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Via federal eRulemaking portal, <http://www.regulations.gov>

RE: RIN 1615-AC57, USCIS Docket No. 2020-0013, RIN 1125-AB08, A.G. Order No. 4747-2020, Public Comment Opposing Joint Notice of Proposed Rulemaking on “Security Bars and Processing”

Dear Ms. Alder Reid:

Kids in Need of Defense (KIND) submits the following comments in response to the above Notice of Proposed Rulemaking (NPRM) on Security Bars and Processing, published by the Department of Homeland Security (DHS) and the Executive Office for Immigration Review (EOIR) (collectively, the “agencies”) on July 9, 2020 at 85 Fed. Reg. 41201 (the “Proposed Rule”). We focus our comments on those issues most affecting the unaccompanied children we serve but we object to the rule as a whole, which is the latest in a long line of proposed regulations designed to undermine asylum in the United States. This particular rule hides behind the tragedy of the Covid-19 pandemic to institute a sweeping and unlawful ban on asylum and withholding of removal in the name of public health and national security, conflating the two policy objectives in an attempt to justify a dramatic overhaul of the U.S. protection system. The Proposed Rule flouts clear U.S. law and international treaty obligations through which this nation committed to offer refuge to the persecuted. In addition, it ignores specific provisions of law designed to facilitate the fair and humane treatment of unaccompanied children, including ensuring that they have access to asylum and other forms of protection Congress has created.

The Proposed Rule’s infirmities extend to its promulgation, which permits only a 30-day comment period for an issue so complex and grave that it requires careful review and analysis by diverse stakeholders, such as those with expertise in immigration law, medicine, and public health. The national public health emergency caused by Covid-19 is no excuse for compressed time frames and truncated rulemaking, particularly in the case of a rule that envisions a broad asylum ban on individuals who may have been exposed to a wide range of infectious diseases, many of which are treatable, in the name of national security. Moreover, the rule was promulgated in the midst of an even broader and more extensive set of proposed changes to the asylum system with no coordination or explanation of the

relationship between the outcomes or impact of the two rules if both were implemented.¹ This appears to be nothing more than an attempt to leave no stone unturned in blocking access to asylum, throwing so many roadblocks and diversions at applicants that they will have no chance at receiving protection in the United States, an illegitimate regulatory purpose at odds with the law.

KIND is a national nonprofit organization dedicated to providing free legal representation and protection to unaccompanied immigrant and refugee children in removal proceedings. KIND and its pro bono partners have helped hundreds of children to obtain asylum in the United States, and our organization is well-known for providing expert advice and guidance on the unique issues and needs facing children, particularly unaccompanied children, throughout the asylum process. Since January 2009, KIND has received referrals for more than 20,000 children from 70 countries. KIND has field offices in ten cities: Los Angeles, San Francisco, Atlanta, Baltimore, Boston, Houston, Newark, New York City, Seattle, and Washington, DC. Legal services professionals who serve children through KIND provide defense in removal proceedings and pursue immigration benefits, including asylum, withholding of removal, and protection under the Convention Against Torture (CAT) on behalf of their child clients. KIND also employs social services coordinators throughout the country, providing unaccompanied children with the support they need outside of the courtroom. KIND promotes protection of children in countries of origin and transit countries and works to address the root causes of child migration from Central America. KIND also advocates for laws, policies, and practices to improve the protection of unaccompanied children.

As discussed below, we urge that this rule be withdrawn in full as it lacks any basis in evidence or law, is a misappropriation of the idea of endangering national security and ignores the fundamental legal rights of unaccompanied children.

I. The Proposed Rule violates U.S. asylum law and international treaty obligations and represents an arbitrary and capricious exercise of authority.

