

August 10, 2020

Submitted via <https://www.regulations.gov/>

**Re: Comments in Response to the Department of Homeland Security and Department of Justice Executive Office for Immigration Review Notice of Proposed Rulemaking: *Security Bars and Processing*, RIN 1615-AC57 / USCIS 2020-0013 / RIN 1125-AB08 / A.G. Order No. 4747-2020**

The Tahirih Justice Center<sup>1</sup> (Tahirih) submits the following comments to DHS and EOIR in response to the above-referenced NPRM published by the Departments on July 9, 2020.<sup>2</sup> Tahirih opposes the rule as both a matter of public policy and because it patently violates numerous laws, including the Immigration & Nationality Act (INA), the Administrative Procedure Act (APA), and the international obligations of the United States as a State party to the United Nations (UN) Convention Relating to the Status of Refugees and 1967 Protocol (collectively, the Convention). *See generally* UNHCR, *The 1951 Refugee Convention*.<sup>3</sup>

## **I. Introduction**

Tahirih is a national, nonpartisan policy and direct services organization that has answered calls for help from nearly 29,000 survivors of gender-based violence since its inception twenty-three years ago. Our clients are primarily women and girls who endure horrific human rights abuses such as domestic violence, rape and sexual torture, forced marriage, human trafficking, widow rituals, female genital mutilation/cutting (FGM/C), and “honor” crimes.<sup>4</sup>

Tahirih provides free legal and social services to help our clients find safety and justice as they engage in the daunting, courageous, and rewarding work of rebuilding their lives and contributing to their communities as illustrated by our

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<sup>1</sup> <https://www.tahirih.org/>. We note that although these comments are the official comments of Tahirih as an organization, individual Tahirih employees may also have submitted comments on the NPRM in their personal capacities. The agencies must, of course, also consider those individual comments.

<sup>2</sup> All sources cited in this comment—including, but not limited to, court opinions, legislative history, and secondary sources—are to be considered part of the administrative record.

<sup>3</sup> <https://www.unhcr.org/1951-refugee-convention.html>.

<sup>4</sup> For background information on these types of gender-based violence, *see, e.g.*, UNHCR, *Guidelines on the Protection of Refugee Women* 17, <https://www.unhcr.org/3d4f915e4.html>; UN Women, *Defining “honour” crimes and “honour” killings*, <https://endvawnow.org/en/articles/731-defining-honourcrimes-and-honour-killings.html>; [https://en.wikipedia.org/wiki/Female\\_genital\\_mutilation](https://en.wikipedia.org/wiki/Female_genital_mutilation); [https://en.wikipedia.org/wiki/Forced\\_marriage](https://en.wikipedia.org/wiki/Forced_marriage); <https://www.widowsrights.org/>.

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clients' stories. Since its founding, Tahirih has also served as an expert resource for the media, Congress, policymakers, and others on immigration remedies for survivors fleeing gender-based violence both abroad and within the U.S. See, e.g., Tahirih Justice Center, *Tahirih in the News*;<sup>5</sup> Tahirih Justice Center, *Congressional Testimony*;<sup>6</sup> Tahirih Justice Center, *Comments*.<sup>7</sup>

Among the clients we have served are Mariam\*<sup>8</sup> from Mali, who learned at a very young age that her community did not value women and girls and about how they are punished. She recounts:

*In my family, there is no joy when a girl is born. When a boy is born, relatives gather at the parents' home. They offer small gifts of gold in celebration, and they sacrifice three to four animals. They celebrate the day with food, conversation, and laughter. When a girl is born, my relatives kill just one lamb. No one talks. No one celebrates. They eat quickly and leave.*

*All of my uncles have more than one wife, and they treat them very poorly. They only talk to their wives to give them orders. I have heard my uncles and aunts fighting, and it always gets physical. I have seen my uncles hit their wives with belts, shove them against walls, and push them to the ground and kick them.*

*The day after my 16th birthday, my father circled a date on the calendar: August 28. He told me this was the day that I would be married. My soon-to-be-husband was a wealthy man from Mali. He was older than my father! I begged my father to stop the marriage, but he insisted it was final. In that moment, I felt like my life was over. My mom learned that my fiancé had AIDS. Villagers said his first wife died of the disease.*

*Desperate for a way out, I told my uncles I was no longer a virgin. They beat me so badly that I thought I would die. Then, they locked me in a room used to store crops. There was no bathroom or windows, just a hole in the wall for food. I couldn't tell if it was night or day, and I knew that if my life ended, they would not care.*

*Eight months passed before my mom rescued me. My uncles went away on a business trip, and she broke through the bolt on the door. With the help of my sister I escaped to the United States and applied for asylum. I'll never forget the day I received my asylum approval. I am free! I can live my life without fear of being forced back to Mali, where my uncles would kill me.*

*Very soon, I will graduate from college with a degree in agribusiness. I hope to get a job in banking or at a government agency and then pursue an MBA. And I want to get married and start a family, but at my own pace.*

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<sup>5</sup> <https://www.tahirih.org/news-media/latest-updates/?tab=tahirih-in-the-news>.

<sup>6</sup> [https://www.tahirih.org/pubs/?qmt%5Bpub\\_cat%5D%5B%5D=131](https://www.tahirih.org/pubs/?qmt%5Bpub_cat%5D%5B%5D=131).

<sup>7</sup> [https://www.tahirih.org/pubs/?qmt%5Bpub\\_cat%5D%5B%5D=261](https://www.tahirih.org/pubs/?qmt%5Bpub_cat%5D%5B%5D=261).

<sup>8</sup> An \* after a name denotes a pseudonym.

Another client, Meena\* from Iran, was taught early on that her sole purpose was to serve men. She would be “transferred” from a childhood serving her father, to a lifetime of serving a husband. She explains:

*I grew up in a very conservative community in southwest Iran. For as long as I can remember, my father treated me and my mother like servants in our own home. No matter how hard we tried to please him, he found a reason to beat us and threaten to kill us. I'll never forget the time he hurled a butcher knife at my head when I was 10 because I didn't say “hello” to my uncle when he entered our home. I threw my hands up to protect my face, and the knife went through my right hand, causing severe bleeding. I was not allowed to see a doctor.*

*My father got away with this because women were treated as property or worse in my family — my paternal relatives beheaded their wives and daughters for disobeying orders and fleeing arranged marriages. Despite my persistence to get out of the house and go to school, my father told me I would never be a source of pride because I am a girl. He said being obedient to men was my destiny as a woman.*

*When I turned 15, my father arranged for me to marry my cousin. I dreaded a life of never-ending misery. My mother, a brave and strong-willed woman, decided it was time to save us both. In the middle of the night, with only a few clothes and a blanket, we ran away. We spent the next seven years in hiding.*

*During my travels abroad with relatives, I befriended an American man. I fell in love, and when he proposed, my mother and I agreed I should accept his offer. My fiancé helped me obtain a visitor's visa to come to America but he soon revealed that he was already married and abandoned me. I felt so alone, with no home, no family, and no resources.*

*My attorneys and social service aides helped me access the food, shelter, and support services I needed to survive. Their unwavering support gave me the courage to move forward and share my story with an asylum officer. After several difficult months, I was granted asylum. I felt like I had a second chance at life.*

*I found work as a translator for the U.S. military and have been working in this position for the past three years. Today, I am determined to earn a degree in criminal justice because I want to have a career protecting others. I just received a full scholarship to go to college. Never in my life would I have imagined writing these words except in a dream.*

And finally, Koumba\* from Benin began her fight for justice when she was raped at the age of 11 by a man from her father's village. Four years later, she was raped a second time by a different man. She then learned that she had been promised to this man in marriage. Koumba\* suffered for a long time with shame from the rapes, but she tried her best to establish as normal a life as possible.

Koumba\* eventually attended university, earned her degree, and worked as a human resources professional for an insurance company. A decade passed, and she fell in love with a man from her

church and married him. Koumba\* put her past abuse behind her and built a happy new life with her husband.

In 2010, Koumba\*'s world was violently upended when the rapist to whom she had been promised in her teens passed away. To her shock and dismay, this man and his family had never forgotten that Koumba\* had been promised to him like property. Now, upon the rapist's death, his brother "inherited" Koumba\*. At his direction, members of a sect from his village kidnapped her. Koumba\* was forced to perform widow rituals, which included washing the dead man's body as well as her own intimate parts with the same water. She was then forced to spend the night lying next to the corpse of her rapist. She knew she would get no help from the local police, so at the first opportunity, she fled to another town.

Unfortunately, her safety was temporary. A few months later, Koumba\* was kidnapped again. This time, the dead man's brother kept her in a dark hut with her arms and legs tied to a bed and raped her every day. Once again she escaped, this time the night before their formal marriage ceremony was to take place. Because she knew that she could no longer live in Benin in safety, she gave up her career and everything she had worked for in her native land and fled to the United States. After facing additional hardship here, she was finally able to apply for and win asylum.

