

**NATIONAL
IMMIGRANT
JUSTICE CENTER**
A HEARTLAND ALLIANCE PROGRAM

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Re: [Security Bars and Processing; Docket No: USCIS 2020-0013, A.G. Order No. 4747-2020; RIN 1615-AC57](#) (“Proposed Rules” or “NPRM”)

Dear Assistant Director Reid and Division Chief Davidson,

The National Immigrant Justice Center (“NIJC” or “we”) defends the rights and dignity of all immigrants, including asylum seekers. With the above-referenced Proposed Rules the Department of Justice (DOJ)’s Executive Office of Immigration Review (EOIR) and the Department of Homeland Security (DHS) (collectively, “the Departments”) weaponize public health to override U.S. and international obligations to asylum seekers. Therefore, NIJC writes to express our strong opposition to the Proposed Rules and call for their rescission. NIJC urges the Departments to withdraw the Rules in their entirety and ensure that a full and fair asylum system is made accessible to all who seek safety here.

NIJC’s strong interest and opposition to proposed changes

NIJC is dedicated to ensuring human rights protections and access to justice for immigrants, refugees, and asylum seekers. NIJC provides direct legal services to and advocates for these populations through policy reform, impact litigation, and public education. Since its founding more than three decades ago, NIJC uniquely blends individual client advocacy with broad-based systemic change.

Headquartered in Chicago, NIJC provides legal services to more than 10,000 individuals each year, including many asylum seekers, torture survivors, and unaccompanied children who have entered the United States by crossing the U.S.-Mexico border. These individuals have overcome unimaginable persecution and torture in their home countries and journeyed to the United States in hopes of finding a better future. Under these Proposed Rules, the ability for many to access safety is effectively destroyed. As our comments explain further below, the Proposed Rules are not reasonable interpretations of statutory requirements, but a wholesale ban on asylum seekers and torture survivors. NIJC strongly condemns these unlawful, nonsensical, indefensible regulatory changes to asylum law which will send countless migrants back to certain harm or death. For these reasons, NIJC calls for immediate rescission of the Proposed Rules.

More specific comments follow. Thank you for your consideration and please do not hesitate to contact Azadeh Erfani for further information.

/s/

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DETAILED COMMENTS

In opposition to Security Bars and Processing; Docket No: USCIS 2020-0013, A.G. Order No. 4747-2020; RIN 1615-AC57

The Departments propose three drastic changes to the regulations. First, the Departments propose to redefine Sections 208(b)(2)(A)(iv) and 241(b)(3)(B)(iv) of the Immigration and Nationality Act (“INA”), which bar asylum seekers from asylum and withholding of removal if there are reasonable grounds to believe they are a “danger to the security of the United States.” Specifically, the Departments propose to insert public health grounds to bar asylum seekers from asylum and withholding, leaving only deferral under the Convention Against Torture (“CAT”). Second, the Departments propose to apply those bars in expedited removal, summarily removing individuals who fail to meet the high burden under CAT. Third, the Departments advocate for further leeway to remove torture survivors prior to adjudication of their claims under Section 240 of the INA, so long as the asylum seeker has not “affirmatively established” that it is more likely than not that they could be tortured in that third country.

Our comments below review the substantive changes put forward in the Proposed Rules to screenings in expedited removal and changes to eligibility for asylum, withholding of removal, and relief under the CAT. As explained *infra*, the Departments’ Proposed Rules violate the INA, international obligations of non-*refoulement*, the Due Process Clause of the U.S. Constitution, and the Administrative Procedures Act (“APA”). Any of these violations—in isolation, let alone in the aggregate—are fatal to the Proposed Rules, rendering them unlawful; NIJC thus urges the Departments to rescind the NPRM in its totality.

I. The Proposed Rules Violate the INA.

The Departments purport to “clarify” that the asylum and withholding bar for those alleged to pose a “danger to the security of the United States” may include “emergency public health concerns based on communicable disease.”¹ In order to make this leap, they try to transplant public health concerns into the phrase “security of the United States” and argue that one’s travel through or from a country with a prevalent disease, as well as exhibiting symptoms “consistent with” such disease, suffice to trigger this bar.

In doing so, the Departments’ Proposed Rules interfere with their statutory mandate under the INA and usurp Congress’ power to define the bounds of asylum eligibility. Furthermore, though the Departments find inspiration from the Centers for Disease Control and Prevention’s (“CDC”) order shutting the border, they have no statutory support for the regulatory scheme of the NPRM.

¹ Security Bars and Processing, 85 Fed. Reg. 41201, 85 Fed. Reg. 41201.

Finally, the Departments also act *ultra vires* by requiring asylum seekers to affirmatively establish that they are more likely to be tortured to obtain relief.

A. The Proposed Rules Violate the Plain Text of the INA, Which Does Not Bar Asylum Seekers on Public Health Grounds.

Forty years ago, Congress passed the Refugee Act of 1980 (“Refugee Act”), codifying portions of the United Nations Protocol Relating to the Status of Refugees (hereinafter the “Refugee Protocol”) and mandating a uniform asylum system.² Under section 208(a)(1) of the INA, Congress provided that any person “physically present in the United States or who arrives in the United States . . . irrespective of such [person’s] status, may apply for asylum[.]”³ This broad definition sought to bring the U.S. in compliance with the requirements of the Refugee Protocol not to refoul or return asylum seekers to the persecution they fled—an obligation that the Refugee Act adopted as its policy.⁴

Congress also defined the limits of asylum eligibility, listing specific bars to asylum or withholding of removal. Barred individuals include those who ordered, incited, assisted, or participated in the persecution of others; have been convicted of particularly serious crimes; have committed serious non-political crimes outside the United States; are a danger to the security of the United States; or were firmly resettled in another country.

Simply put, the plain language of U.S. asylum law does not permit barring asylum seekers on public health grounds. The Departments thus redefine one of the aforementioned bars (“danger to the security of the United States”), forcing a notably absent public health bar into this existing statutory bar.⁵ By effectively barring individuals from asylum and withholding eligibility that Congress chose not to bar, the NPRM is unlawful.

Nevertheless, Proposed 8 C.F.R. §§ 208.13(c)(10) and 1208.13(c)(10) and Proposed 8 C.F.R. §§ 208.16(d)(2) and 1208.16(d)(2) hinge on the Departments’ distortion of the INA’s plain text. The Departments twist Congress’ definition in two important ways: first, they stretch “danger to the security of the United States” beyond logic to include public health; second, they erroneously

² Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102. (Codified as 8 U.S.C. §§ 1157-1159 (1980)). For background on the Refugee Act, see Deborah E. Anker & Michael H. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9 (1981).

³ See 8 U.S.C. § 1158(a)(1).

⁴ See Refugee Act, *supra* n. 2 (“The Congress declares that it is the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands[.]”).

⁵ See INA § 208(b)(2)(A)(iv), 8 U.S.C. § 1158(b)(2)(A)(iv) and INA § 241(b)(3)(B)(iv), 8 U.S.C. § 1231(b)(3)(B)(iv).

interpret “reasonable ground to believe” that individuals pose such a danger as inclusive of travel through/from countries where a communicable disease is prevalent as well as exhibiting symptoms “consistent with” such disease.⁶ The INA does not permit the Attorney General (“AG”) to make such substantial changes to Congress’ statutory mandate. Finally, the NPRM is also inconsistent with other sections of the INA that explicitly render individuals with certain communicable diseases inadmissible.

1. Congress understood danger to the security of the United States to include heightened security risks to national security—not health-related risks.