The Proposed Rule would categorically bar individuals from applying for asylum who are thought to pose a health risk to the United States on the grounds that transmission of an infectious disease poses a national security threat that can only be avoided by eliminating access to asylum. Specifically, the proposed rule would make individuals ineligible for asylum or withholding of removal if “entry would pose a risk of further spreading infectious or highly contagious illnesses or diseases, because of declared public health emergencies in the United States or because of conditions in their country of origin or point of embarkation to the United States, pose a significant danger to the security of the United States” (85 Fed. Reg. at 41208). The agencies argue that the spread of an infectious disease has the potential to endanger the health of employees at U.S. Customs and Border Protection (CBP) or U.S. Immigration and Customs Enforcement (ICE), other government employees and immigrants, and the general public; in addition to the health consequences, the government cites to the economic impact of the Covid-19 pandemic thus far, arguing that the combined danger to health and the American economy must surely constitute a danger to the national security of the United States. If so, the reasoning goes, then such individuals fall under the statutory exceptions that bar asylum and withholding of removal in cases where there are reasonable grounds to find that an individual poses a danger to the security of the United States (8 U.S.C. §§ 1158(b)(2)(A)(iv) & § 1231(b)(3)(B)(iv)). But the logic fails at this point in the

¹ DHS and EOIR, Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 36264 (June 15, 2020).

analysis, because the kind of individualized assessment necessary to make such a determination is completely at odds with the categorical, sweeping, and arbitrary scope of the Proposed Rule. The government seeks to redefine eligibility for asylum based on capacity issues, ignoring both the law and the alternatives available to safely process individuals arriving from countries where Covid-19 infections currently exist. Its impact on unaccompanied children would be particularly severe, potentially reading out all of the protections afforded to children seeking asylum and other relief under the Trafficking Victims Protection Reauthorization Act of 2008.

II. The Proposed Rule’s categorical ban on asylum ignores the law in order to avoid processing legitimate applications for asylum.

While the supplemental discussion accompanying the Proposed Rule offers a lengthy discourse on the threats of pandemics and Covid-19, it explains asylum in only a few words, referring to asylum as “a form of discretionary relief that, generally, keeps an alien from being subject to removal and creates a path to lawful permanent resident status and U.S. citizenship” (85 Fed. Reg. at 41206). This neutered definition of asylum de-emphasizes the fact that asylum is a form of relief for individuals seeking protection from persecution; providing a mechanism for asylum and a subsequent path to citizenship for asylees are key components adopted by the Refugee Act of 1980 to meet the United States’ international obligations under the United Nations Refugee Convention and Protocol. While the discussion gives short shrift to the reasons for seeking asylum, it goes to great lengths to discuss the statutory exceptions to asylum eligibility, along with asserting the Attorney General’s authority to impose additional restrictions, giving only the briefest lip service to the requirement that any such restrictions be consistent with the statute (85 Fed. Reg. at 41206-07). Nor does it acknowledge that previous efforts to create new bars to asylum—such as those that seek to bar applicants based on manner of entry or based on failing to previously apply for asylum while in transit to the United States—have been found unlawful precisely because the bars were so overbroad and inconsistent with the spirit of refugee protection embodied in the Refugee Act of 1980 that they effectively would deny asylum eligibility to broad swathes of people based on factors that have nothing to do with whether or not the individual is a refugee.²

In this case, the NPRM is distinguished from prior efforts to limit asylum because it relies on an existing bar—danger to the security of the United States—rather than creating a new one to cover public health matters. But the act of interpreting—or in this case reinterpreting—statutory language requires the same careful consideration of conformity with existing law that the courts have applied when interpreting newly devised asylum bars. The new definition must be consistent with current law, it must align with Congressional intent, and it must be tempered in its application in a manner that avoids arbitrary and capricious decision-making. This Proposed Rule meets none of those criteria. The NPRM mischaracterizes the concept of danger as applied to the asylum bar, ignores the framework of international refugee protection upon which the bar is based and to which Congress acceded, and lacks

² USCIS and EOIR, Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33829 (July 16, 2019) (interim final rule creating new 8 C.F.R. §§ 208.13(c)(4) and 1208.13(c)(4)), *enjoined*, *East Bay Sanctuary Covenant v. Barr*, ___ F.3d ___ (9th Cir. July 6, 2020), *rule invalidated on other grounds*, *Capital Area Imm. Rights Coalition v. Trump*, ___ F. Supp. 3d ___, 2020 U.S. Dist. LEXIS 114421 (D.D.C. June 30, 2020); USCIS and EOIR, Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims, 83 Fed. Reg. 55934 (Nov. 9, 2018) (interim final rule creating new 8 C.F.R. §§ 208.13(c)(3) and 1208.13(c)(3)), *enjoined*, *East Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242 (9th Cir. 2020).

any individualized assessment of danger to the United States. The result is an exception that swallows the rule, virtually eliminating the right to apply for asylum not only because of the current pandemic, but in almost any circumstance in which an individual arrives from a country where an infectious disease exists.