#### **A. Asylum Seekers Fleeing Gender-Based Violence are a Uniquely Vulnerable Population**

Gender-based violence is ubiquitous:<sup>9</sup> Even women and girls who are also targeted for persecution for reasons unrelated to their gender are unfortunately likely to suffer gender-based discrimination or violence in some form. And gender-based violence in all of its forms involves a unique set of common characteristics that leave survivors of such violence uniquely vulnerable. That set of characteristics includes (i) persecution at the hands of family members, communities, and other non-state actors; (ii) severe ostracization and searing social stigmas; (iii) disbelief of survivors; (iv) internalized shame; (v) the inability to disclose gender-based violence to or in the presence of children or male family members; (vi) the absence or nonenforcement of laws to protect survivors; (vii) laws permitting gender-based discrimination or violence; (viii) cultural acceptance of gender-based violence; (ix) barriers to medical or mental health treatment for survivors; (x) forced dependence or unequal caretaking responsibilities; (xi) multiple victimization and revictimization; and (xii) ongoing gender-based violence even after a survivor reaches the United States.

Survivors of gender-based violence—who include entrepreneurs, physicians, teachers, historians, grocery clerks, lawyers, authors, caregivers, politicians, entertainers, and scientists—are thus isolated, traumatized, and cut off from family and community resources, and those who do manage to escape are in desperate need of counsel,<sup>10</sup> medical, mental health, and other services as

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<sup>9</sup> See generally UNFPA, *Against My Will: Defying the Practices That Harm Women and Girls and Undermine Equality* (2020), [https://www.unfpa.org/sites/default/files/pub-pdf/UNFPA\\_PUB\\_2020\\_EN\\_State\\_of\\_World\\_Population.pdf](https://www.unfpa.org/sites/default/files/pub-pdf/UNFPA_PUB_2020_EN_State_of_World_Population.pdf).

<sup>10</sup> This is particularly the case for detained asylum seekers. See, e.g., Tahirih Justice Center, *Nationwide Survey: A Window into the Challenges Immigrant Women and Girls Face in the United States and the Policy Solutions to Address Them* (Jan. 31, 2018), <http://www.tahirih.org/wp-content/uploads/2018/01/Tahirih-Justice-Center-Survey-Report-1.31.18-1.pdf>.

they navigate our system. *See, e.g.,* Tahirih Justice Center, *Immigrant Survivors Fear Reporting Violence* (May 2019).<sup>11</sup> Yet due to the nature of gender-based violence, survivors are *least* likely to be able to access such services. Access to corroborating evidence to support their claims is also very limited. In fact, as noted by U.N. High Commissioner for Refugees (UNHCR), in “gender-related claims, the usual types of evidence used in other refugee claims may not be as readily available. Statistical data or reports on the incidence of sexual violence may not be available, due to under-reporting of cases, or lack of prosecution.” UNHCR, *Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, U.N. Doc. HCR/GIP/02/01, at 10 (2002) (*Gender Guidelines*).<sup>12</sup> The formidable obstacles survivors already face in seeking safety have only been amplified by the global pandemic. *See, e.g.,* Rená Cutlip-Mason, *For Immigrant Survivors, the Coronavirus Pandemic is Life-Threatening in Other Ways*, Ms. Magazine (Apr. 14, 2020);<sup>13</sup> Tahirih Justice Center, *The Impact of COVID-19 on Immigrant Survivors of Gender-Based Violence* (Mar. 23, 2020).<sup>14</sup>

## **B. The NPRM Would Eviscerate Humanitarian Protection for Survivors of Gender-Based Violence**

As a law student in 1996, Tahirih founder and CEO Layli Miller-Muro<sup>15</sup> was involved in a landmark asylum case on behalf of Fauziya Kassindja<sup>16</sup> from Togo. Ms. Kassindja recounted her escape, at just 17 years of age, from imminent FGM/C and a forced polygynous marriage<sup>17</sup> to a man more than twice her age: “On Thursday they said I’d be married. On Friday they told me they’d cut me. At midnight, I escaped.” Ms. Kassindja was ultimately granted asylum and her case, *Matter of Kasinga*, 21 I. & N. Dec. 357 (BIA 1996), set national precedent establishing gender-based persecution as a ground of asylum in the United States.<sup>18</sup> Soon thereafter, Congress enacted legislation criminalizing FGM/C of a minor. *See* Omnibus Consolidated Appropriations Act, 1997, Pub. L. 104-208, div. C, title VI, § 645(b)(1), 110 Stat. 3909-709 (1996), *codified at* 18 U.S.C. § 116. Thirty-five states have since followed suit. *See* Equality Now, *FGM in the US: What Is Female Genital Mutilation (FGM)?*.<sup>19</sup>

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<sup>11</sup> <https://static1.squarespace.com/static/5b9f1d48da02bc44473c36f1/t/5d290b07a8dea8000138bf97/1562970888076/2019-Advocate-Survey-Final.pdf>.

<sup>12</sup> <https://www.unhcr.org/3d58ddef4.pdf>.

<sup>13</sup> <https://msmagazine.com/2020/04/14/for-immigrant-survivors-the-coronavirus-pandemic-is-life-threatening-in-other-ways/>.

<sup>14</sup> [https://www.tahirih.org/wp-content/uploads/2020/03/Impact-of-Social-Distancing-on-Immigrant-Survivors-of-Gender-Based-Violence\\_Final-March-23-2020.pdf](https://www.tahirih.org/wp-content/uploads/2020/03/Impact-of-Social-Distancing-on-Immigrant-Survivors-of-Gender-Based-Violence_Final-March-23-2020.pdf).

<sup>15</sup> *See* [https://en.wikipedia.org/wiki/Layli\\_Miller-Muro](https://en.wikipedia.org/wiki/Layli_Miller-Muro).

<sup>16</sup> *See* <http://www.pbs.org/speaktruthtopower/fauziya.html>.

<sup>17</sup> *See* <https://en.wikipedia.org/wiki/Polygyny>.

<sup>18</sup> Following the decision, Ms. Miller-Muro founded Tahirih to help more women and girls targeted for violence and torture simply because they are female.

<sup>19</sup> [https://d3n8a8pro7vhm.cloudfront.net/equalitynow/pages/216/attachments/original/1565706130/FGMintheUS\\_factsheet\\_Aug2019.pdf?1565706130](https://d3n8a8pro7vhm.cloudfront.net/equalitynow/pages/216/attachments/original/1565706130/FGMintheUS_factsheet_Aug2019.pdf?1565706130).

For decades, the United States has more generally recognized the pervasive, severe, and acute threat that gender-based violence poses to the lives and safety of women and girls. Since 1984, for example, bipartisan majorities of Congress have enacted the Family Violence Prevention and Services Act (FVPSA), Pub. L. 98-457, title III, 98 Stat. 1749, 1757, *codified at* 42 U.S.C. §§ 10401-12,<sup>20</sup> the Violence Against Women Act (VAWA), Pub. L. 103-322, 108 Stat. 1796 (1994), and the Victims of Trafficking and Violence Protection Act (VTVPA), Pub. L. 106-386, 114 Stat. 1464 (2000). And nine states plus Washington, D.C. and the U.S. Virgin Islands have enacted criminal laws barring forced marriage. *See* Tahirih Justice Center, *Criminal Laws Addressing Forced Marriage in the United States* (Aug. 2019).<sup>21</sup>

The Refugee Act of 1980, Pub. L. 96-212, 94 Stat. 102 (1980), did not explicitly name persecution based on “gender” as a ground for asylum. That omission reflects Congress’s adoption of the UN Convention’s then nearly 30-year old refugee protection framework, which was drafted from a male-centered perspective. *See* UNHCR, *Gender Guidelines* 2. But “properly interpreted,” the definition of “refugee” included in the Convention, and adopted by Congress, “covers gender-related claims.” *Id.* at 3. As UNHCR put the matter in 2002 guidelines for interpreting the Convention, “it is widely accepted that [gender] can influence, or dictate, the type of persecution or harm suffered and the reasons for this treatment...as such, there is no need to add an additional ground to the 1951 Convention definition.” *Id.* And those guidelines, which remain in effect today, “provide legal interpretative guidance for governments, legal practitioners, decision-makers and the judiciary” in all countries, including the United States, that are parties to the Convention. *See id.* at 1.<sup>22</sup>

The U.S. government routinely recognizes that the definition of “refugee” encompasses those persecuted on account of gender. The State Department, for instance, has emphasized in the refugee

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<sup>20</sup> *See also* Nat’l Resource Ctr. on Domestic Violence, *Learn About FVPSA*, <http://www.learnaboutfvpsa.com/35yrs-impact>.

<sup>21</sup> [https://preventforcedmarriage.org/wp-content/uploads/2015/01/Forced-Marriage-Criminal-Statutes\\_2019.pdf](https://preventforcedmarriage.org/wp-content/uploads/2015/01/Forced-Marriage-Criminal-Statutes_2019.pdf).