As the Third Circuit has explained, the phrase “danger to the security of the United States” originates in the Refugee Protocol and was incorporated in the Refugee Act.⁷ There is unanimous agreement (among foreign courts, international law experts, and Congress’ legislative history) that this bar was conceived as a narrow exception to *non-refoulement* obligations.⁸ Because Congress intended to protect asylum seekers “to the fullest extent of our Nation’s international obligations,”⁹ this bar has been typically applied in cases where an asylum seeker is alleged to support terrorism or violent acts towards the United States.¹⁰ After all, “‘danger to the security of the United States’ includes an inherent seriousness requirement.”¹¹

Contrary to the Departments’ contention, “the [Refugee Protocol’s] language, as well as the statute and its legislative history, make clear that Congress did not intend to allow DHS to remove otherwise-eligible asylees who do not present genuine security threats to the United States.”¹² Importantly, “the plain language and structure of the [Refugee] Protocol demonstrate that a state may expel only asylees who present true security threats to the United States.”¹³

⁶ 85 Fed. Reg. at 41215.

⁷ *Yusupov*, 518 F.3d at 203.

⁸ *Id.*

⁹ *Id.*

¹⁰ See *Yusupov*, 518 F.3d at 196 n.19; *Malkandi v. Holder*, 576 F.3d 906 (9th Cir. 2009) (alleged links to terrorist groups); *Matter of A–H–*, 23 I. & N. Dec. 774, 788 (AG 2005) (respondent was leader-in-exile in armed terrorist group that persecuted others); *Hernandez v. Sessions*, 884 F.3d 107, 112 (2d Cir. 2018) (“Congress is free to decide that an alien who provided material support to a terrorist organization, even if under duress, is a danger to the security of the United States.”) (citations omitted).

¹¹ See *Yusupov*, 518 F.3d at 204; see also n. 34 (“‘Danger’ inherently requires a heightened level of risk”).

¹² See *Hernandez*, 884 F.3d at 113 (Droney, J., concurring).

¹³ *Id.* (referencing *Swarna v. Al–Awadi*, 622 F.3d 123, 132 (2d Cir. 2010)). See also 85 Fed. Reg. at 41209 (reviewing legislative history distinguishing between national security and economic interests).

The Departments do not demonstrate their grasp of this legislative history and international obligation, as incorporated into the Refugee Act and the INA. Instead, the Departments focus on the AG’s prior interpretation of this phrase as “a risk to the Nation’s defense, foreign relations, or economic interests”—following the INA’s definition of “national security” in a different section of the INA.¹⁴ Then, they pivot to analyzing the collateral economic impact of communicable diseases, forcing this narrow definition to suit their redefinition of asylum and withholding eligibility.

There are three problems with these leaps. First, the definition of “national security” the Departments seek to import into the Refugee Act *strictly* concerns the designation of foreign terrorist organizations; unlike other definitions in the INA, it is not applicable to the rest of the statute, including asylum law.¹⁵ Second, it is inconsistent with the legislative history and international obligation Congress incorporated into the Refugee Act, stressing “true security threats” as the crux of this bar.¹⁶ Third, even if this definition bears on the interpretation elsewhere in the INA, it is clearly tethered to a heightened danger of terrorist organizations, where past conduct, material support, and *mens rea* are pertinent to the risk assessment—not whether one struggles with a chronic cough or travelled through a country afflicted with infectious diseases.¹⁷ The Departments must not cherry-pick ill-suited definitions and interpretations that are convenient for their purpose of stretching this bar beyond reason.¹⁸

Last, the Departments try to find cover under 8 U.S.C. § 1158(b)(2)(C), claiming that Congress gave the AG free license to add new bars to asylum eligibility. Here again, they err. Congress was very clear that any limitation must be “consistent with” 8 U.S.C. § 1158. As the Ninth Circuit recently explained in striking another unlawful ban on asylum:

¹⁴ See *Matter of A-H-*, 23 I. & N. Dec. 744, 788 (AG 2005)). See also INA § 219(d)(2), 8 U.S.C. § 1189(d)(2) (defining “national security,” for the purposes of that section, as “the national defense, foreign relations, or economic interests of the United States”). Although the

¹⁵ See INA § 219(d)(2), 8 U.S.C. § 1189(d)(2) (“As used in this section... the term “national security” means the national defense, foreign relations, or economic interests of the United States”) (emphasis added). In contrast, general definitions in the INA, which apply across sections, find their home in 8 U.S.C. § 1101.

¹⁶ See *Hernandez*, 884 F.3d at 113.

¹⁷ The Departments’ appeal to the probable cause standard, granted deference under *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 843–44 & n. 11 (1984) by the Third Circuit, is further evidence that this bar concerned criminal or culpable conduct or association, not physical health concerns that individuals cannot control. See 85 Fed. Reg. at 41210; *Yusupov*, 518 F.3d at 199-200 (accepting reasonableness of AG’s interpretation in *Matter of A-H-*).

¹⁸ 85 Fed. Reg. at 41209.

If the Attorney General’s discretion to add limitations and conditions for asylum eligibility were the same as his discretion to deny asylum to eligible aliens, the “consistent with” language in § 1158(b)(2)(C) would be superfluous. Under the canons of construction, we should avoid an interpretation of statutory language that would produce superfluity. But even without resort to the canons, we can be confident that the “consistent with” language is not, and was not intended to be, superfluous. The legislative history of IIRIRA emphasizes the importance Congress attached to the constraints on the Attorney General’s discretion to prescribe criteria for asylum eligibility. When enacting IIRIRA, Congress went out of its way to insert the “consistent with” language into § 1158(b)(2)(C), adding it to an earlier draft of IIRIRA that had not contained that language. *Compare* H.R. Rep. No. 104-469, at 80 (1996), *with* H.R. Rep. No. 104-828, at 164 (1996) (Conf. Rep.).¹⁹

In sum, there is no support for the Departments’ interpretation of the INA—neither in plain text nor legislative history. Since the Departments have no statutory basis to stretch INA § 208(b)(2)(A)(iv) to fit their goals, Proposed 8 C.F.R. §§ 208.13(c)(10) and 1208.13(c)(10) and Proposed 8 C.F.R. §§ 208.16(d)(2) and 1208.16(d)(2) are unlawful.

2. *Even if the NPRM’s redefined bar passed muster, the Departments cannot show that asylum seekers pose an actual danger to the United States on the basis of health.*

There is another barrier the Departments cannot surmount under the INA. As envisioned by Congress, the national security bar cannot be levied against individual who *may* pose a risk—only on those who do.²⁰ Whether an asylum seeker “is” a danger to the security of the United States does not include ambiguous, or potential risks. As the Third Circuit aptly stressed, “[i]s’ does not mean ‘may,’” therefore the Departments are not entitled *Chevron* deference by diluting the threshold for this bar.²¹

The Departments also admit that their proposed inclusion of communicable diseases cannot meet the threshold. However, they focus on the “unique” character of communicable diseases, including pandemics, noting that “[i]n many cases it is not possible to know whether any

¹⁹ See *East Bay Sanctuary Covenant v. Barr*, 964 F.3d 832, 849 (9th Cir. 2020). The Court below also declined to adopt this broad interpretation. See *East Bay Sanctuary Covenant v. Barr*, 385 F.Supp. 3d 922, 943 n.10 (N.D. Cal. 2019).

²⁰ See 8 U.S.C. 1158(b)(2)(A)(iv); INA § 241(b)(3), 8 U.S.C. § 1231(b)(3) (“[T]here are reasonable grounds to believe that the alien *is* a danger to the security of the United States”).