1. The NPRM mischaracterizes the “danger to the security of the United States” bar to asylum, ignoring the historic limitations on exclusion of refugees.

Under the INA, the national security bar to asylum applies where the Attorney General (AG) determines that “there are reasonable grounds for regarding the alien as a danger to the security of the United States.” 8 U.S.C. § 1158(b)(2)(A)(iv). Similarly, asylum seekers are barred from withholding of removal where the AG decides “there are reasonable grounds to believe that the alien is a danger to the security of the United States.” 8 U.S.C. § 1231(b)(3)(B)(iv). These exclusions are grounded in Article 33.2 of the 1951 Refugee Convention (which provides an exception to a state’s obligation to avoid the refoulement of a refugee “whom there are reasonable grounds for regarding as a danger to the security of the country”).³ In adopting the Refugee Act of 1980, Congress explicitly acknowledged that it was following the framework of the Refugee Convention and its 1967 Protocol, noting that the provisions of the Act were adopted “with the understanding that it is based directly upon the language of the Protocol and it is intended that the provision be construed consistent with the Protocol.”⁴ To be consistent with the Protocol, however, the bars would need to be applied sparingly, and in the case of applying the “danger to national security bar,” it must be based on a reasonable assessment that a person *is*, rather than may be, someone likely to put the country at risk.⁵ As the Third Circuit has noted, “[W]e must take the statute to mean what it says: ‘is’ indicates that Congress intended this exception to apply to individuals who (under a reasonable belief standard) actually pose a danger to U.S. security. It did not intend this exception to cover aliens who conceivably could be such a danger or have the ability to pose such a danger (a category nearly anyone can fit).”

Historically, the courts have refused to dilute the notion of danger to national security, limiting its application to individuals for whom there is a clear and present risk of harm that would undermine the security of the United States, threatening its very existence. The Ninth Circuit has found, for example,

³ UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: <https://www.refworld.org/docid/3be01b964.html> [accessed 5 August 2020] and *See* 19 U.S.T. 6223, 6259-6276, T.I.A.S. No. 6577 (1968). This article of the Convention is binding on the United States via its accession to the 1967 Refugee Protocol. *See generally INS v. Cardoza-Fonseca*, 480 US 421, 429 (1987).

⁴ H.R. Conf. Rep. No. 96-781, at 20 (1980), cited in, *Yusupov v. Att’y Gen.*, 518 F.3d 185, 202-03, (3d Cir. 2008). The court goes on to explain that the national security exception was adopted initially in the Refugee Act of 1980, consistent with the exceptions listed in Article 33 of the Refugee Convention and Protocol. The Refugee Act amended U.S. law to ensure that it conformed with Article 33’s “nonrefoulement obligation which provides that “a contracting country must not expel or return a refugee to a country where his “life or freedom would be threatened on account of his race, religion, nationality, membership [in] a particular social group or political opinion).” *INS v. Stevia*, 467 U.S. 407, at 421 (1984).

⁵ *Yusupov*, 518 F.3d at 203-04, n. 30 (“International law scholars agree (unanimously so far as we can tell) that Article 33.2 carves out a limited exception to mandatory withholding, and that the “danger” sufficient to threaten national security encompasses only serious acts.”).

that asylum was appropriately denied where the government presented sufficient evidence and testimony to support a finding that a man was a danger to national security based on evidence that he had facilitated travel for an Al Qaeda operative and continued to lie about his activities under oath.⁶ In an advisory opinion addressing the scope of Article 33.2 of the 1951 Convention and 1967 Protocol, the UNHCR concluded that Convention delegates intended the danger to national security exception to address those instances where a person is influenced by foreign nationals to do harm to the country of refuge; leading international scholars have summarized the threat of such danger as the threat of conduct that endangers the foundations of the country such as terrorism, espionage, and acts of war against a nation that has provided refuge.⁷

The global pandemic does not trump the serious nature of the obligation to provide protection. In fact, at the time of ratification of the 1967 Protocol, the executive branch specifically noted that exclusion from asylum based on public health issues would be impermissible.⁸ Moreover, in providing guidance to parties to the Convention and Protocol during the Covid-19 pandemic, the UNHCR has reminded nations that international protection obligations are not voided by a public health emergency:

[I]mposing a blanket measure to preclude the admission of refugees or asylum-seekers, or of those of a particular nationality or nationalities, without evidence of a health risk and without measures to protect against refolement, would be discriminatory and would not meet international standards, in particular as linked to the principle of non-refoulement. In case health risks are identified in the case of individual or a group of refugees or asylum-seekers, other measures could be taken, such as testing and/or quarantine, which would enable authorities to manage the arrival of asylum-seekers in a safe manner, while respecting the principle of non-refoulement. **Denial of access to territory without safeguards to protect against refolement cannot be justified on the grounds of any health risk.**⁹

Despite such clear admonitions, the government has repeatedly used the Covid-19 pandemic to justify the suspension of entry to persons crossing the southern border with Mexico, to expel children and other asylum seekers without any kind of screening, and now, to define away the right to seek asylum in the United States based merely on the possibility that someone may be carrying a virus that has already spread rampantly across this country. While Covid-19 presents a serious danger to the public health, its transmission is not the kind of national security risk envisioned under the Convention and its Protocol or

⁶ *Malkandi v. Mukasey*, 544 F.3d 1029 (9th Cir. 2008).

⁷ UN High Commissioner for Refugees (UNHCR), *Advisory Opinion from the Office of the United Nations High Commissioner for Refugees (UNHCR) on the Scope of the National Security Exception Under Article 33(2) of the 1951 Convention Relating to the Status of Refugees*, 6 January 2006, available at: <https://www.refworld.org/docid/43de2da94.html> [accessed 5 August 2020].

⁸ Message from the President transmitting the Protocol Relating to the Status of Refugees, S. Exec. Doc. K, 90th Cong., 2d Sess. III (1968), at VIII (“[I]t would not be humanitarian to deport a refugee for reasons of health or economic dependence.”), available at https://www.google.com/books/edition/_/09Xg93YBnXEC?hl=en&gbpv=0.

⁹ UN High Commissioner for Refugees (UNHCR), *Key Legal Considerations on access to territory for persons in need of international protection in the context of the COVID-19 response*, 16 March 2020, available at: <https://www.refworld.org/docid/5e7132834.html> (emphasis added) [accessed 5 August 2020].

by Congress. And by imposing this additional bar under Covid panic, the agencies would potentially restrict asylum in the future for individuals with different infections, including some that are neither pandemic in scale nor readily transmissible.

2. The Proposed Rule fails to provide a reasonable basis for individually and categorically banning the vast majority of asylum seekers without any individualized assessment of danger or risk.

The Proposed Rule is a puzzling response to the Covid-19 pandemic, one in which the government essentially throws up its hands and argues that it lacks capacity to process people safely and efficiently at the border. This is not the forum to critique the scope of the federal government's failure to quickly and efficiently respond to the public health emergency, but the evidence is clear that both DHS and EOIR have repeatedly failed to implement alternative measures to promote public health and safety within the immigration system and were not adequately prepared to implement safety protocols and quarantine measures that could minimize the risk of further spreading the virus.¹⁰ Public health experts have condemned both the CDC order suspending entry of migrants at the southern border and the Proposed Rule as inconsistent with public health guidelines and humanitarian standards.¹¹ In other contexts, the government is making an effort to adapt its safety protocols, for instance at airports, in order to facilitate the travel of approved visitors.¹² Its arguments with respect to capacity arise only in the context of unauthorized immigrants, particularly those who seek asylum. In reality, the government

¹⁰ Public health experts have repeatedly called on the government to adopt straightforward measures for reducing the spread of Covid-19 within DHS and DOJ facilities, from suspending immigration court proceedings, to releasing detained immigrants to following common sense public health practices at the border and in facilities. See, e.g., Public Health Officials Urge U.S. Officials to Withdraw Order Enabling Mass Expulsion of Asylum Seekers (May 18, 2020), <https://www.publichealth.columbia.edu/public-health-now/news/public-health-experts-urge-us-officials-withdraw-order-enabling-mass-expulsion-asylum-seekers>; Megan Towey, Citing Coronavirus Pandemic, Judges and ICE Attorneys Demand Closure of Immigration Courts (March 25, 2020), <https://www.cbsnews.com/news/citing-coronavirus-pandemic-judges-and-ice-attorneys-demand-closure-of-immigration-courts/>; Eliot Spagat, How the Coronavirus Spread Through One Immigration Facility, Minneapolis Star-Tribune (July 28, 2020), <https://www.startribune.com/how-the-coronavirus-spread-through-one-immigration-facility/571824121/>.