<sup>22</sup> UNHCR’s views on the proper interpretation of asylum law are entitled to particular deference because they reflect extensive input by member states—including the United States. *See, e.g.*, UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the Convention* (1992) <https://www.unhcr.org/4d93528a9.pdf>; *see also, e.g.*, *Refugee and Humanitarian Visa Applicants: Guidelines on Gender Issues for Decision Makers* (Department of Immigration and Humanitarian Affairs, Australia, July 1996); *Guideline 4 on Women Refugee Claimants Fearing Gender-Related Persecution: Update* (Immigration and Refugee Board, Canada, 13 November 1996); *Position on Asylum Seeking and Refugee Women* (European Council on Refugees and Exiles, December 1997); *Gender Guidelines for the Determination of Asylum Claims in the UK* (Refugee Women’s Legal Group, July 1998); *Gender Guidelines for Asylum Determination* (National Consortium on Refugee Affairs, South Africa, 1999); *Asylum Gender Guidelines* (Immigration Appellate Authority, United Kingdom, November 2000); *Gender-Based Persecution: Guidelines for the investigation and evaluation of the needs of women for protection* (Migration Board, Legal Practice Division, Sweden, 28 March 2001); *Sexual Violence Against Refugees: Guidelines on Prevention and Response* (UNHCR, Geneva, 1995); *Prevention and Response to Sexual and Gender-Based Violence in Refugee Situations* (Report of Inter-Agency Lessons Learned Conference Proceedings, 27-29 March 2001, Geneva).

protection context that the “empowerment and protection of women and girls has been a central part of U.S. foreign policy and national security” and that “gender-based violence[ ] is a critical issue” that is “intricately linked to” the Department’s strategic goals. Bureau of Population, Refugees, and Migration, *Gender and Gender-Based Violence*.<sup>23</sup> To that end, the State Department has “implement[ed]” an entire strategy to combat gender-based violence around the world. *Id.*; see USAID, *United States Strategy to Prevent and Respond to Gender-Based Violence Globally* (2016).<sup>24</sup> And as noted above and shown in detail below, the agencies and the federal courts have, in the decades since *Kasinga*, consistently treated gender-based persecution as grounds for asylum.

The NPRM, in contrast, would plainly bar asylum for most asylum seekers—including most survivors of violence inflicted on account of their gender. It is nothing short of astounding for the U.S. government to outlaw gender-based violence within the United States; retain its status as a Refugee Convention State party; currently proclaim itself a “leader within the humanitarian community on the protection of women and girls” (Bureau of Population, Refugees, and Migration, *Gender and Gender-Based Violence*); and, in the very next breath, decimate humanitarian protections for women and girls. To say that the rule will swiftly, cruelly, and arbitrarily sentence women and girls to torture and death is not hyperbole. It is the plain, simple truth. See, e.g., Human Rights Watch, *Deported to Danger* (Feb. 5, 2020).<sup>25</sup>

## II. Comments on the NPRM as a Whole

The NPRM should be withdrawn in its entirety. As discussed above, it will lead to the persecution, torture, and death of survivors of gender-based violence—and countless others. Unsurprisingly, the entirety of the NPRM also violates federal law in at least four ways.

### A. Pretext

As an initial matter, the NPRM is nothing more than a pretext for severely restricting asylum in the United States. The Supreme Court recently made clear that “[t]he reasoned explanation requirement of administrative law ... is meant to ensure that agencies offer genuine justifications for important decisions.” *Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019). To that end, the agencies’ actual reasoning must be provided so that it “can be scrutinized by courts and the interested public.” *Id.* at 2576. And as part of disclosing their “actual reasoning,” administrative agencies “must ‘disclose the basis’” of their actions. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962) (quoting *Phelps Dodge Corp. v. Labor Bd.*, 313 U.S. 177, 197 (1941)). The provision of “contrived reasons would defeat the purpose of the enterprise.” *Dep’t of Commerce*, 139 S. Ct. at 2576.

Here, the agencies’ rationales are, as shown at length below, so thin as to be entirely implausible. Although the agencies purport to rest on public health considerations, “[t]here is no public health rationale for denying admission to individuals based on legal status.” Letter from Public

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<sup>23</sup> <https://www.state.gov/other-policy-issues/gender-and-gender-based-violence/#ftn1>.

<sup>24</sup> <https://www.state.gov/wp-content/uploads/2019/03/258703.pdf>.

<sup>25</sup> <https://www.hrw.org/report/2020/02/05/deported-danger/united-states-deportation-policies-expose-salvadorans-death-and>.

Health Experts to Alex Azar and Robert Redfield (May 18, 2020);<sup>26</sup> *see also, e.g.*, Letter from Georgia Public Health Experts to Robert Redfield (June 17, 2020).<sup>27</sup> That fact, standing alone, gives rise to a strong inference that the agencies’ stated reasoning is pretextual rather than “genuine.” *Dep’t of Commerce*, 139 S. Ct. at 2575. That inference is further supported by the facts that (1) the new bars in the rule do not even pretend to implicate the merits of asylum claims, (2) the NPRM would remove from the United States those who are eligible for relief under CAT; and (3) the NPRM makes clear that the agencies have not considered any alternatives to the proposals included in the NPRM.

There are also external sources of evidence for the inference that the NPRM’s stated goal is merely pretextual. In general, the NPRM seeks to link a person’s status as an immigrant, rather than any actual medical facts or determination, to the idea of disease. It therefore embodies the timeworn trope of the “diseased immigrant.” As researchers have regularly concluded: “Anti-immigrant rhetoric and policy have often been framed by an explicitly medical language, one in which the line between perceived and actual threat is slippery and prone to hysteria and hyperbole.” Howard Markel and Alexandra Minna Stern, *The Foreignness of Germs: The Persistent Association of Immigrants and Disease in American Society*, *Milbank Quarterly* 2002 Dec; 80(4) 757;<sup>28</sup> *see also*, Ibrahim Abubakar et al., *The UCL–Lancet Commission on Migration and Health: the health of a world on the move*, *The Lancet Commissions*, Volume 392, Issue 10164, P2606-2654 (December 15, 2018).

The inference of pretext also finds support in the statements of those who signed or influenced the rule. To start at the top, President Donald J. Trump has stated that immigrants attempting to cross the southern border of the United States should be shot. Eugene Scott, *Trump’s most insulting—and violent—language is often reserved for immigrants*, *Wash. Post* (Oct. 2, 2019).<sup>29</sup> He has suggested that the border should include an “electrified” wall with “spikes on top that could pierce human flesh.” *Id.* He has referred to immigrants as “animals” who “infest” the United States. Juan Escalante, *It’s not just rhetoric: Trump’s policies treat immigrants like me as “animals,”* *Vox* (May 19, 2018);<sup>30</sup> Brian Resnick, *Donald Trump and the disturbing power of dehumanizing language*, *Vox* (Aug. 14, 2018).<sup>31</sup> And he has, without citing to any evidence, both associated immigrants generally with “[d]rugs, gangs, and violence” (Dara Lind, *Trump just delivered the most chilling speech of his presidency*, *Vox* (June 28, 2017)),<sup>32</sup> and said that Mexican immigrants “bring[ ] drugs,” “bring[ ] crime,” and are “rapists.” Scott, *supra*.

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<sup>26</sup> <https://www.publichealth.columbia.edu/public-health-now/news/public-health-experts-urge-us-officials-withdraw-order-enabling-mass-expulsion-asylum-seekers>.

<sup>27</sup> [https://www.cvt.org/sites/default/files/attachments/u101/downloads/letter\\_to\\_dir\\_redfield\\_from\\_georgia\\_professionals\\_re\\_border\\_closure\\_order\\_final\\_dcl61420.pdf](https://www.cvt.org/sites/default/files/attachments/u101/downloads/letter_to_dir_redfield_from_georgia_professionals_re_border_closure_order_final_dcl61420.pdf).

<sup>28</sup> <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2690128/>.

<sup>29</sup> <https://www.washingtonpost.com/politics/2019/10/02/trumps-most-insulting-violent-language-is-often-reserved-immigrants/>.

<sup>30</sup> <https://www.vox.com/first-person/2018/5/18/17369044/trump-ms-13-gang-animals-immigrants>.

<sup>31</sup> <https://www.vox.com/science-and-health/2018/5/17/17364562/trump-dog-omaro-sa-dehumanization-psychology>.

<sup>32</sup> <https://www.vox.com/policy-and-politics/2017/7/28/16059486/trump-speech-police-hand>.