²¹ See *Yusupov*, 518 F.3d at 201.

particular individual is infected at the time of apprehension.”²² By definition, this means that they are attempting to bar asylum seekers on the basis that they “may” pose a danger, not because they do pose one. Mere travel through a country, or exhibiting a symptom that could be consistent with allergies as much as a pandemic,²³ does not render a person an actual danger. This interpretation was not granted *Chevron* deference before due to its inconsistency with the plain text of the statute, and therefore will not pass muster now either.²⁴

3. *The Departments improperly import a public health bar into the asylum statute, ignoring existing statutory language in the INA addressing this issue.*

It is a “fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.”²⁵ A good indicator that Congress did not mean to include communicable diseases under this bar is that there is a separate section of the INA that explicitly deals with the issue of communicable diseases—one that has its own, lengthy legislative history.²⁶

Since 1891, Congress has enacted legislations to limit admissibility of noncitizens based on the risk of contagious illnesses. In 1952, the INA included health related grounds in seven out of thirty-one grounds for exclusion. In 1990 and 1996, Congress codified a health-related ground of inadmissibility, requiring noncitizens to demonstrate that they do not have a “communicable disease of public health significance” and that they have received required vaccinations.²⁷ Today, health-related grounds of inadmissibility are found at INA §212(a)(1), 8 U.S.C. §1182(a)(1) and controlled by the Secretary of Health and Human Services—not the Departments. Under this

²² 85 Fed. Reg. at 41209-41210 n. 53.

²³ See Anna R. Wolson, *Allergies? Common cold? Flu? Or COVID-19?*, HARVARD HEALTH PUBLISHING BLOG (Apr. 9, 2020), available at <https://www.health.harvard.edu/blog/allergies-common-cold-flu-or-covid-19-2020040919492>.

²⁴ The Departments’ focus the probable cause standard is a distraction. See 85 Fed. Reg. at 41210. This standard, as the reasonable interpretation of “reasonable grounds” to believe an asylum seeker poses a danger, is not at issue. They simply have no explanation for the conversion of “is” into “may”—which affects the purported dangerousness of the individual, not the standard of proof required.

²⁵ See *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809, 109 S.Ct. 1500, 103 L.Ed.2d 891 (1989); see also *United Sav. Ass’n of Tex. v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988) (“A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme”).

²⁶ See Ruth Ellen Wasem, *Immigration Policies and Issues on Health-Related Grounds for Exclusion*, CONGRESSIONAL RESEARCH SERVICE (Aug. 13, 2014).

²⁷ *Id.* at 5.

ground, any noncitizen “who is determined to have a communicable disease of public health significance . . . is inadmissible.”²⁸

Importantly, Congress did not interfere with the uniform asylum system created by the Refugee Act, and implemented the Refugee Protocol’s *non-refoulement* proscription. Asylum seekers become subject to the existing public health grounds of inadmissibility should they adjust status or seek admission into the United States. However, they are not penalized for being afflicted with a communicable disease, or traveling through or from a country where such disease is prevalent. Imposing such penalty would ignore the life-threatening persecution that motivated their flight and run afoul of U.S. and international law.

As stated above, Congress deliberately did not include this bar in the asylum and withholding statutes. While that alone should suffice to render the Proposed Rules improper, one additional clue as to Congress’ decision resides in the asylum and withholding statutes themselves. Under the current asylum system, an individual cannot be penalized where their country was unable or unwilling to protect them from persecution.²⁹ Similarly, a third country or a country of transit only factor into the analysis of asylum or withholding eligibility should an individual firmly resettle there or the U.S. have a bilateral agreement.³⁰ The Departments ignore these long-established principles and impute a country’s failure to contain an illness—whether the persecuting country or a country of transit during an asylum seeker’s flight—onto the asylum seeker themselves.

This turns the INA on its head. Asylum seekers are tasked with proving their *own* government’s inability or unwillingness to shield them from persecution; a country’s health infrastructure and economic means to prevent a disease from being prevalent is irrelevant to the inquiry at hand. When concerning the asylum seeker’s country of persecution, it is also cruel to impute that country’s failure onto the asylum seeker and deport them back to the conditions they flee. This proposed change is likely to send countless asylum seekers—including children, LGBTQ+ individuals, survivors of gender-based violence—straight back to their death.

B. The Departments’ Reliance on the CDC’s Use of Public Health Service Act of 1944 to Justify the NPRM Is Also Misguided.

The Departments appear heartened by the CDC Director’s use of 42 U.S.C. § 265 to effectuate expulsions at the U.S. border on the basis of the COVID-19 pandemic—a directive that has faced

²⁸ See INA § 212(a)(1), 8 U.S.C. § 1182(a)(1).

²⁹ See INA §§ 208 and 241.

³⁰ 85 Fed. Reg. at 41211 (“or has embarked at a place, where such disease is prevalent or epidemic”); 8 USC §§ 1158(b)(2)(A)(vi); 1158(a)(2)(A).

multiple legal challenges (hereinafter “CDC order”).³¹ They reference the Public Health Service Act of 1944 (“PHSA”) in multiple instances and take on the powers Congress ascribed the Secretary of Health and Human Services (“HHS”).³² Specifically, the Departments ascribe themselves powers Congress ascribed specifically and solely to the HHS Secretary. The flaw with their approach is twofold: neither the CDC nor the Departments have the statutory authority to regulate away migration.

First, the PHSA was not drafted for purposes of immigration control. The Public Health Service Act of 1944 was drafted as a quarantine law, in response to diseases like small pox and cholera transplanting health statutes into immigration law.³³ That is why the PHSA concerned suspending the introduction of “persons,” not noncitizens. Congress did not want to single out noncitizens, precisely because it does not make sense from a public health standpoint.³⁴ The statute contemplated suspending the introduction of persons, regardless of immigration status, not as a backdoor to create an unlawful and extrajudicial deportation system. Therefore, the CDC’s application of this rule to noncitizens far exceeds Congress’ design and purpose and conflicts with decades of subsequent legislation, including the Refugee Act and the 2008 William Wilberforce Trafficking Victims Protection Reauthorization Act (“TVPRA”).³⁵

³¹ CDC, *Notice of Order Under Sections 362 and 365 of the Public Health Service Act Suspending Introduction of Certain Persons From Countries Where a Communicable Disease Exists*, 85 FR 17060; see also, Camilo Montoya-Galvez, *The U.S. gave her refuge from gangs. But her 13-year-old daughter was expelled under Trump’s new border policy*, CBS News (June 10, 2020), available at <https://www.cbsnews.com/news/13-year-old-daughter-refugee-expelled-trump-new-border-policy/>; Montoya-Galvez, *U.S. policy of expelling migrant children during pandemic faces first court challenge*, CBS News (June 10, 2020), available at <https://www.cbsnews.com/news/expelling-migrant-children-during-pandemic-us-policy-faces-first-court-challenge/>.

³² 85 Fed. Reg. at 41212 (Departments taking on role of designating noncitizens or class of noncitizens as danger to public health; designating foreign countries and period of incubation as posing danger to the United States; and designating individuals who exhibit symptoms consistent with disease).

³³ See Lucas Guttentag, *Coronavirus Border Expulsions: CDC’s Assault on asylum-seekers and Unaccompanied Minors*, JUST SECURITY (April 13, 2020), available at <https://www.justsecurity.org/69640/coronavirus-border-expulsions-cdcs-assault-on-asylum-seekers-and-unaccompanied-minors/>; *Letter from Senator Leahy et al. to DHS Acting Secretary* (April 7, 2020), <https://www.leahy.senate.gov/imo/media/doc/4.7.20%20FINAL%20Jud%20letter%20to%20DHS%20re%20Title%2042%20-%20SIGNED.pdf>.

³⁴ Joanna Maples-Mitchell, *There is No Public Health Rationale for a Categorical Ban on Asylum Seekers*, JUST SECURITY (April 17, 2020), available at <https://www.justsecurity.org/69747/there-is-no-public-health-rationale-for-a-categorical-ban-on-asylum-seekers/>.

³⁵ See 8 U.S.C. § 1232(a)(2)(A)(ii) (proscribing the return of children from contiguous countries who has a “credible fear of persecution”); § 1232(b-d) (providing panoply of protections to unaccompanied children, including transfer into HHS custody, and access to asylum protection).