¹¹ Public Health Experts Urge U.S. Officials to Withdraw Proposed Rule that Would Bar Refugees from Asylees and Other Humanitarian Protections in the U.S. (Aug. 6, 2020), <https://www.publichealth.columbia.edu/public-health-now/news/public-health-experts-urge-us-officials-withdraw-proposed-rule-would-bar-refugees-asylum-and-and>.

¹² The Transportation and Security Administration, for example, has adopted numerous practices to minimize the spread of Covid-19 in airports, <https://www.tsa.gov/coronavirus>.

is violating the asylum laws daily, using the cover of the CDC's Order Suspending Entry of Persons¹³ along the southern border with Mexico as an excuse for mass expulsions and makeshift proceedings.¹⁴

The Proposed Rule is an attempt to give a gloss of respectability to this illegal conduct by defining away U.S. obligations toward asylum seekers. But the Proposed Rule cannot overrule the statutory requirement of an individualized assessment when determining that an applicant is barred from asylum based on a threat to national security. When applying this bar, there must be reasonable evidence that the alleged danger not only exists, but that denying asylum or withholding of removal is a proportionate response to the risks of returning an individual to a country where their life or freedom may be threatened. The UNHCR has summarized the proportionality assessment as a three pronged test in which "(1) there must be a rational connection between the removal of the refugee and the elimination of the danger; (2) refoulement must be the last possible resort to eliminate the danger; and, (3) the danger to the country of refuge must outweigh the risk to the refugee upon refoulement."¹⁵

The Proposed Rule fails to meet any of these tests, authorizing government officials to invoke the danger to national security based on the existence of undiagnosed symptoms, potential exposure, travel through countries where the diseases in question is prevalent, or any categorical designation based on the prevalence of an infectious disease pursuant to other federal laws.¹⁶ No provisions for assessing the likelihood that an individual is actually a carrier of the novel coronavirus or any other infectious disease are included within the rule. Thus, the bar applies equally to an individual who has a temperature and a cough, has tested positive for Covid-19, has tested negative for Covid-19 but has potentially been exposed to the illness, or someone who resides in or has traveled through a country that has been branded as dangerous. The rule applies equally to an individual who is infected with a wide range of infectious diseases, including many sexually transmitted diseases that are both treatable and are not transmitted through airborne particles. The bar itself is so broad and sweeping that it cannot be rationally connected to any individual traveler without some understanding of that traveler's particular health and travel history nor can it predict the likelihood that an individual asylum seeker would necessarily spread the virus, even if her or she were infected. The rule presupposes that asylum seekers cannot or will not take the necessary precautions to protect themselves and others. Nor does the NPRM provide any evidence that the asylum bar will actually reduce the threat of Covid-19 anywhere in the United States—a country with a much higher rate of infection than almost any other place from which a

¹³ Lucas Guttentag, *Coronavirus Border Expulsions: CDC's Assault on Asylum Seekers and Unaccompanied Minors*, April 13, 2020, <https://www.justsecurity.org/69640/coronavirus-border-expulsions-cdcs-assault-on-asylum-seekers-and-unaccompanied-minors/>.

¹⁴ Dara Lind, *U.S. Senators Demand Answers on Trump's Secretive Border Expulsions*, Pro Publica, April 8, 2020, <https://www.propublica.org/article/democratic-senators-demand-answers-on-trumps-secretive-border-expulsions>.

¹⁵ See *supra*, note 7.

¹⁶ Proposed §§ 208.13 (c)(10) and 1208.13(c)(10) invoke myriad avenues for labeling an individual as a danger to national security based on the threat of infectious disease without making any allowances for the ameliorative effects of isolation, quarantine, testing, and treatment. In essence, the danger posed is time-based rather than permanent, and absent diagnosis is only speculative. As written, the Proposed Rule would consider someone a danger to the national security of the United States at first encounter, regardless of the time that ordinarily would elapse between initial encounter, a credible fear determination, and an asylum hearing. The so-called danger is transient and unlike the conduct which is ordinarily considered in the determination of this bar.

refugee might be entering. Moreover, the NPRM makes no effort to explain how the Proposed Rule can be justified when there are other alternatives available to protect the public health without returning asylum seekers to harm. Finally, the NPRM fails to demonstrate how, in any individual case, the potential risk of harm outweighs the harm of refoulement of an individual found to meet the refugee definition.