More specifically, President Trump has referred to asylum seekers as “invad[ing]” and “infest[ing]” the United States. Donald J. Trump (@realDonaldTrump), Twitter (June 19, 2018, 6:52 AM);<sup>33</sup> Donald J. Trump (@realDonaldTrump), Twitter (June 24, 2018, 8:02 AM).<sup>34</sup> He has claimed without evidence that support for asylum seekers is equivalent to support for “crime,” “drugs,” and “human trafficking.” *Remarks: Donald Trump Meets With Representatives of Law Enforcement* (Sept. 26, 2019).<sup>35</sup> And he has made clear his view that all asylum seekers should “IMMEDIATELY” be deported without any legal process whatsoever, in clear contravention of the INA and international law. Donald J. Trump (@realDonaldTrump), Twitter (June 30, 2018, 3:44 PM).<sup>36</sup>

President Trump has also repeatedly claimed that the asylum system routinely grants relief to people without legitimate claims. He has, for instance, claimed that there is routine “abuse” of the asylum process. Exec. Order No. 13,767, *Border Security and Immigration Enforcement* (Jan. 25, 2017). He has referred to the lawful asylum process as a “loophole” exploited by those with “fraudulent or meritless” claims. *Remarks by Pres. Trump on the Illegal Immigration Crisis and Border Security* (Nov. 1, 2018).<sup>37</sup> He has referred to asylum as a “hoax” and a “scam” and claimed, in clear contravention of U.S. and international law, that “we’re not taking [asylum seekers] anymore.” *Trump on Asylum Seekers: ‘It’s a Scam, It’s a Hoax’*, Daily Beast (Apr. 5, 2019).<sup>38</sup> He has expressed the unelaborated view that “asylum procedures are ridiculous” and that “you have to get rid of [immigration] judges” to get the outcomes he prefers. *Remarks by President Trump and NATO Secretary General Jens Stoltenberg Before Bilateral Meeting* (April 2, 2019).<sup>39</sup> He has claimed that asylum laws are “horrible” and “unfair” (*Remarks by President Trump on the National Security and Humanitarian Crisis on our Southern Border* (Mar. 15, 2019))<sup>40</sup> and that asylum claims are “frivolous” and “bogus” (*Remarks: President Trump Signs Taxpayer First Act in the Oval Office* (July 1, 2019)).<sup>41</sup> None of these statements were supported by so much as a shred of evidence, and no supporting evidence exists for any of them.

These views constitute just a small sample of President Trump’s anti-immigrant, and anti-asylum seeker, statements.

Attorney General William Barr, who signed the NPRM on behalf of DOJ, likewise has a long history of statements that, at the time of his confirmation, led to the accurate prediction that he would “be a loyal foot soldier for Trump’s aggressive immigration agenda.” Dara Lind, *William Barr*

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<sup>33</sup> <https://twitter.com/realDonaldTrump/status/1009071403918864385>.

<sup>34</sup> <https://perma.cc/35AQ-NSDH>.

<sup>35</sup> <https://factba.se/transcript/donald-trump-remarks-law-enforcement-september-26-2019>.

<sup>36</sup> <https://twitter.com/realDonaldTrump/status/1013146187510243328?s=20>.

<sup>37</sup> <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-illegal-immigration-crisis-border-security/>.

<sup>38</sup> <https://www.thedailybeast.com/trump-on-asylum-seekers-its-a-scam-its-a-hoax>.

<sup>39</sup> <https://perma.cc/5ZKY-P53D>.

<sup>40</sup> <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-national-security-humanitarian-crisis-southern-border-2/>.

<sup>41</sup> <https://factba.se/transcript/donald-trump-remarks-bill-signing-taxpayer-act-july-1-2019>.

hearing: attorney general nominee's immigration record aligns with Trump's, Vox (Jan. 16, 2019).<sup>42</sup> For instance, in 1992, when the acquittal of the white Los Angeles police officers who savagely beat Rodney King led to violence, Barr made the astonishing claim that “[t]he problem of immigration enforcement” was in part responsible for the violence. Ronald J. Ostrow, *William Barr: A “Caretaker” Attorney General Proves Agenda-Setting Conservative*, L.A. Times (Jun 21, 1992).<sup>43</sup> Like Trump, Barr has long believed—without a shred of supporting evidence—that large numbers of asylum seekers present “patently phony claims.” *Asylum and inspections reform: Hearing before the Subcommittee on International Law, Immigration, and Refugees of the Committee on the Judiciary, House of Representatives* (Apr. 27, 1993).<sup>44</sup> And more recently, while criticizing so-called “sanctuary” policies, Barr baselessly referred to all undocumented people as “criminal aliens.” E.g., Justine Coleman, *Barr announces ‘significant escalation’ against ‘sanctuary’ localities*, The Hill (Feb. 10, 2020).<sup>45</sup>

There is little public information about Chad Mizelle, who illegally signed the NPRM on behalf of DHS (see Section II.C, *infra*). However, Mizelle is universally described as having been made purported Acting General Counsel of DHS thanks to his close ties to White House immigration adviser Stephen Miller. See, e.g., Geneva Sands, *Stephen Miller ally tapped as top Homeland Security attorney*, CNN (Feb. 12, 2020);<sup>46</sup> Meghana Srivastava, *Cornell Law Alum Named Homeland Security Head Lawyer*, Cornell Sun (Feb. 19, 2020).<sup>47</sup> Presumably, then, Mizelle broadly shares Miller’s views toward asylum seekers and other immigrants.

Miller’s view of asylum seekers is that the United States should treat the children in families seeking asylum “badly enough” that parents will no longer seek refuge in this country. Jonathan Blitzer, *How Stephen Miller Manipulates Donald Trump to Further His Immigration Obsession*, The New Yorker (Feb. 21, 2020).<sup>48</sup> He, too, has claimed without evidence that there is an “‘asylum fraud crisis’ at the border.” *Id.* More generally, Miller has, by his own admission, dedicated his entire life to making the lives of immigrants more difficult. *Id.* Miller’s central driving belief is that immigrants bring crime to the United States. SPLC, *Emails Confirm Miller’s Twin Obsessions: Immigrants and Crime* (Nov. 25, 2019).<sup>49</sup> That belief, however, has been repeatedly and conclusively refuted. See, e.g., Jason L. Riley, *The Mythical Connection Between Immigrants and Crime*, Wall St. J. (July 14,

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<sup>42</sup> <https://www.vox.com/2018/12/7/18128926/barr-confirmation-senate-immigration-trump>.

<sup>43</sup> <https://www.latimes.com/archives/la-xpm-1992-06-21-op-1236-story.html>.

<sup>44</sup> [https://archive.org/stream/asyluminspection00unit/asyluminspection00unit\\_djvu.txt](https://archive.org/stream/asyluminspection00unit/asyluminspection00unit_djvu.txt).

<sup>45</sup> <https://thehill.com/regulation/court-battles/482425-barr-announces-significant-escalation-against-sanctuary-cities>.

<sup>46</sup> <https://www.cnn.com/2020/02/12/politics/chad-mizelle-department-of-homeland-security/index.html>.

<sup>47</sup> <https://cornellsun.com/2020/02/19/cornell-law-alum-named-homeland-security-head-lawyer/>.

<sup>48</sup> <https://www.newyorker.com/magazine/2020/03/02/how-stephen-miller-manipulates-donald-trump-to-further-his-immigration-obsession>.

<sup>49</sup> <https://www.splcenter.org/hatewatch/2019/11/25/emails-confirm-millers-twin-obsessions-immigrants-and-crime>.

2015);<sup>50</sup> Christopher Ingraham, *Two charts demolish the notion that immigrants here illegally commit more crime*, Wash. Post (June 19, 2018);<sup>51</sup> Walter Ewing et al., *The Criminalization of Immigration in the United States* (July 13, 2015);<sup>52</sup> Anna Flagg, *Is There a Connection Between Undocumented Immigrants and Crime?*, The Marshall Project (May 13, 2019).<sup>53</sup>

Thus, even if the text of the NPRM left any doubt about the true goal of its proposals—and it does not—that doubt would be dispelled by the statements of those who approved the NPRM or were in a position to dictate its contents. Because the NPRM does not, and cannot, justify its true goal of making it effectively impossible for asylum seekers to receive relief, it must be withdrawn in its entirety.

## **B. Impermissible Retroactivity**

The NPRM’s main provisions are, by their terms, illegally retroactive in effect. The NPRM is silent as to whether its bar on asylum and withholding of removal would apply to those who submitted asylum applications before its provisions become effective. Thanks to a variety of factors, prominently including USCIS’s decision to shift to a last-in-first-out priority system in adjudicating asylum claims and DOJ’s repeated (and often illegal) meddling in the dockets of the immigration courts, there are many such applications—including some that have been pending for at least five years.

The application of the NPRM to pending applications would violate the well-settled presumption against retroactivity. A regulation may not be applied retroactively unless Congress has included a clear statement that the agencies may promulgate regulations with that effect. *E.g.*, *INS v. St. Cyr*, 533 U.S. 289, 316-17 (2001). There is no statute that authorizes either DHS or DOJ to promulgate new bars to asylum and withholding of removal that have retroactive effect.

The application of the NPRM’s proposals to pending asylum applications is therefore illegal if that application qualifies as “retroactive.” It does. “The inquiry into whether a statute operates retroactively demands a commonsense, functional judgment about ‘whether the new provision attaches new legal consequences to events completed before its enactment.’” *St. Cyr*, 533 U.S. at 317 (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270 (1994)). The phrase “new legal consequences” encompasses any provision that would “take[ ] away or impair[ ] vested rights acquired under existing laws” or that would “create[ ] a new obligation, impose[ ] a new duty, or attach[ ] a new disability, in respect to transactions or considerations already past.” *Id.* at 321 (quoting *Landgraf*, 511 U.S. at 269)). And the inquiry into whether a provision does so must “be

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<sup>50</sup> <https://www.wsj.com/articles/the-mythical-connection-between-immigrants-and-crime-1436916798>.