While the CDC lacked the authority to legislate new deportation policies, the Departments have no statutory basis to exclude asylum seekers on the basis of communicable disease.³⁶ Nevertheless, they carve out a space for themselves to “consult” with the HHS Secretary and identify countries and periods of time that would suffice to trigger the risk of infection.³⁷ Congress ascribed neither DHS nor DOJ with such knowledge or expertise, even in consultation with HHS; in turn, HHS has no statutory role with respect to the adjudication of asylum or withholding of removal. Although the Departments found inspiration in the CDC’s venture into immigration control, they should not confound their own role as executors of the U.S. asylum law.³⁸

C. There Is No Statutory Basis for Requiring Asylum Seekers to Affirmatively Establish That They Are More Likely to Be Tortured.

If these Proposed Rules become final, most asylum seekers could be subject to the national security bar. Their only resort to remain in the United States would be deferral of removal under CAT, which asylum seekers must affirmatively raise under the NPRM.³⁹ As discussed in Part III *infra*, the burden asylum seekers will face will be unsurmountable for many, since proving torture is a far higher threshold than proving persecution. Nevertheless, the few asylum seekers who meet this threshold will be met with yet another barrier: the novel and unfounded requirement to “affirmatively establish” that they are more likely than not to be tortured in a third country. Otherwise, the Departments contend, DHS should have the “unreviewable discretion” to remove them immediately to a third country.⁴⁰

³⁶ See *Letter to DHS Secretary Wolf and Attorney General Barr Signed by Leaders of Public Health Schools* (hereinafter “Public Health Expert Letter to Departments”), Medical Schools, Hospitals, and Other U.S. Institutions, Columbia Mailman School of Public Health (Aug. 6, 2020), available at <https://www.publichealth.columbia.edu/public-health-now/news/public-health-experts-urge-us-officials-withdraw-proposed-rule-would-bar-refugees-asylum-and-and> (“In bypassing public health experts, the rule would authorize unqualified government functionaries who lack public health or medical training to make assessments with profound implications for access to asylum and other humanitarian protections.”).

³⁷ 85 Fed. Reg. at 41212.

³⁸ Prior to the COVID-19 pandemic, DHS followed clear procedures when encountering individuals who exhibit symptoms of a communicable disease. These procedures never entailed the immediate removal or summary bar from relief of such individuals—they entailed medical care and quarantine, at most. See U.S. Government Accountability Office, *Public Health and Border Security: HHS and DHS Should Further Strengthen Their Ability to Respond to TB Incidents*, GAO-09-58, October 2008, pp. 49-50 (noting that Customs and Border Protection protocols require at a minimum that DHS agents isolate a person and notify CDC).

³⁹ 85 Fed. Reg. at 41216.

⁴⁰ See Proposed 8 C.F.R. § 1208.30(e) and (g). It is unclear how the Departments understand “affirmatively establish” in relation to “affirmatively raise.” The former appears in the proposed regulations, while the latter is only

The Departments provide no justification for their new addition that asylum seekers must affirmatively establish, during a credible fear interview usually occurring within days of entry, that they are more likely than not to be tortured in their home country *and* in a third country. That is because the INA provides no support for placing such a burden on asylum seekers.⁴¹ The Departments appear to forget that asylum seekers often have limited English proficiency, if any, and rarely have the knowledge to navigate complex U.S. regulations and laws; some are children; many cannot afford the assistance of counsel. Further, many arrive deeply traumatized, and their interviews by asylum officers can be cause to trigger their trauma rather than invite them to share more.⁴² In NIJC’s experience, requiring asylum seekers to affirmatively establish risk of torture (in their country and beyond) is nonsensical, particularly when considering the fact that torture survivors likely carry greater trauma than those fleeing persecution. The expectation that torture survivors will affirmatively meet their burden is completely unfounded under the INA, which does not assign such a burden.⁴³ Further requiring that asylum seekers present affirmative proof that they could not be tortured in a third country defies any logic.

II. If Implemented, The Proposed Rules Would Result in *De Facto* and Automatic *Refoulement* of Most Asylum Seekers.

As the Supreme Court recognized over 30 years ago, “[i]f one thing is clear from the legislative history . . . of the [Refugee Act], it is that one of Congress’ primary purposes was to bring United States refugee law into conformance with the [Refugee Protocol] to which the United States acceded in 1968.”⁴⁴ Under the Refugee Protocol, the U.S. may not “expel or return (‘refouler’) a

stated in the preamble. The Departments’ shift to “affirmatively establish” in the proposed regulations appears to suggest a heightened burden on the asylum seeker than raising the risk of torture—signaling a burden of presenting affirmative proof of torture at the incipient stages of an asylum seeker’s claim in credible or reasonable fear interviews. It is unclear and confusing what standard the Departments are inserting. Nevertheless, neither formulation comports with the INA as we explain further in this section.

⁴¹ Lacking statutory basis for these drastic changes, the Departments also appear to struggle with their own interpretations of proper procedures when DHS determines that an individual may be barred from asylum and withholding; they note that this NPRM conflicts with the Notice of Proposed Rulemaking, “Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review.” 85 Fed. Reg. 36264 (June 15, 2020). The Departments recognize this head-scratching moment, but purport to “reconcile” the two conflicting procedures and invite comments. 85 Fed. Reg. at 41211.

⁴² See Katrin Schock et al., *Impact of asylum interviews on the mental health of traumatized asylum seekers*, 6 European J. Psychotraumatology (2015), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4558273/>.

⁴³ See INA § 241(b)(3), 8 U.S.C. § 1241(b)(3).

⁴⁴ *I.N.S. v. Cardoza-Fonseca*, 40 U.S. 421, 436-37 (1987); see also *INS v. Stevic*, 467 U.S. 407, 426 n.20 (1984) (With the Refugee Act, Congress intended to make “U.S. statutory law clearly reflect[] our legal obligations under

refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”⁴⁵ Further, as a party to CAT, the United States has committed not to “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.”⁴⁶ Indeed, Congress adopted essentially identical language to that contained in Article 33 of the Refugee Protocol.

However, the NPRM would consistently violate the *non-refoulement* mandate, as the vast majority of asylum seekers could be summarily removed on the basis of this regulatory bar. As the Departments remark, communicable diseases may include pandemics that affect virtually every country in the world. Mere passage through such country could suffice to nullify an individual’s chance to seek life-saving protection. *Non-refoulement* is the only safekeeping procedure to offer asylum seekers access to a safe and fair process to adjudicate their claims. If the Departments refool asylum seekers under the Proposed Regulations, they will not only violate U.S. and international law; they will also render the comprehensive system Congress created in the Refugee Act obsolete.

III. The Departments Try to Shed Procedural Safeguards They Find Cumbersome, at the Expense of Asylum Seekers’ Due Process Rights.

The Due Process Clause applies to all “persons” in the United States, including asylum seekers.⁴⁷ The need for due process protections is even greater in asylum cases where the noncitizen “makes a claim that he or she will be subject to death or persecution if forced to return to his or her home country.”⁴⁸ Importantly, procedural protections in removal proceedings are especially important because deportation is a “particularly severe penalty.”⁴⁹

international agreements.”); *see also Sale v. Haitian Centers Council*, 509 U.S. 155, 178 (1993) (“[T]he history of the [Refugee Act] does disclose a general intent to conform our law to Article 33 of the [Refugee Protocol]”).

⁴⁵ Convention Relating to the Status of Refugees art. 33, cl. 1, Jul. 28, 1951, 189 U.N.T.S. 137.

⁴⁶ Protocol relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (“Protocol”). Pursuant to Art. I(1) of the Protocol, “[t]he States Parties to the present Protocol undertake to apply articles 2 to 34 inclusive of the Convention to refugees as hereinafter defined.” *Id.* at 606 U.N.T.S. 268.

⁴⁷ *See Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).