Thus the Proposed Rule is inherently flawed. Not only is it overly broad, encompassing a range of infectious diseases, many of which are treatable and pose no threat to the general public, but it fails to acknowledge that there must be a proportional analysis that weighs the relative harms and risks to all parties. A person seeking asylum *may or may not* have an infectious illness and spread that illness, but if that person is found to be a refugee, then he or she *is* in need of protection. And while we address the credible fear and other procedural questions below, it only follows that a highly individualized determination cannot be made in a truncated proceeding without the full resources and rights provided an applicant in an affirmative asylum setting, before an immigration judge, or in an unaccompanied child's claim before the Asylum Office under the TVPRA.¹⁷ Consequently the legal analysis required in assessing whether an individual is a danger to national security precludes the changes that the agencies propose with respect to credible fear determinations. The gravity of the bar requires more than this Proposed Rule can ever provide and consequently it must be withdrawn in its entirety.

III. The Proposed Rule Threatens to Deprive Unaccompanied Children of Statutory Protections Provided for by the Trafficking Victims Protection Reauthorization Act of 2008.

For more than a decade, federal law has provided procedural protections for unaccompanied children in our immigration system “to protect children . . . who have escaped traumatic situations such as armed conflict, sweatshop labor, human trafficking, forced prostitution and other life threatening circumstances” and to fulfill “a special obligation to ensure that these children are treated humanely and fairly.”¹⁸ These protections, codified in the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), include screening for trafficking and protection concerns, child-appropriate care by the Office of Refugee Resettlement (ORR), access to legal counsel, and placement in full removal proceedings under Section 240 of the INA. Accordingly, unaccompanied children are exempt from expedited removal. The TVPRA also exempts unaccompanied children from the one-year filing bar and safe third country bar to asylum, in recognition of their unique vulnerability to harm or exploitation and challenges they face in navigating a “system designed for adults.”¹⁹

Despite these safeguards, the NPRM is silent as to the Proposed Rule's treatment of unaccompanied children and wholly fails to address how the proposed security bar would interact with the TVPRA's statutory protections. Neither the terms “children” nor “unaccompanied alien child” appear anywhere in the NPRM or Proposed Rule, and the NPRM makes no reference to the fact that unaccompanied

¹⁷ In fact, a determination that an individual poses a danger to national security under the asylum and withholding bars is a fact-intensive discussion in which the government has the initial burden of proof. The truncated proceedings proposed in the NPRM would make it impossible to follow accepted standards of evidence, burden shifting, and right to present evidence. *See, Malkandi*, 544 F. 3d at 1037-39.

¹⁸ 154 Cong. Rec. S10886 (daily ed. Dec. 10, 2008).

¹⁹ *See, e.g.,* statement of Sen. Feinstein, 153 Cong. Rec. S3004 (daily ed. Mar. 12, 2007).

children are exempt from expedited removal. No small oversight, this omission leaves thousands of children subject to the whims of individual officials or unlawful procedures that may lead to their return to harm, danger, or death. In doing so, the Proposed Rule runs counter to the TVPRA and the agencies' rulemaking responsibilities under the APA.

1. The Proposed Rule Risks Turnbacks and Expulsions of Unaccompanied Children, in Violation of the TVPRA.

Absent an explicit exemption of unaccompanied children from the Proposed Rule, the agencies could seek to expel unaccompanied children through a makeshift expedited removal procedure at the border—a result that would fly in the face of the TVPRA's carefully crafted screening procedures and its requirement that unaccompanied children be transferred to ORR and placed in Section 240 removal proceedings, not expedited removal. This possibility is devastatingly foreshadowed by the Administration's unlawful expulsion of at least 2,175 unaccompanied children from the U.S. since it began implementing the CDC's March 2020 order,²⁰ which the NPRM cites repeatedly in its efforts to justify the changes proposed here and which is currently the subject of litigation.²¹ Thousands of unaccompanied children have been expelled without any protection screenings to ensure that they will be safe in the countries to which they are being removed or that they are not at risk of being trafficked. Indeed, of the 1,650 unaccompanied children apprehended by CBP in June 2020, only 61 children were transferred to ORR,²² where they may be cared for by child welfare professionals, evaluated for protection needs, and able to prepare their legal cases for protection. Thousands of others have been forced to face both the dangers of the pandemic along with the perils from which they initially fled alone, as many countries lack formal reception centers to receive children being returned and restrictions hinder the ability of civil society organizations, parents, and caregivers to reach them. Fear related to Covid-19 and repressive measures by some governments have led to stigmatization and violence in many of the countries to which children are being expelled from the U.S.,²³ compounding the dangers for unaccompanied children.