<sup>51</sup> <https://www.washingtonpost.com/news/wonk/wp/2018/06/19/two-charts-demolish-the-notion-that-immigrants-here-illegally-commit-more-crime/>.

<sup>52</sup> <https://www.americanimmigrationcouncil.org/research/criminalization-immigration-united-states>.

<sup>53</sup> <https://www.themarshallproject.org/2019/05/13/is-there-a-connection-between-undocumented-immigrants-and-crime>.

informed and guided by familiar considerations of fair notice, reasonable reliance, and settled expectations.” *Id.* (quoting *Martin v. Hadix*, 527 U.S. 343, 358 (1998)).

There can be no doubt that the NPRM would either impair rights concerning, or place new disabilities on, asylum applications already filed. After all, it would indiscriminately bar those with pending applications from asylum—in some cases, based on their presence in the United States, a country in which COVID-19 is more “predominant” than almost anywhere else on Earth. It would also leave those who have previously filed for CAT relief facing a serious, hitherto unheard-of threat that they will be immediately removed to third countries. Applicants who submitted applications on the basis of existing law would therefore find themselves newly disadvantaged in numerous, serious ways. For this reason, too, the NPRM must be withdrawn in its entirety.

### **C. Violation of the Vacancies Act**

The NPRM is also invalid, and must be withdrawn, in its entirety because it was issued in violation of the Federal Vacancies Reform Act (FVRA). The NPRM was signed by Chad Mizelle in his purported capacity as “Senior Official Performing the Duties of the General Counsel, U.S. Department of Homeland Security.” 85 Fed. Reg. at 36,306. Because the DHS General Counsel does not have the authority to sign proposed or final rules under the Homeland Security Act or existing DHS delegations, the NPRM also includes a paragraph in which purported Acting Secretary Chad Wolf “delegate[s] the authority” to sign the document to Mizelle. *Id.* at 36,290. However, both Wolf and Mizelle are serving in violation of the FVRA, 5 U.S.C. §§ 3345 & 3346. As a result, both Wolf’s delegation and Mizelle’s signature are without force and effect under the FVRA, 5 U.S.C. § 3348(d)(1), and contrary to law under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). The NPRM, and any final rule based on the NPRM, are accordingly void.

### **D. Insufficient Time for Public Comment**

Finally, the agencies have provided insufficient time for public comment, and have done so without any attempted justification. The NPRM proposes drastic and sweeping changes to the asylum system—but the public has been given a mere 30 days to respond. Even under normal circumstances, at least 60 days would be needed for the public to submit thorough, considered comments on a rule with such sweeping consequences. And these are not normal circumstances: The agencies saw fit to issue this NPRM so that the comment period overlapped with the equally short comment period on another sweeping, highly technical, extensive set of proposals to restrict asylum.<sup>54</sup> The public is at an even greater disadvantage now due to the COVID-19 pandemic.

The 30-day period has also proven insufficient in practice, as our experience highlights. At Tahirih all employees continue to perform mandatory telework, many while simultaneously caring for babies, toddlers, and/or school-age children. As a result, full-time Tahirih employees were expected to work no more than 32 hours per week during the comment period, with the expectations for part-time employees—two of whom were crucial to the drafting of these comments—reduced proportionally. Thus, these comments do not—and cannot—represent Tahirih’s full response to the rule. And they do not, because they cannot, include all of the analysis and evidence that Tahirih would have provided if given at least 60 days to respond to the rule. The agency’s decision not to provide

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<sup>54</sup> See DHS & DOJ, *Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review*, 85 Fed. Reg. 36,264 (June 15, 2020).

more than 30 days for comment has therefore impaired Tahirih’s opportunity and ability to comment on the rules.

Furthermore, that decision is arbitrary. The NPRM contains no reasons for permitting only a 30-day comment period. And there can be no legitimate urgency to the agencies’ proposals, because effectively no asylum seekers are arriving in the United States at this moment. After all, because of COVID-19, U.S. borders are indefinitely closed, and air travel into the country is severely curtailed.

### **III. Comments on Individual Proposals in the NPRM**

The NPRM proposes to “clarify that [the agencies] can categorically bar from eligibility for asylum, statutory withholding of removal and withholding of removal under the CAT regulations” anyone who (1) “exhibits symptoms consistent with being afflicted with” certain diseases, or (2) has come from, or is “part of a class” that “is coming from a country, or a political subdivision or region of that country, or has embarked at a place,” where certain diseases are “prevalent or epidemic.” 85 Fed. Reg. at 41,208, 41,215. On that purported basis, the NPRM effectively proposes to (1) bar from asylum and withholding of removal anyone who might have passed through a country in which COVID-19 is prevalent or epidemic; (2) allow the agencies to extend that treatment to other diseases; and (3) drastically change the process for CAT claims.

Like every other change to asylum law and processes that the agencies have proposed over the past three years, these proposals are flagrantly illegal and bear no rational relationship to their stated purpose. They must accordingly be withdrawn.

#### **A. New Bar on Asylum and Withholding of Removal**

##### **1. Violation of Domestic and International Law**

Contrary to the agencies’ presumption, it is perfectly clear that the INA does not permit the proposed bar on asylum and withholding of removal. The NPRM purports to rely on 8 U.S.C. §§ 1158(b)(2)(A)(iv) and 1231(b)(3)(B)(iv), which allow the agencies to bar from asylum and withholding an individual for whom “there are reasonable grounds to believe ... is a danger to the security of the United States.” This statutory language cannot plausibly be read to support the NPRM’s proposal.

The INA does not define the words “reasonable,” “danger,” or “security.” All three must accordingly be given their ordinary meaning. “Reasonable” means “using or showing ... sound judgment” or “sensible.” Webster’s New World College Dictionary 1118 (3d ed. 1997). A “danger” is a “thing that may cause injury.” *Id.* at 350. And “security” in this context means “protection or defense.” *Id.* at 1214. The INA therefore allows the agencies to bar someone from asylum and withholding only if there is a sensible ground to believe that person may injure the protection or defense of the United States.<sup>55</sup>

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<sup>55</sup> The NPRM cites (85 Fed. Reg. at 41,209) the definition of “security” from *Matter of A-H-*, 23 I. & N. Dec. 774, 788 (AG 2005). But although the Attorney General in that opinion purported to rely on the plain meaning of “danger,” he never discussed the plain meaning of the word “security.” And his gloss on that term cannot be used to override the plain meaning of the word Congress

The NPRM does no such thing. As an initial matter, the NPRM does not propose to bar only individuals who have COVID-19 or some other pandemic disease. To the contrary, the plain terms of the NPRM make clear that it would instead bar from asylum and withholding countless individuals who have no communicable disease at all and therefore cannot possibly injure the protection or defense of the United States. In fact, given that the NPRM would bar people who simply have the bad luck to belong to a “class” of people that the agencies decide might have traveled from a place with a disease, the NPRM would bar individuals who have never even been exposed to the sorts of communicable disease discussed in the NPRM. Similarly, because it contains no time limitation, the NPRM would bar from asylum all those who have *ever* passed through an area with a given disease, even those who did so decades ago and pose no possible risk of infection. But as the NPRM concedes, the federal courts to address the issue have squarely held that only individuals who *actually* pose a danger to the security of the United States may be excluded under this bar.

In a footnote, the agencies make a feeble attempt to justify the exclusion of healthy asylum seekers by waving their hands about the *potential* lack of testing and the *potential* for asymptomatic infection. 85 Fed. Reg. at 41,209-10 n.53. But that attempt falls flat: Many pandemics do *not* entail high risks of asymptomatic transmission, and in most pandemics—including *this one*—testing and other successful preventive public health measures become quickly available. Further, given that the head of the executive branch has repeatedly stated that the United States has sufficient, indeed world-leading, testing capacity (*see, e.g., President Donald J. Trump and His Administration Have Created The Best Covid-19 Testing System In The World* (July 31, 2020)),<sup>56</sup> and that other countries have maintained access to asylum via preventive health measures (*see, e.g., UNHCR, Coronavirus: UNHCR offers practical recommendations in support of European countries to ensure access to asylum and safe reception* (Apr. 27, 2020)),<sup>57</sup> the agencies may not attempt to base a rule on the notion that the United States has insufficient testing to test incoming asylum seekers.