⁴⁸ *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987).

⁴⁹ *See Padilla v. Kentucky*, 559 U.S. 356, 365 (2010) (internal citations omitted).

Asylum seekers are constitutionally entitled to the “opportunity to be heard at a meaningful time and in a meaningful manner.”⁵⁰ The Fifth Amendment demands “that [noncitizens] in removal proceedings have ‘a full and fair opportunity to be represented by counsel, to prepare an application for ... relief, and to present testimony and other evidence in support of [that] application.’”⁵¹ Thus, for example, the Third Circuit has held that an asylum procedure is constitutionally inadequate if it “fails to provide ... the most basic of due process protections,” which include a neutral judge, a complete record of the proceeding, and an interpreter if needed.⁵²

Rather than safeguard these vital protections, the Departments perceive them as cumbersome. They state that “the COVID-19 crisis highlights the fact that the existing expedited removal procedures require the Departments to engage in *redundant and inefficient screening mechanisms* to remove aliens who would not be able to establish eligibility for asylum and withholding of removal in the first place.”⁵³ The Departments further demonstrate their reluctance to follow the process mandated by Congress, speculating that “[t]he dangers of such diseases [as the historic COVID-19 pandemic] are *exacerbated* if the Government *must* provide lengthy process and review” to noncitizens.⁵⁴

There is no justification for the Departments’ evasion of constitutional and statutory guarantees in the face of crisis. U.S. and international asylum protections, born out of the atrocities of global warfare and genocide, were precisely a response to unprecedented crisis.⁵⁵ Pandemics do not enable the Departments to suspend their non-refoulement obligations either.⁵⁶ Instead, they are to follow the strict procedure laid out by Congress to ensure asylum seekers’ right to fair processing and adjudication.

⁵⁰ See *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976) (internal quotation and citation omitted).

⁵¹ See *Guan v. Barr*, 925 F.3d 1022, 1032 (9th Cir. 2019) (internal citations omitted); see also *Salgado-Diaz v. Ashcroft*, 395 F.3d 1158, 1162–63 (9th Cir. 2005) (“[F]ailing to afford petitioner an evidentiary hearing on his serious allegations of having been unlawfully stopped and expelled from the United States, aborting his pending immigration proceedings and the relief available to him at the time, violated his right to due process of law.”).

⁵² See *Marincas v. Lewis*, 92 F.3d 195, 203-04 (3d Cir. 1996).

⁵³ 85 Fed. Reg. at 41210 (emphasis added).

⁵⁴ 85 Fed. Reg. at 41205 (emphasis added).

⁵⁵ See UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (UNHCR), The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, September 2011, available at: <https://www.refworld.org/docid/4ec4a7f02.html> [accessed 5 August 2020].

⁵⁶ See UNHCR, Key Legal Considerations on Access to Territory for Persons in Need of International Protection in the Context of the COVID-19 Response, Mar. 16, 2020, available at <https://www.refworld.org/docid/5e7132834.html>.

Specifically, the Departments strip asylum seekers of due process protections in the following ways.

- **Arbitrary, unlawful indicia of dangerousness will deprive asylum seekers of the full and fair opportunity to be heard.** By distorting the statutory bar of danger to national security,⁵⁷ the Departments will strip asylum and withholding eligibility from a large number of asylum seekers. Asylum seekers will be barred from relief on the basis of factors fully outside their control: their country of persecution’s ability to contain disease; the corresponding ability of countries they merely transit through to contain disease; or symptoms they exhibit following what is often a long and perilous journey to seek safety. Even within the context of expedited removal, the changes the NPRM proposes are incompatible with Congress’ intent to safeguard review of asylum eligibility.⁵⁸ Nevertheless, by redefining the national security bar, the Departments short-circuit asylum seekers’ right to their day in court.
- **Asylum seekers will face the higher burden of proving eligibility under CAT, a burden that is significantly higher than asylum.** In order to prevail on their asylum claims, asylum seekers face a lesser burden of proof than withholding applicants and torture survivors.⁵⁹ While asylum and withholding applicants must show that the harm they fear rises to the level of persecution, proving torture under CAT is a much higher burden.⁶⁰ Failing to meet this high burden can be fatal, for asylum seekers who otherwise have a well-founded fear of persecution; 98% of individuals who seek CAT relief are denied protection.⁶¹ Erecting this new barrier will undermine Congress’ mandate, in

⁵⁷ See Section I.A. *supra*.

⁵⁸ See *Grace v. Whitaker*, 344 F. Supp. 3d 96, 104 (D.D.C. 2018) (citing H.R. REP. NO. 104-469, pt. 1, at 158 (1996)) (“[T]here should be no danger that [a noncitizen] with a genuine asylum claim will be returned to persecution.”).

⁵⁹ See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (ten percent chance of persecution may establish a well-founded fear); *id.* at 423 (withholding of removal is only granted if “it is more likely than not that the [noncitizen] would be subject to persecution”); 85 Fed. Reg. at 41206

⁶⁰ See, e.g., *Lopez v. Sessions*, 901 F.3d 1071, 1078 (9th Cir. 2018) (“Torture is defined as an extreme form of cruel and inhuman treatment that is specifically intended to inflict severe physical or mental pain or suffering.”); *Guo v. Sessions*, 897 F.3d 1208, 1217 (9th Cir. 2018) (the concept of torture is more severe than persecution); *Al-Saheer v. INS*, 268 F.3d 1143, 1147 (9th Cir. 2001) (quoting 8 C.F.R. § 208.18(a)(2)), *amended by* 355 F.3d 1140 (9th Cir. 2004) (“Torture is an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment that do not amount to torture.”).

⁶¹ See U.S. Dep’t of Justice, Exec. Office of Immigration Review, Statistics Yearbook: FY 2018, Tbl. 16, <https://www.justice.gov/eoir/file/1198896/download> (last visited June 18, 2020) (showing 69,618 total applicants for CAT protection, and only 1,334 grants of withholding or deferral of removal).

accordance with the Refugee Protocol, to refrain from deporting individuals and disrupt their ability to present their claim under the appropriate, fair procedure designated for asylum seekers. The results, like most parts of this NPRM, will spell death and harm for many.

- **Requiring asylum seekers to affirmatively establish their eligibility under CAT will invite a flood of unwarranted deportations.** As stated in Section I.C. *supra*, the Departments impose a novel requirement that has no basis in the INA. Specifically, the Departments’ expectation that asylum seekers must volunteer CAT eligibility—their only resort to evade removal—when faced with the arbitrary bar the Departments propose defies logic. Significantly, it also deprives asylum seekers of their sole opportunity to appear before a neutral adjudicator for their claims—the “most basic of due process protections.”⁶²
- **DHS would subject asylum seekers, particularly those in detention, to repeated attempts to deport them to third countries without review before an immigration judge.** DHS does not only expect asylum seekers to arrive at their credible fear interviews ready to volunteer their fear of torture. They also place the heavy burden that those very asylum seekers affirmatively establish that they could face torture in a third country.⁶³ Otherwise, DHS reserves discretion to remove them at their whim. These efforts to effectuate third country removals would deliberately interfere with EOIR’s review of the merits of the asylum seeker’s claim—who could be deported abruptly prior to their day in court.⁶⁴ This proposed change would seriously disrupt an asylum seeker’s attempts to find legal counsel and prepare their requests for humanitarian protection in the United States.
- **By eliminating reconsideration of negative credible fear findings, the Departments will strip a key safeguard against erroneous adjudications from asylum seekers.** The Departments propose to amend 8 C.F.R. § 1208.30(g)(2)(IV)(A) to remove DHS’ ability to reconsider a negative credible fear finding that was affirmed by an immigration judge.⁶⁵ The Departments provide no justification for eliminating this procedural safeguard, despite the high risk of wrongful deportations. In NIJC’s experience, this

⁶² See *Marincas*, 92 F.3d at 203-04.