²⁰ See Lauren Villagran, *Despite Coronavirus, Children Are Still Arriving at the Border. They're Being Turned Away* (June 10, 2020), *El Paso Times*, <https://www.elpasotimes.com/story/news/2020/06/10/border-patrol-rejects-migrant-children-cdc-authority-covid-19/5274691002/>.

²¹ See, e.g., *J.B.B.C. v. Wolf*, No.1:20-cv-01509-CJN (D.D.C. 2020), Transcript of Telephonic Motion Hearing (June 24, 2020), at 50 (“Even if the power to remove were read by section 265, the plaintiff has likelihood of success because the provision, in the Court’s view, should be harmonized, to the maximum extent possible, with the immigration statutes, including those already referenced that grant special protections to minors and also those immigration statutes that deal with communicable diseases and quarantines.”); *G.Y.J.P. v. Wolf*, No. 1:20-cv-01511 (D.D.C. 2020).

²² Camilo Montoya-Galvez, *U.S. border expulsions of migrant children continue, with few allowed to seek refuge under virus order* (July 17, 2020), <https://www.cbsnews.com/news/migrant-children-expelled-under-coronavirus-policy/>.

²³ See, e.g., Latin America Working Group, *COVID-19 in Latin America and the Caribbean: A Deadly Virus in a Vulnerable Region* (Apr. 30, 2020), <https://www.lawg.org/covid-19-in-latin-america-and-the-caribbean-a-deadly-virus-in-a-vulnerable-region-2/>.

Circumstances are similarly perilous for unaccompanied children expelled from the U.S. to Mexico. Many children cannot access shelters and are living in unregulated camps, tent cities, and on the street. The U.S. border closure has trapped them in border cities with widespread violence by cartels and other criminal organizations that control many border regions. KIND's NGO partners at the border report increasing incidences of very young boys and girls experiencing sexual abuse. Adolescent girls in particular are at increased risk of gender-based violence, as government resources and response have been further limited amid the pandemic.²⁴ The NPRM discusses conditions in Mexico, among other countries, in an effort to justify the proposed changes, quoting in part the CDC order as stating that "[m]edical experts believe that . . . spread of COVID-19 at asylum camps and shelters along the U.S. border is inevitable."²⁵ Yet the NPRM boldly overlooks the role that U.S. policies such as the CDC order and related guidance as well as the Migrant Protection Protocols (MPP) have played in creating and exacerbating these very conditions. Despite the Administration's stated public health rationale, expulsions from the U.S. have not prevented the spread of the virus, but rather, contributed to it.²⁶ The Proposed Rule threatens to make permanent the government's ability to enact similar, unlawful measures under the pretext of public health, and imperils the lives and safety of thousands more children.

2. The Proposed Rule Provides Undue Discretion to DHS and EOIR to Circumvent Due Process Protections and Repatriate Unaccompanied Children.

More troubling still, the Proposed Rule does not appear to confine itself to expedited removal proceedings and could conceivably be used by the agencies to bar access to protection for unaccompanied children in removal proceedings. This possibility threatens to unlawfully deprive unaccompanied children of the TVPRA's protections and undermine their right to due process.