There is no sensible reason at all to believe that anyone who does *not* have a disease poses a threat of injury to the protection or defense of the United States on account of that disease. *See also Yusupov v. Att’y Gen.*, 518 F.3d 185, 201 (3d Cir. 2008) (mere suspicion of a security risk, or existence of a merely conceivable security risk, is not enough to bar an asylum seeker). As UNHCR put the point, “imposing a blanket measure to preclude the admission of refugees or asylum-seekers ... without evidence of a health risk” is merely “discriminatory,” not a *bona fide* effort to protect the security of the United States. UNHCR, *Key Legal Considerations on access to territory for persons in need of international protection in the context of the COVID-19 response* ¶ 6 (Mar. 16, 2020).<sup>58</sup> It is therefore completely unsurprising that the agencies make no attempt at all to articulate any non-discriminatory reason for excluding healthy asylum seekers on public health grounds.

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chose. It goes without saying that the debatable inferences the agencies would draw from legislative history (85 Fed. Reg. at 41,209) also cannot override the plain language of the statute.

<sup>56</sup> <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-administration-created-best-covid-19-testing-system-world/>.

<sup>57</sup> <https://www.unhcr.org/en-us/news/press/2020/4/5ea68bde4/coronavirus-unhcr-offers-practical-recommendations-support-european-countries.html>.

<sup>58</sup> <https://www.refworld.org/docid/5e7132834.html>.

In any event, the rule would remain contrary to the INA even if it imposed a bar on only those who actually have a relevant disease. A sick person—even someone sick with a contagious disease—poses no colorable threat to the protection or defense of the United States writ large. And the NPRM again offers no contrary evidence, because no evidence exists. And in the context of the current pandemic, the available evidence instead makes clear that simple precautions, such as mask usage, physical distancing, and contact tracing, provide ample protection allowing the U.S. asylum system to operate as usual.<sup>59</sup> See, e.g., Human Rights First, *Public Health Measures to Safely Manage Asylum Seekers and Children at the Border* (May 2020).<sup>60</sup>

The NPRM does assert that those with COVID-19 might pose a danger to Border Patrol and ICE agents (85 Fed. Reg. at 41,204-05), but any risk to individual agents categorically fails to implicate the security of the United States. And the agencies have no evidence—because no evidence exists—that “[t]he spread of infectious disease into CBP facilities and to CBP personnel could disrupt CBP operations to such an extent that it significantly impacts CBP’s ... border functions.” 85 Fed. Reg. at 41,208. The evidence is, in fact, to the contrary: At this moment, we are in the midst of the worst pandemic that the United States has seen since at least 1918—and the proposals in the NPRM are not, of course, in place. Nevertheless, there has been no report of any disruption in CBP activities at the border. In fact, there are so far from being “gaps” in CBP coverage at the border (85 Fed. Reg. at 41,208) that CBP agents have been illegally deployed to other tasks. CBP agents have been (illegally) deployed against political opponents of the current administration in Portland, Oregon—hundreds of miles from the border with Canada. See, e.g., CBP, *Statement on CBP Response in Portland, Oregon* (July 17, 2020).<sup>61</sup> Further, at least until late July 2020, CBP officers had (illegally) been made available to perform credible fear interviews—a task that was, until 2019, always performed by USCIS asylum officers. See *Memorandum of Agreement Between U.S. Customs and Border Protection (CBP) and U.S. Citizenship & Immigration Services (USCIS)* (Jan. 30, 2020). The agencies’ statement that CBP operations will be disrupted absent the proposed ban in the NPRM is therefore an arbitrary *ipse dixit* contradicted by all available evidence. It is demonstrably nothing more than a wafer-thin pretext for a sweeping bar on asylum.

Further, although the NPRM also states that “[p]andemics also threaten the United States economy” (*id.* at 41,205), the NPRM does not, because it cannot, provide any evidence that individual asylum seekers pose a significant risk of beginning either new epidemics or new outbreaks of current epidemics. Indeed, the dynamics of pandemics are to the contrary: If a pandemic is unknown, then introduction into the country will occur *before* the NPRM’s bar is instituted (and is, in any event, exceedingly unlikely to originate with an asylum seeker, as opposed to from a wealthy U.S. citizen traveling abroad). If a pandemic is already known, on the other hand, preventative measures are sufficient, such that the bar in the NPRM is not necessary to protect the economy. In any event, a risk to the *economy* of the United States is also not a risk to the *security*—i.e., the protection or defense—

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<sup>59</sup> To be sure, the executive branch has proven singularly unwilling to promote these measures despite their clear benefits for the health of individual U.S. citizens and residents and of the U.S. economy as a whole. But that deadly intransigence cannot override the clear scientific evidence demonstrating the efficacy of such measures.

<sup>60</sup> <https://www.humanrightsfirst.org/sites/default/files/PublicHealthMeasuresattheBorder.05.18.2020.pdf>.

<sup>61</sup> <https://www.cbp.gov/newsroom/speeches-and-statements/statement-cbp-response-portland-oregon>.

of the United States. The entirety of the proposed ban on asylum and withholding is therefore contrary to the plain language of the INA.

The legislative history of the INA’s national-security provisions confirms as much. Congress expressly intended that the withholding of removal provisions in 8 U.S.C. § 1231 “be construed consistent with the” 1968 Protocol Relating to the Status of Refugees. H.R. Conf. Rep. No. 96-781, at 20 (1980). And UNHCR has construed the Protocol to *prohibit* the type blanket bar contemplated by the NPRM. UNHCR, *Key Legal Considerations*; UNHCR, *Advisory Opinion from the UNHCR on the Scope of the National Security Exception Under Article 33(2) of the 1951 Convention Relating to the Status of Refugees* 5 (2006) (security exception is only for those who “pose a serious danger to the foundations or the very existence of the State”).<sup>62</sup> So, too, did U.S. officials at the time the United States signed the Protocol. *See, e.g., Message from the President of the U.S. Transmitting the Protocol Relating to the Status of Refugees*, at VIII (1968); Dep’t of Health, Edu., and Welfare, *Memorandum for Ambassador Graham Martin re: Protocol Relating to the Status of Refugees* (July 22, 1968); Dep’t of Health, Edu., and Welfare, *Letter to Ambassador Graham Martin re: Protocol Relating to the Status of Refugees* (July 16, 1968).

The NPRM attempts a sleight of hand to circumvent the statutory requirements. The agencies opine that, under the statute, “it is enough that the presence of disease in the countries through which the [individual] has traveled to reach the United States makes it reasonable to believe that the entry of [individuals] from that country presents a *serious danger of introduction of the disease* into the United States.” 85 Fed. Reg. at 41,210 (emphasis added). But that is not at all what the INA says. The INA says that there must be reasonable grounds to believe someone is a *danger to security*. And as shown above, an *introduction of disease* is not, without more, a *danger to security*—even a slight one. And that conclusion is doubly true for those who do not have an infectious disease in the first place.

Finally, in addition to violating both the INA and international law, the NPRM’s proposal would also violate the constitutional guarantee of equal protection. There can be no question that enforcement of the NPRM would disproportionately impact women and girls who are survivors of gender-based violence. The available evidence clearly shows that the COVID-19 pandemic has caused a sharp rise in gender-based violence—even in countries where such violence existed at epidemic levels before the onset of COVID-19. *See, e.g., Int’l Rescue Comm., IRC data shows an increase in reports of gender-based violence across Latin America* (June 9, 2020);<sup>63</sup> Nat’l Task Force to End Domestic Violence, *Fast Facts: Survivors of Domestic and Sexual Violence are at Heightened Risk Now, and Will Remain So Long After the Current Crisis*;<sup>64</sup> Refugees Int’l, *Exacerbating the Other Epidemic: How COVID-19 Is Increasing Violence Against Women and Girls* (Aug. 4, 2020);<sup>65</sup>

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<sup>62</sup> <https://www.refworld.org/docid/43de2da94.html>.

<sup>63</sup> <https://www.rescue.org/press-release/irc-data-shows-increase-reports-gender-based-violence-across-latin-america>.

<sup>64</sup> <https://static1.squarespace.com/static/57d7477b9de4bb8b14256cf4/t/5e9dc0e935d08275a98b9925/1587396842687/NTF+Fact+Sheet.DV-SA+survivors+and+the+COVID19+crisis.pdf>.

<sup>65</sup> <https://www.refugeesinternational.org/reports/2020/7/31/exacerbating-the-other-epidemic-how-covid-19-is-increasing-violence-against-displaced-women-and-girls>.



see also Tahirih Justice Center, *The Impact of COVID-19 on Immigrant Survivors of Gender-Based Violence* (Mar. 23, 2020) (describing similar dynamics in the United States).<sup>66</sup> In addition, those who inflict gender-based violence frequently deny survivors access to health care as a tool of abuse. See, e.g., Laura McCloskey et al., *Abused Women Disclose Partner Interference with Health Care: An Unrecognized Form of Battering*, 22(8) J. Gen. Intern Med. 1067 (Aug. 2007);<sup>67</sup> Meera Jagannathan, ‘We’ve seen an alarming spike in domestic violence reports:’ For some women, it’s not safe to leave the house OR stay home, Market Watch (June 19, 2020).<sup>68</sup> The NPRM will thus both disproportionately expose women and girls to persecutorial violence *and* disproportionately expose women and girls to COVID-19 itself. Yet the NPRM proposes no rational explanation linking this disproportionate effect on women to a legitimate government policy—much less show that it bears a substantial relationship to an important government objective. See *Craig v. Boren*, 429 U.S. 190, 197 (1976). It therefore violates the constitutional guarantee of equal protection.