⁶³ 85 Fed. Reg. at 41212 (Proposed 8 C.F.R. §§ 208.16(f) and 1208.16(f)).

⁶⁴ *Id.* (permitting removal to third country “prior to an adjudication of the alien’s request for withholding or deferral of removal [under CAT]”)

⁶⁵ 85 Fed. Reg. at 41218.

change can be life-changing for many asylum seekers. Years ago, NIJC represented Lidia,⁶⁶ an asylum seeker transferred from the U.S. border upon receiving negative credible fear findings from DHS, concurred upon by EOIR. Lidia was detained and unrepresented throughout those two prior reviews, lacked access to critical evidence to support their claims, and had serious concerns about the interpretation services she received throughout; unable to tell her full story, she was summarily found to have no credible fear by the Departments. Upon intaking Lidia, NIJC urgently requested reconsideration, engaging DHS about the grave danger these women would face if wrongfully removed. Lidia went on to win asylum. But for this procedural protection, she would have never lacked the full and fair opportunity to present her meritorious claim. The Departments' proposed amendment thus would have stripped her of a vital procedural protection and left hasty and erroneous initial decisions undisturbed

In sum, the NPRM cannot comport with constitutional due process requirements. In lieu of protecting due process, the Departments strip multiple procedural protections; they evade the process mandated by Congress for asylum, withholding, and relief under CAT and impose a draconian burden on asylum seekers; they grant DHS the right to remove asylum seekers to a third country prior to adjudication of their claims; and finally, the Departments propose eliminating reconsideration of negative credible fear screenings, ripping away vital procedural protection for asylum seekers in expedited removal. Altogether, these changes cannot pass constitutional muster and shatter any pretense of upholding a fair asylum system.

IV. The Proposed Rules Are Arbitrary and Capricious.

The NPRM cannot be reconciled with the Departments' statutory, non-refoulement, and constitutional mandates to protect asylum seekers' rights. This suffices to render the Proposed Rules unlawful under the APA.⁶⁷ However, there are four additional reasons why the NPRM conflicts with the APA. First, the Departments' Proposed Rules does not afford interested parties a reasonable opportunity to participate in the rule-making process; second, the Departments fail to justify drastic changes; third, the Departments fail to consider settled reliance interests; and last, the NPRM betrays an impermissible discriminatory animus.

A. The APA Requires Reasonable Opportunity to Comment—an Opportunity Sorely Lacking in this Rushed NPRM.

⁶⁶ Pseudonym used to protect confidentiality.

⁶⁷ See 5 U.S.C. § 706(2).

The APA requires the Departments to provide notice of their proposed rules and the proposed legal bases for those rules.⁶⁸ Notice must afford interested parties “reasonable opportunity to participate in rule-making process.”⁶⁹ Despite great interest in commenting on the substance of the Proposed Rules,⁷⁰ NIJC and fellow stakeholders were subjected to an expedited timeframe without justification. The Proposed Rules will have devastating impact on the clients and communities NIJC serves. Nevertheless, NIJC has spent a significant amount of its time and resources to file *habeas corpus* petitions and defend the rights of asylum seekers during the COVID-19 pandemic—which has coincided with the Departments’ and the CDC’s most virulent attacks on asylum.⁷¹ Additionally, the medical community plays a critical role in defense of the right to asylum—procuring expert evaluations on the trauma, harm, and torture asylum seekers survived to seek their day in court. Nevertheless, the medical community faces the laborious task of containing the present COVID-19 pandemic, straining its ability to respond to these Rules.

Additionally, the Departments published the NPRM concurrently with another set of Proposed Rules, the Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 36264. The comment period for the latter proposed rules expired shortly after this NPRM’s clock began. Even the Departments appeared rushed by this overlap. When they noticed significant inconsistencies between their interpretations of expedited removal procedures, they did not pause to reconcile those prior to issuing this NPRM. Instead, they asked for comments to reconcile significant inconsistencies.⁷² Suffice it to say that NIJC, among thousands of stakeholders who are critically impacted by both rules and lack the substantial resources of the Federal government, also struggled with dedicating the attention needed to this NPRM on such an expedited timeframe.

Finally, we draft these comments from the epicenter of this global pandemic that has already afflicted over 5 million lives with this highly infectious disease and killed 162,950 in the U.S.⁷³ Rather than mourn and recover from this tragedy, the U.S. has been plunged back into a sharp spike in reported cases throughout the country. Rushing the comment period in the midst of a

⁶⁸ See 5 U.S.C. § 553.

⁶⁹ See *Forester v. Consumer Product Safety Com.*, 559 F.2d 774, 787 (D.C. Cir. 1977) (citation omitted); *Cal. Citizens Band Assn. v. U.S.*, 375 F.2d 43, 48-49 (9th Cir.), *cert. denied*, 389 U.S. 844 (1967); *Logansport Broadcasting Corp. v. U.S.*, 210 F.2d 24, 28 (1954); *Willapoint Oysters. v. Ewing*, 174 F.2d 676 (9th Cir. 1949), *cert. denied*, 338 U.S. 860 (1949).

⁷⁰ See *supra* pp.1-2.

⁷¹ See NIJC, *A Timeline of the Trump Administration’s Efforts to End Asylum* (last accessed on Aug. 10, 2020).

⁷² 85 Fed. Reg. at 41211.

⁷³ See Johns Hopkins University, Coronavirus Resource Center, World Map (last accessed on Aug. 10, 2020), <https://coronavirus.jhu.edu/map.html>.

crisis of such historical magnitude is not just unreasonable; it raises serious questions as to the Departments' motives in evading valuable scrutiny, while upending decades of asylum law within half the time normally granted for public comment.⁷⁴

NIJC' entire staff are currently required to work remotely and face disruptions in normal modes of attorney-client communication. NIJC is far from alone in our constrained capacity; NIJC was among 30 national, state, and local organizations who urged the Departments to extend the comment period to 60 days⁷⁵—a request the Departments ignored. In light of these circumstances, the truncated notice-and-comment period flies in the face of reasonable regulatory practices.

B. The Departments Fail to Provide Rational Justification for the NPRM.

Under *State Farm*, “the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.”⁷⁶ Its decision must be “based on a consideration of the relevant factors” to survive review, will be deemed arbitrary and capricious “if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”⁷⁷ “[T]he presumption of constitutionality afforded legislation drafted by Congress” is not equivalent to “the presumption of regularity afforded an agency in fulfilling its

⁷⁴ See Office of Management and Budget Office of Information and Regulatory Affairs <https://aboutlaw.com/PWO> (acknowledging that “COVID-19 has disrupted the lives and work of many Americans, including some potential commenters” and calling on administrative agencies to assess the “need to allow more time for preparation of comments outweighs any need for urgency in rulemaking”).

⁷⁵ See *Letter Requesting Extension of Public Comment Period for Proposed Rule Making Fundamental Changes to Asylum Processing and the Immigration System*, WOMEN’S REFUGEE COMMISSION (Aug. 6, 2020), available at <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/>.

⁷⁶ See *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983).

⁷⁷ *Id.* at 43.

statutory mandate.”⁷⁸ An agency must “examine the relevant data and articulate a satisfactory explanation for its action.”⁷⁹

With this NPRM, the Departments provide insufficient rational justification in at least three critical ways.

