there are no due process guarantees, into *the* forum where asylum seekers must prove their case. First, the rule advances to the CFI stage the application of the bars to asylum and withholding of removal, including the new public health bar contemplated by this rule.⁴³ As explained above, the overly expansive nature of this public health bar will allow asylum officers, not immigration judges, to categorically deny most asylum seekers for asylum or withholding of removal. This outcome fails to consider the realities asylum seekers face when they are going through the initial screening phase. These screenings happen just days after asylum seekers arrive at ports of entry or are apprehended and when most asylum seekers are in detention, drastically limiting the opportunity to consult counsel. Forcing asylum seekers to fully lay out their claims and prove that they are not subject to any bars at this point when they have just concluded a traumatic journey, are detained in notoriously poor conditions, and without access to any legal help poses enormous due process concerns.

Second, by advancing the eligibility bar determination, the rule authorizes the agencies to force asylum seekers to meet a much higher standard of proving that they are “more likely than not” to be tortured if removed to their home country. As most asylum seekers will have been deemed ineligible for asylum or withholding of removal, they will be forced to pursue, instead, deferral of removal protection under CAT. The agencies are open about their contravention of Congressional intent, stating that this rule will force applicants to meet “their ultimate burden to demonstrate eligibility” at this initial screening phase instead of in a full immigration court hearing with a judge, access to counsel, and opportunity for testimony.⁴⁴ The Proposed Rule does not indicate how asylum seekers, without time to prepare or access to counsel, are supposed to meet this impermissibly high standard.

Even if an individual is miraculously able to meet these standards, the Proposed Rule would still remove her from the U.S. by giving the DHS Secretary “unreviewable discretion” to remove such an individual to a third country instead of giving her the opportunity to pursue her claims in a full immigration court hearing in the U.S.⁴⁵ This is an extremely reckless policy that will not only contribute to the spread of the COVID-19 virus globally but also put vulnerable individuals directly in harm’s way. The agencies claim that the Proposed Rule is necessary

⁴¹ 142 Cong. Rec. 25,347 (1996).

⁴² H.R. Rep No. 104-469, Pt.1, at 158 (1996).

⁴³ Proposed Rule incorporates the third country transit asylum bar, which has been struck down by federal court. This interim final rule was recently vacated in its entirety for the federal administration’s failure to follow the notice-and-comment requirements of the APA. *See Capitol Area Immigrants’ Rights Coalition, et al v. Trump*, No. 19-cv-02117-TJK, (D.D.C. Jun. 30, 2020).

⁴⁴ 85 FR 41210.

⁴⁵ 85 FR 41212.

because admitting anyone who could have had any possible contact with COVID-19 can contribute to the spread of the disease in the U.S. Yet, they would send such individuals to third countries to increase the global spread. This is in line with how DHS' actions have helped to spread the disease domestically and internationally.⁴⁶ Even besides global health ramifications, this provision would be in contravention of U.S.'s domestic and international legal obligations to provide a pathway to humanitarian relief here in the U.S. Just a month ago, the Ninth Circuit Court cast serious doubts on the agencies' determination of which third countries are "genuinely safe."⁴⁷ As the Ninth Circuit pointed out, the "core regulatory purpose" of asylum requires that the system "ensure some degree of safety for aliens barred from asylum."⁴⁸ Given the agencies' track record of finding "safe" third countries that have been overwhelmingly documented to be dangerous, the Proposed Rule would essentially be allowing the DHS secretary to send victims of torture to places where they are likely to suffer even further harm.

Taken together, the erosions to due process contained in this rule illustrate the ultimate goals of the Proposed Rule—to deny the opportunity for a full immigration court hearing at all costs and to expel all asylum seekers from the U.S. This direct assault on our nation's decades old commitment to international humanitarian protections affects New York City directly, especially if the agencies' final rule on the expansion of expedited removal is allowed to take effect.⁴⁹ Even without the expansion, expedited removal applies to many asylum seekers arriving at the City's international airports. With the expansion, expedited removal would apply to any New York City resident who DHS believes has not resided in the U.S. for more than two years.⁵⁰ Of those residents placed in expedited removal, anyone wishing to apply for asylum will be subject to the Proposed Rule's provisions designed to expel with no due process. This would undermine the investments New York City has made in deportation defense and emergency funding for rapid response legal services.

IV. Conclusion

Having no basis in public health, the Proposed Rule's true aim is to further limit asylum and immigration to the U.S. – part of a larger anti-immigrant agenda rooted in racism.⁵¹ Denying lifesaving protections, the Proposed Rule fails to articulate a public health rationale or legal basis for imposing a categorical bar to asylum so broadly written that it could end asylum. Thus, the Proposed Rule continues this federal administration's trend of making the United States a hostile place for immigrants to the detriment of everyone in our communities. The City is particularly concerned with any rule that targets the most vulnerable individuals fleeing for safety, those of

⁴⁶ Emily Kassie and Barbara Marcolini, *'It Was Like a Time Bomb': How ICE Helped Spread the Coronavirus*, New York Times (July 10, 2020), available at: <https://www.nytimes.com/2020/07/10/us/ice-coronavirus-deportation.html>

⁴⁷ Ninth Circuit invalidated the agencies' interim final rule, Asylum Eligibility and Procedural Modifications, 84 FR 33829 (July 16, 2019), in part because "the Rule does virtually nothing to ensure that a third country is a 'safe option.'" *E. Bay Sanctuary Covenant v. Barr*, 964 F.3d 832 (9th Cir. 2020).

⁴⁸ *Id.*

⁴⁹ Designating Aliens for Expedited Removal, 84 FR 35409 (Jul. 23, 2019).

⁵⁰ As indicated in the City's comment opposing the expansion of expedited removal, our analysis of Census Bureau data, we estimate that about 34,000 New Yorkers would be directly affected by the law.

⁵¹ Caitlin Dickerson and Michael D. Shear, *Before Covid-19, Trump Aide Sought to Use Disease to Close Borders*, New York Times (May 3, 2020), available at: <https://www.nytimes.com/2020/05/03/us/coronavirus-immigration-stephen-miller-public-health.html>

whom our country has a long, proud history of protecting. As discussed above, the City is deeply invested in both supporting immigrant communities, including the most vulnerable, and honoring our legacy as a beacon for those seeking refuge. For these reasons, the City calls on DHS and DOJ to rescind the Proposed Rule.