## 2. Arbitrary and Capricious

The bar on asylum and withholding is also arbitrary and capricious in violation of the APA.

a. To the extent that the language of the security bar is ambiguous in any relevant way (and, to be clear, it is not), the agencies’ interpretation is unreasonable for all of the reasons above.

b. The rule is also arbitrary and capricious because it has the disproportionate, unacknowledged, undefended, and indefensible effect on women and girls shown above.

c. In addition, the rule would arbitrarily bar from relief in the United States any asylum seeker who is currently in the United States. After all, the United States itself is a country in which COVID-19 is currently epidemic; in fact, by some measures—such as number of deaths from COVID-19—the United States is worse off than any other country on the planet. See, e.g., Johns Hopkins Univ., *COVID-19 Dashboard*.<sup>69</sup> The result is that anyone who has “embark[ed]” on a journey within this country will be barred from asylum under the rule by virtue of their presence in this country—which is, of course, a prerequisite to filing for asylum. Many others who have been in this country for years, meanwhile, are originally “from” other countries in which COVID-19 is uncontrolled, but who cannot possibly bring new cases of COVID-19 to the United States because they now live here.

The NPRM would also likely bar from asylum and withholding asylum seekers who would be in the United States but for illegal policies promulgated by the agencies. There are, for example, tens of thousands of asylum seekers who have been illegally stranded in Mexico for months and years as a result of the flagrantly misnamed “Migrant Protection Policies.” See, e.g., *Innovation Law Lab v. Wolf*, 951 F.3d 1073 (9th Cir. 2020). Other asylum seekers have been left in Mexico as a result of

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<sup>66</sup> [https://www.tahirih.org/wp-content/uploads/2020/03/Impact-of-Social-Distancing-on-Immigrant-Survivors-of-Gender-Based-Violence\\_Final-March-23-2020.pdf](https://www.tahirih.org/wp-content/uploads/2020/03/Impact-of-Social-Distancing-on-Immigrant-Survivors-of-Gender-Based-Violence_Final-March-23-2020.pdf).

<sup>67</sup> <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2305736/>.

<sup>68</sup> <https://www.marketwatch.com/story/its-not-safe-to-leave-the-house-and-its-not-safe-to-stay-in-the-house-how-coronavirus-could-exacerbate-domestic-violence-2020-03-20>.

<sup>69</sup> <https://coronavirus.jhu.edu/map.html>.

illegal policies to “meter” entry at official U.S. ports of entry. *See, e.g., Al Otro Lado, Inc. v. McAleenan*, 394 F. Supp. 3d 1168 (S.D. Cal. 2019). And now, the illegal NPRM threatens to bar the victims of these other illegal policies from asylum and withholding *because* they have been subject to MPP or metering. That Kafkaesque result would be arbitrary and capricious.

*d.* The language and placement of the proposed regulations is also self-contradictory. The agencies propose to add the new bar to the subsection of 8 C.F.R. § 208.13 titled “mandatory bars.” But the proposed regulatory text does not read as a mandatory bar; rather, it reads as an instruction to immigration judges and asylum officers to “consider” symptoms and travel routes. 85 Fed. Reg. at 41,217. And there is no further direction concerning how officials are to “consider” these factors. This disconnect, without more, renders the NPRM’s proposal arbitrary.

We believe the rule will, in practice, be applied as a categorical bar. But even if it is not, it is contrary to the INA for the reasons above. If it is not, it is arbitrary both because it provides immigration judges and asylum officers with no guidance and because it vests unlimited expert medical discretion in those officials—who, of course, have no medical training and no basis for making medical conclusions.

*e.* The rationales provided in the NPRM are uniformly irrational. The NPRM states that the bar is aimed at individuals “whose entry poses a significant public health danger” because it “pose[s] a risk of further spreading infectious or highly contagious illnesses or diseases.” 85 Fed. Reg. at 41,208. But as shown above, the rule’s primary effects will be on those whose entry does not, and cannot, pose any kind of health danger, because they are not infected with a contagious disease. And as further shown above, even if the rule were aimed at these risks, the risks are not ones that rise to the level of dangers to the security of the United States. As further shown above, the NPRM’s assertions about CBP coverage, the dangers to the community of individual asylum seekers with health problems, and the U.S. economy do not support its sweeping bar on relief.

*f.* The list of diseases that the NPRM suggests could trigger bars is also arbitrary. The NPRM ties potential triggering diseases to 42 C.F.R. § 34.2(b). 85 Fed. Reg. at 41,215. But that regulation lists diseases that are easily treated and therefore pose no risk of a significant public-health emergency. In fact, the list expressly implicates a much lower bar—the potential to “affect the health of the American public” (42 C.F.R. § 34.2(b)(2))—than the INA’s focus on U.S. security. And this mismatch is exacerbated, not cured, by the standardless discretion the NPRM would give to the Attorney General and the Secretary of DHS to pick and choose diseases listed in § 34.2(b).

As drafted, the NPRM would also arbitrarily allow the agencies to bar survivors of rape and sexual assault from asylum and withholding of removal *because* they were assaulted. The list in § 34.2(b) includes several sexually transmitted diseases—*i.e.*, diseases a survivor could contract from their persecutor. At the same time, the sexually transmitted diseases in § 34.2(b) are not ones that are in any way likely to cause a public health crisis in the United States.

*g.* The NPRM also arbitrarily fails to define “prevalent or epidemic.” The application of those terms to a disease in an individual country is not clear. And the NPRM provides no benchmarks to determine when a disease is prevalent or epidemic. Rather, it leaves that determination to the completely non-expert determination of the agencies themselves.

*h.* More generally, the NPRM arbitrarily gives supposed public health decisions to agencies that lack public health expertise. The NPRM requires that DHS and DOJ *consult with* other agencies before announcing restrictions purportedly based on public health, but it leaves the ultimate determination in the hands of DHS and DOJ—and even in the hands of individual immigration judges completely untutored in medicine or public health. The NPRM would, in other words, arbitrarily empower those agencies to override public health experts in purported matters of public health. Further, the agencies make no attempt to rationalize this choice.

## **B. Changes to Deferral of Removal Under the Convention Against Torture**

In proposing changes to 8 C.F.R. §§ 208.30 and 1208.30, the agencies seek a sea-change in procedures and protections offered to those fleeing persecution and torture. Congress directed a low-threshold screening process for asylum seekers seeking asylum without documentation. That process requires non-adversarial interviews by asylum officers who must elicit information relevant to whether there is a significant possibility that the individual could establish eligibility for asylum. 8 U.S.C. § 1225(b). If the asylum officer concludes there is, the applicant has met the credible fear requirement, and is not eligible for expedited removal. Instead, she is to be placed into full proceedings.<sup>70</sup>

The NPRM entirely short-circuits that statutory process. Any asylum seeker subject to the new medical/national security bar or the transit bar (which was vacated by a federal court ruling on June 30) who meets the statutory credible fear requirements will nonetheless be *denied* the opportunity to seek asylum, contrary to statute. Moreover, to avoid immediate expedited removal under the proposed changes, she must *also* prove that she is “more likely than not” to be tortured if returned to her own country. 85 Fed. Reg. at 41,210, 41216-18. But even that is not enough, because the NPRM also provides that DHS may choose to remove her to a third country, even before there is any resolution on her claim of likely torture in her own country. *Id.*

In other words, the NPRM turns what Congress established as a low-threshold screening process to ensure that those with potential claims of persecution or torture were *not* subject to expedited removal, into a categorical denial of asylum and assurance of expedited removal for the vast majority of applicants who can meet the credible fear standard. For those who can mount a withholding of removal claim, they are likewise denied and subject to expedited removal.

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<sup>70</sup> IIRIRA’s legislative history unanimously confirms that conclusion. As the Conference Report presented by the Joint Committee from the House and the Senate explained: If the officer finds that [an individual] has a credible fear of persecution, the [individual] shall be detained for further consideration of the application for asylum under normal non-expedited removal proceedings. H. Rept. 104-828, at 209 (1996) (emphasis added). That straightforward understanding that normal removal proceedings apply for those screened out of the expedited removal process appears repeatedly in the rest of the Act’s legislative history. In presenting presented the compromise bill to the Senate, for instance, Senator Hatch stated as follows: “Under the revised provisions, [individuals] coming into the United States without proper documentation who claim asylum would undergo a screening process to determine if they have a credible fear of persecution. If they do, they will be referred to the usual asylum process.” 142 Cong. Rec. S, 11491 (Sept. 27, 1996) (emphasis added). Likewise, in explaining the new credible fear standard itself, Senator Hatch noted: “The standard adopted in the conference report is intended to be a low screening standard for admission into the usual full asylum process.” *Id.* (emphasis added).