First, the Departments provide little to no justification for crucial changes that would strip procedural protections from asylum seekers. As discussed in the prior section, the NPRM discards reconsideration of negative fear interviews under 8 C.F.R. § 1208.30(g)(2)(IV)(A). It is unclear if the Departments considered any evidence that this change needed to be made, since the NPRM is devoid of any reasoning to support this change. On the other hand, the Departments face a powerful mandate not to return refugees to certain harm. By failing to consider this mandate, or justify shirking responsibility, the Departments effectively fail to “articulate a satisfactory explanation for their action.”⁸⁰ Additionally, the Departments themselves acknowledge inconsistency between their reasoning in the NPRM and the reasoning of an overlapping asylum proposed rule they issued. Rather than reconcile this difference and justify their reasoning under this NPRM, the Departments solicit assistance from commenters *after* the rules are finalized. Rushed as they may be (for reasons undisclosed in the NPRM), the Departments still bear the burden under the APA to justify and consider relevant factors in their rulemaking—particularly when their reasoning may result in the harm or death of asylum seekers. Reasoned rulemaking would demand at least that they have proper justification prior to finalizing their Proposed Rules—not after.

Second, the Departments fail to consider a critical factor that would mitigate the risk of infection: the possibility of not detaining asylum seekers. Detention centers are tinderboxes for infectious diseases, and public health experts⁸¹ and human rights organizations have called urgently on DHS to utilize the vast spectrum of release and community care options available as

⁷⁸ *Id.* at 43 n.9; *see also Bowen v. American Hospital Association*, 476 U.S. 610, 626-27 (1986) (plurality opinion) (“Agency deference has not come so far that we [the Supreme Court] will uphold regulations whenever it is possible to ‘conceive a basis’ for administrative action [T]he mere fact that there is ‘some rational basis within the knowledge and experience of the [regulators]’ under which they ‘might have concluded’ that the regulation was necessary to discharge their statutorily authorized mission will not suffice to validate agency decisionmaking.” (internal citations omitted)).

⁷⁹ *See State Farm*, 463 U.S. at 43.

⁸⁰ *See East Bay*, 964 F.3d at 851 (citing *State Farm*, 463 U.S. at 43) (stressing agencies’ complete silence as to the basis for their regulatory decision in the face of evident harm to asylum seekers).

⁸¹ *See* Catherine C. Shoichet, *Doctors warn of ‘tinderbox scenario’ if coronavirus spreads in ICE detention*, CNN (Mar. 20, 2020), <https://www.cnn.com/2020/03/20/health/doctors-ice-detention-coronavirus/index.html>.

alternatives.⁸² Specifically, allowing asylum seekers to be processed and paroled into the community to shelter at home safely with their loved ones⁸³ and promptly reuniting children with their families are safe and viable avenues that will not further strain our public health system. DHS has “significant parole authority” to release all asylum seekers, including those subject to statutorily mandated detention.⁸⁴ For children, the TVPRA already mandates their placement in the least restrictive setting, including reunification with family sponsors who can safely care for children outside of crowded detention settings.⁸⁵ *Not* detaining asylum seekers would avoid irreparable harm and permit asylum seekers to adhere to safe guidelines and avert the risk of infection; the fact that the Departments completely disregard existing,⁸⁶ less harmful alternatives that are fully under their control is further evidence that the rule is not the product of “reasoned decisionmaking.”⁸⁷

Third and most importantly, there is “no public health rationale” for the Departments’ core proposition to consider asylum seekers a danger to U.S. public health. Public health experts have challenged the executive branch’s approach to asylum law and public health as an “either/or” fallacy.⁸⁸ In a letter to DHS Secretary Chad Wolf and AG William Barr, 170 public health and medical experts recently exposed DHS and DOJ’s specious reasoning:

Public health measures in the United States have moved on from the days when individuals with communicable diseases were treated merely as vectors of disease and

⁸² See HUMAN RIGHTS WATCH, *Letter to CDC Director re: Border Closure* (April 1, 2020), <https://www.hrw.org/news/2020/04/01/human-rights-watch-letter-centers-disease-control-and-prevention-and-department>; Vera Institute of Justice, *Guidance for preventive and responsive measures to coronavirus for immigration system actors* (Mar. 18, 2020), <https://www.vera.org/downloads/publications/coronavirus-guidance-immigration-system-actors.pdf>.

⁸³ See Tom K. Wong, *Seeking Asylum: Part 2*, U.S. IMMIGRATION POLICY CENTER (Oct. 29, 2019), available at <https://usipc.ucsd.edu/publications/usipc-seeking-asylum-part-2-final.pdf>, at 13 (“91.9% [of asylum seekers] have family or close friends who live in the U.S.”).

⁸⁴ See DEMOCRACY NOW!, *Former ICE Director: Release Immigrants from Detention or COVID-19 Will Spread Like Wildfire Inside* (Mar. 23, 2020), https://www.democracynow.org/2020/3/23/ice_detention_centers_covid_19 (quoting John Sandweg).

⁸⁵ See *Letter from 79 organizations condemning children’s border expulsions*, <https://supportkind.org/wp-content/uploads/2020/04/Organizational-Sign-on-Letter-Regarding-UAC-Expulsions-4.16.20.pdf>.

⁸⁶ The Departments review at length the strain of detaining asylum seekers afflicted with a communicable disease, but not the possibility of releasing asylum seekers. See 85 Fed. Reg. at 41204.

⁸⁷ See *ACA Int’l v. FCC*, 885 F.3d 687, 700 (D.C. Cir. 2018).

⁸⁸ See Amnesty International USA, Human Rights First, Physicians for Human Rights, Doctors Without Borders, et al., “Responding to the COVID-19 Crisis While Protecting Asylum-Seekers” (March 25, 2020), <https://www.amnestyusa.org/wp-content/uploads/2020/03/COVID-19-and-the-Border-UPDATED.pdf>.

immigrants were scapegoated for outbreaks and barred from the United States. Just ten years ago, the CDC lifted an immigration ban on individuals living with HIV—first adopted in the 1980s when there were more known cases of HIV/AIDS in the United States than anywhere else in the world—acknowledging that the restrictions were not an effective or necessary public health measure. The United States should not repeat past mistakes by adopting another discriminatory and ineffective ban on the pretext of public health.⁸⁹

While health screenings are advised, there is no evidence that walling off asylum seekers will mitigate the spread of infectious diseases.⁹⁰ Importantly, public health measures only work “when they include everyone”⁹¹—including asylum seekers and torture survivors lawfully seeking protection at U.S. borders. And yet, the Departments proceed with no reasonable justification to upend asylum protections on the basis of an absent danger.

C. The Proposed Change Fails to Consider Settled Reliance Interests

“When an agency changes course ... it must ‘be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account.’”⁹² Here, the Departments propose to bar and deport a large segment of asylum seekers to their country of persecution or third countries, without the opportunity to present their claims.⁹³ This is no small change of course. It would nearly nullify the system Congress designed under INA § 240 and that legal service providers, private practitioners, and applicants utilize daily. The Departments would unlawfully disturb the settled reliance interest of various stakeholders.

NIJC staff and volunteer develop and implement trainings, *pro se* assistance, and workshop materials, all suited to assist asylum seekers navigate Section 240 proceedings. In addition to providing counsel to asylum seekers in the Midwest, NIJC has a program in San Diego, CA designed to assist asylum seekers in expedited removal. NIJC also provides direct representation to asylum seekers and separated families at the border in Texas. Through years of litigation,

⁸⁹ See

⁹⁰ See Natalia Banulescu-Bogdan, Meghan Benton, and Susan Fratzke, *Coronavirus Is Spreading across Borders, But It Is Not a Migration Problem*, MIGRATION POLICY INSTITUTE (March 2020), <https://www.migrationpolicy.org/news/coronavirus-not-a-migration-problem>.

⁹¹ DOCTORS WITHOUT BORDERS, *Mexico: Closing borders will endanger lives of asylum seekers and jeopardize public health* (Mar. 27, 2020), <https://www.doctorswithoutborders.org/what-we-do/news-stories/news/mexico-closing-borders-will-endanger-lives-asylum-seekers-and>.