Applicants are left to proceed to a trial on the merits of any potential deferral of removal claim in which DHS can simply suggest country after country and require applicants to prove that it is more likely than not that they will be subject to torture there.

Especially for survivors of gender-based violence who have just finished traumatic journeys, forcing them to prove this extremely high standard for any number of countries in a geographic game of whack-a-mole is arbitrary, capricious, in violation of law, and cruel.

*First*, the NPRM requires meeting the evidentiary burden for actual relief in the context of an informal and non-adversarial screening interview. This is contrary to the statutory definition of a credible fear hearing. It is also arbitrary and capricious because the agencies utterly ignore the timing and nature of the screening process itself. Congress firmly rejected imposing a higher level of proof at the screening stage because of the timing and nature of the screening. The legislation was designed to provide “major safeguards” to prevent the persons with a significant chance of obtaining asylum from being returned to persecution. Recognizing that in expedited removal proceedings, the asylum officer’s “power to send people summarily back to dangerous places” is “extraordinary,” Representative Christopher Smith stressed the importance that “the process be fair—and particularly that it not result in sending genuine refugees back to persecution.” 142 Cong. Rec. H11054, H11066-67 (daily ed. September 25, 1996) (statement of Rep. Smith). And Senator Hatch expressed concern “about the harsh consequences that could result to asylum applicants who do have a valid claim but who may not speak English, may not have the necessary proof of their claim with them.” 142 Cong. Rec. S4457-91 (daily ed. May 1, 1996) (statement of Sen. Hatch). These concerns apply equally to applicants seeking relief under CAT or withholding, as the agencies can have no legitimate interest in sending people back to persecution or torture.

*Second*, the agencies fail to consider the many practical reasons militating against requiring individuals to prove their entitlement to relief on the merits in the context of a credible fear interview. The regulations provide that the initial screening interviews are to be conducted “in a non-adversarial manner,” 8 C.F.R. § 208.30(d), so attorneys are rarely present at this stage. However, applicants who have just arrived from other countries and are not represented by counsel are unlikely to understand American legal standards or processes. In addition to significant language and cultural barriers, refugees who have just fled from persecution in their home countries may be fearful or reluctant to talk about that persecution and torture with U.S. authorities. *See, e.g., Senathirajah v. INS*, 157 F.3d 210, 218 (3d Cir. 1998) (“Given [the individual’s] allegations of torture and detention, he may well have been reluctant to disclose the breadth of his suffering in Sri Lanka to a government official upon arriving in the United States even if he could understand the questions he was being asked at the airport.”)

*Third*, the agencies also fail to take into account how trauma affects the fear screening process, and how raising the screening standard to a decision standard would be affected by these facts. Tahirih clients are survivors of violence in countries and cultures around the world. They have survived rape, severe and routine beatings, FGM/C, and attempted femicide. They have been trafficked for profit, subjected to slavery, and coerced into relationships with men who use violence—sexual, verbal, emotional, and physical abuse—to establish power over them, effectively forcing them into the submissive role they are expected to fill in their societies as women in a domestic relationship. They have been subject to acid attacks and attempted murder as a matter of family “honor.” Finding the courage to escape that violence does not mean escaping the associated trauma. Like survivors of other traumatic events—war, hurricanes, criminal attacks—immigrant

survivors of gender-based violence are marked by that trauma in ways both visible and invisible. For those who successfully make their way to the U.S. border to seek asylum or other relief based on such persecution, that trauma is likely to be, if anything, sharpened by a dangerous journey, fear of the asylum process, fear of being returned to their conditions of persecution, and—especially now—fear of border officials.

These factors can and do affect survivors' ability to tell their stories, and they are especially important in the fear interview at the border when trauma is likely to be freshest and the non-citizen at her most vulnerable. Survivors arriving at the border are ill equipped to effectively communicate with immigration officials due to profound traumatization, hunger, exhaustion, lack of understanding of our legal process, and language and cultural barriers. They may have been separated from family and still be suffering acute physical effects of violence in addition to emotional trauma. With no time to collect their thoughts, let alone corroborative evidence to support highly fact-specific inquiries, it is highly inappropriate to expect them to meet newly restrictive standards of proof.

*Fourth*, the NPRM effectively requires that those seeking protection arrive in the country armed with reams of country condition reports and detailed evidence relating to every country to which DHS might suggest removal. Without that evidence, a claimant will struggle to meet the required “more likely than not” standard. But the agencies fail to consider that those in credible fear proceedings—which occur within hours or a day or two of entering the country—lack access to lawyers, to documentation relating to country conditions, to documentation relating to their claims of persecution and torture, and especially to evidence about what happens in countries that are not their own. The proposed rule makes a sham of the process required to comply with the United States' obligations regarding *non-refoulement*.

*Fifth*, requiring asylum officers in the credible fear process to make determinations about statutory withholding of removal and withholding of removal under CAT violates 8 C.F.R. § 208.16(a), which provides that asylum officers “shall not” decide withholding claims.

*Sixth*, the NPRM proposes to amend 8 CFR 208.30(e)(1) to make preparation of a written record in the credible fear proceeding “subject to (e)(5).” This amendment is unclear at best, but to the extent the agencies seek to excuse any credible fear interview from the requirement of a written record, it violates 8 USC § 1225(b)(1)(B)(iii)(II).

*Seventh*, the proposed changes to 8 C.F.R. § 1208.30(g)(2)(IV)(A) eliminate the ability of “the Service” to reconsider a negative credible fear finding that was concurred with by an immigration judge. This would disrupt an important fail-safe protection for people whose lives are in danger. The opportunity for re-interview is critical in situations where the asylum seeker is not able to convey their fear of return in the original CFI due to problems with interpretation or because of the physical effects of trauma during flight from country or conditions of detention. The NPRM offers no explanation or any discussion of this change, and it provides no rationale for eliminating this long-standing practice.

The NPRM would also allow DHS to immediately remove the very few people who can satisfy the ultimate standard for CAT relief to a third country. Doing so at the credible-fear stage, however, ensures that there will be no detailed, individualized determination made as to whether a person will be tortured in that third country. The absence of any such determination guarantees that the

government will violate its duty of *non-refoulement*. After all, there are many areas of the world in which torturers can freely pursue their victims across national boundaries; to take one example, the three Northern Triangle countries and Nicaragua have no border controls and formalized freedom of movement. And more generally speaking, there can be reason to believe that a person subject to torture on a particular ground in one country will also be subject to the same torture in another country. The Northern Triangle countries—in all three of which women and girls are routinely subject to persecution and torture on account of their gender—once again provide a prime example.

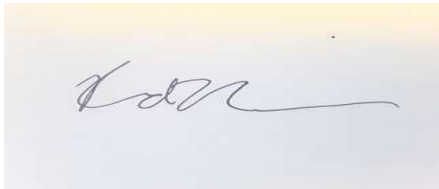
Furthermore, less than a month before this NPRM was issued, DHS and DOJ issued another NPRM proposing very different changes to many of the very same provisions the agencies seek to amend here. *See* 85 Fed. Reg. 36,264 (June 15, 2020) (“Asylum NPRM”). For example, the Asylum NPRM proposed sweeping amendments to 8 C.F.R. § 208.30 to require three different burdens of proof to be applied to different requests for relief, all at the credible fear screening stage. *Id.* at 36,295. But in this NPRM, the agencies make no mention of those three burdens of proof, while this NPRM proposed an even higher burden of proof for one claim, unmentioned in the Asylum NPRM. Likewise, in the Asylum NPRM, the agencies proposed a new definition of “significant possibility,” but in this NPRM, the agencies do not say whether they would apply that new definition to the term as used in these proposed changes. There are multiple examples of similar and more extensive inconsistency, overlap, and outright conflict. It is impossible to tell what the government proposes: will some parts of both rules be adopted? Are the proposals two separate schemes, only one of which may be adopted? What are the agencies’ policy objectives for offering these two conflicting approaches? The purported rationales for each NPRM are quite different, yet this NPRM makes no attempt to explain how the agency would prioritize one policy rationale over another, nor does it evaluate the objectives or the cost/benefit for making a choice.

And while the agencies have conceded some difference between the two NPRMs and purportedly seek comment on how to “reconcile” the two sets of proposed changes (*id.* at 41211), they have failed to provide any indication or notice about what the agency hopes to accomplish in such a reconciliation. There is no discussion in this NPRM, for example, as to why or whether the agencies might choose to forego the three proposed burdens of proof in the Asylum NPRM in favor of a higher burden of proof for removal under two new bases for banning asylum. Therefore, if the agencies attempt to “reconcile” these proposals in a further proceeding, the APA requires them to do so in a way that provides notice of their reasoning and rationales, and an opportunity for the public to comment on those issues.

**IV. Conclusion**

The NPRM must be withdrawn in its entirety.

Sincerely,

A rectangular box containing a handwritten signature in black ink. The signature is cursive and appears to read 'R. Caldarone'.

Richard Caldarone  
Litigation Counsel

*/s/Julie Carpenter*

Julie Carpenter  
Senior Litigation Counsel