⁹² See *D.H.S. v. Regents of the Uni. Of C.A.*, 591 U.S. ____ (slip op., at 23) (2020) (quoting *Encino Motorcars, LLC v. Navarro*, 579 U.S. ____, ____ (slip op., at 9) (2016)).

⁹³ See sections II and III *supra*.

NIJC has garnered extensive experience and expertise in litigating asylum claims based on persecution on account of gender, LGBTQ+ status, and gang violence. NIJC has hired and trained a large number of attorneys, who in turn provide consistent support, subject-matter expertise, and training for thousands of *pro bono* counsel and public defenders.

As such, NIJC has a reliance interest in the integrity of credible and reasonable fear interviews, as well as the asylum process Congress designed to protect those fleeing harm on the basis of protected grounds. The proposed changes will not only nullify years of NIJC advocacy under U.S. and international law; it will also undermine the provision of life-saving services to asylum seekers because of the drastic overhaul proposed by the Departments. Under the APA, the Departments must consider detrimental reliance on the part of applicants and service organizations alike before they eviscerate the current framework in favor of the one proposed in the NPRM.

D. The Departments' Ease with Labeling Asylum Seekers "Dangers" to the Security of the U.S. Betrays Impermissible Discriminatory Animus.

The Departments issued this NPRM in the midst of a resurgence of COVID-19 infections within U.S. communities. For months, the U.S. has been "leading" the world in deaths and infection rates.⁹⁴ Public health experts have long debunked any link between migration and disease.⁹⁵ Rather than spread the disease, immigrants are leading the fight against COVID-19.⁹⁶ Nevertheless, the Departments have chosen to label asylum seekers fleeing persecution "dangers to the security of the United States," without any evidence that they, as a group, pose any actual danger to the U.S. Meanwhile, four million Americans and counting have been infected by the deadly disease. Asylum seekers would be prudent to avoid coming to the United States, given the prevalence of the virus here; however, prudence is a privilege they lack, while fleeing for their lives. Rather than protect their plea for safety, the Departments villainize them on the basis of their national origin.

This form of discriminatory label is not new, unfortunately. In the 19th Century, lawmakers groomed the ideology that immigrants, including asylum seekers, may carry "loathsome and

⁹⁴ See David Leonhardt, *The Unique U.S. Failure to Control the Virus*, N.Y. Times (Aug. 6, 2020), available at <https://www.nytimes.com/2020/08/06/us/united-states-failure-coronavirus.html>.

⁹⁵ See Maggie Fox, *Migrants don't bring disease. In fact, they help fight it, report says*, NBC NEWS (Dec. 5, 2018), available at <https://www.nbcnews.com/storyline/immigration-border-crisis/migrants-don-t-bring-disease-fact-they-help-fight-it-n944146>.

⁹⁶ See NEW AMERICAN ECONOMY RESEARCH FUND, *Immigrant Healthcare Workers Are Critical in the Fight Against Covid-19* (Apr. 9, 2020), available at <https://research.newamericaneconomy.org/report/covid-19-immigrant-healthcare-workers/>.

contagious disease.”⁹⁷ This view—predicated on racist, classist, and ableist stereotypes—laid the groundwork for selective medical screenings, deportations, and eugenics in the 20th Century.⁹⁸ Immigration became synonymous with contagion and a threat to domestic welfare.

In the 1980s, the U.S. imposed a ban on individuals living with HIV/AIDS. Like today, the government ignored the elephant in the room: that the U.S. had the largest outbreak anywhere in the world. Instead, the U.S. began jailing Haitian asylum seekers in an HIV prison camp in Guantanamo Bay,⁹⁹ where some refugees were told that “they could be at Guantanamo for 10 to 20 years or until a cure for AIDS is found.”¹⁰⁰

This racist ideology lives on today. The executive branch has long schemed to exploit public health as a pretext to close the border.¹⁰¹ Between the CDC order closing the border and this NPRM, this scheme is thriving. Indeed, in defense of summary expulsions of 70,000 migrants,¹⁰² DHS’ Acting Commissioner for Customs and Border Protection considers migrant arriving at the border a potential risk to U.S. public health.¹⁰³ This NPRM is irreconcilable with existing obligations under U.S. and international law and the Departments lack reasonable justification to upend the asylum system Congress designed decades ago. However, they proceeded to propose as much—raising legitimate questions as to their motive to place asylum seekers at the bulls’ eye

⁹⁷ See Howard Markel & Alexandra Minna Stern, *The Foreignness of Germs: The Persistent Association of Immigrants and Disease in American Society*, MILBANK QUARTERLY, 2002 Dec; 80(4): 757–788, available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2690128/>.

⁹⁸ See Terry Gross, *Eugenics, Anti-Immigration Laws Of The Past Still Resonate Today*, *Journalist Says*, NPR (May 8, 2019), available at <https://www.npr.org/2019/05/08/721371176/eugenics-anti-immigration-laws-of-the-past-still-resonate-today-journalist-says>.

⁹⁹ See A. Naomi Paik, *US turned away thousands of Haitian asylum-seekers and detained hundreds more in the 90s*, THE CONVERSATION (June 28, 2018), available at <https://theconversation.com/us-turned-away-thousands-of-haitian-asylum-seekers-and-detained-hundreds-more-in-the-90s-98611>.

¹⁰⁰ See *Haitian Centers Council v. Sale*, 823 F.Supp. 1028, 1045 (E.D.N.Y. 1993).

¹⁰¹ See Caitlin Dickerson and Michael D. Shear, *Before Covid-19, Trump Aide Sought to Use Disease to Close Borders*, N.Y. TIMES (May 3, 2020), <https://www.nytimes.com/2020/05/03/us/coronavirus-immigration-stephen-miller-public-health.html>; see also Michael Edison Hayden, *Stephen Miller’s Affinity for White Nationalism Revealed in Leaked Emails*, SOUTHERN POVERTY LAW CENTER (Nov. 12, 2019), available at <https://www.splcenter.org/hatewatch/2019/11/12/stephen-millers-affinity-white-nationalism-revealed-leaked-emails>.

¹⁰² See CUSTOMS AND BORDER PROTECTION (“CBP”), *Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions* (last accessed Aug. 10, 2020), available at <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics>.

¹⁰³ See CBP, *CBP Acting Commissioner Mark Morgan Statement on the Extension of Border COVID-19 Policies* (May 10, 2020), available at <https://www.cbp.gov/newsroom/speeches-and-statements/cbp-acting-commissioner-mark-morgan-statement-extension-border>.

once again. 170 public health experts summarized this motive succinctly, calling the NPRM (and the preceding CDC order) “xenophobia masquerading as a public health measure.”¹⁰⁴

In sum, the Departments are quick to abandon the “‘core regulatory purpose’ of asylum to ‘protect [refugees] with nowhere else to turn.’”¹⁰⁵ Their haste, along with the historical context of equating noncitizens or “class[es] of [noncitizens]”¹⁰⁶ with contagion, raise serious concerns as to their motive in imposing fatal barriers on asylum seekers.

Conclusion

The Departments fail to abide by their obligations under U.S. and international law and usurp Congress’s role as the architect of our asylum system. This should suffice for the immediate rescission of these proposed Rules. But the glaring absence of reasonable justification for this NPRM and evidence of animus in its development further undermines the Departments’ duty to put forth reasonable rulemaking. NIJC urges the Departments to rescind these Proposed Rules and abide by their duty to protect asylum seekers and torture survivors.

¹⁰⁴ See Public Health Expert Letter to Departments, *supra* n. 36.

¹⁰⁵ *East Bay*, 964 F.3d at 850 (quoting *Matter of B-R-*, 26 I. & N. Dec at 122).

¹⁰⁶ 85 Fed. Reg. at 41209-41210 n. 53. The Departments’ use of “class of [noncitizens]” throughout the NPRM itself clarifies the categorical thrust of their proposed changes, which would codify disparate treatment of asylum seekers under the pretext of public health.