Under the Proposed Rule, an asylum officer or immigration judge could bar an unaccompanied child from asylum or withholding of removal based on the child's having transited or lived in a country in which Covid-19 or another infectious disease exists, or based on the adjudicator's determination, however inexpert, that a child exhibits symptoms consistent with certain infectious diseases. It defies logic that Congress would have exempted unaccompanied children from a bar to asylum related to the availability of protection in a safe third country but would allow the same child to be blocked from asylum or withholding of removal for having transited that same country should an infectious disease have been present or pandemic there. Such an interpretation is further strained by the existence in immigration law of provisions addressing inadmissibility based on a "communicable disease of public health significance" (*e.g.*, 8 U.S.C. 1182(a)(1)) and related procedures for medical examinations (8 U.S.C. 1222; 42 U.S.C. 252) that neither bar eligibility for humanitarian protection nor the TVPRA's protections. The Administration may not simply read into existence authority to rewrite immigration laws for its own policy purposes or close its eyes to protections that are plainly there. As with the Administration's

²⁴ See Kids in Need of Defense, *Trapped and Targeted: Gender-based violence against women and children at the U.S.-Mexico Border* (forthcoming, available from KIND upon request).

²⁵ 85 Fed. Reg. 41204.

²⁶ U. S. Deportations During Global Pandemic Risk Spreading Covid-19, (April 9,2020), Washington Office on Latin America, <https://www.wola.org/2020/04/deportations-during-global-pandemic-risk-spreading-covid-19/>

unlawful transit bar, the proposed bar here both ignores protections for and exacerbates the vulnerability of unaccompanied children--a result at odds with the TVPRA and APA.

It is not clear under the Proposed Rule that asylum seekers, including unaccompanied children, would even be afforded an opportunity to make their cases in removal proceedings. Indeed, the Proposed Rule repeatedly references the Administration's desire to adjudicate cases before and without Section 240 proceedings in the claimed interest of efficiency and preventing potential spread of the virus, logic that—whatever its other merits—cannot lawfully be applied to unaccompanied children exempt from Section 235 expedited removal.²⁷ These efforts extend even to those with a recognized need for protection. For example, the Proposed Rule would grant DHS discretion to determine whether to place someone who fears harm or torture in his or her country but who is ineligible for asylum or withholding of removal due to the new security bar into Section 240 removal proceedings or remove them to a third country.²⁸ Although the NPRM makes references to such discretion “in the expedited removal process” (85 Fed. Reg. at 41211), the Proposed Rule elsewhere provides DHS with authority to potentially remove someone to a third country *before* adjudication of a request for withholding or deferral of removal. See Proposed 8 CFR 208.16(f) (Removal to a Third Country). Under the proposed rule this could happen so long as the individual is given an opportunity to withdraw his or her claim for withholding or deferral of removal, an advisal is provided (with no provisions made for ensuring that it is child-friendly or in compliance with the TVPRA) and the individual does not affirmatively establish that it is more likely than not that he or she will be tortured in the country to which the government plans to remove them. The proposed provisions, which threaten to upend due process and lead to the refoulement of protection seekers, are especially troubling for unaccompanied children.

The TVPRA exempts unaccompanied children from operation of the safe third country bar to asylum in recognition of the particular hurdles that children would face in navigating or even knowing of immigration laws in other countries. Requiring unaccompanied children to affirmatively prove the likelihood of their torture in another country—while alone, without counsel and potentially *before* adjudication of their claims, would impose barriers similar to those Congress has already determined to be inappropriate for unaccompanied children—and similarly runs afoul of the TVPRA's requirement that unaccompanied children be placed in Section 240 removal proceedings.

²⁷ See, e.g., 85 Fed. Reg. at 41210 (“It is unnecessary and inefficient to adjudicate claims for relief or protection in 240 proceedings when it can be determined that an alien is subject to a mandatory bar to eligibility for asylum or statutory withholding, and is ineligible for deferral of removal, at the credible fear screening stage.”); *id.* at 41213 (“Thus, the proposed rule would reasonably balance the various interests at stake. It would promote efficiency by avoiding duplicative administrative efforts while ensuring that those who are subject to a bar receive an opportunity to have the asylum officer's finding reviewed by an IJ.”).

²⁸ See, e.g., 85 FR 41211 (“The proposed rule would provide DHS with the option, to be exercised as a matter of prosecutorial discretion, to either place such an alien into 240 proceedings or to remove the alien to a country where the alien has not affirmatively established that it is more likely than not that the alien's life or freedom would be threatened on a protected ground, or that the alien would be tortured. This discretion is important because it would give DHS flexibility to quickly process aliens during national health emergencies during which placing an alien into full 240 proceedings may pose a danger to the health and safety of other aliens with whom the alien is detained , or to DHS officials who come into close contact with the alien. It would restore DHS's ability in the expedited removal process to remove such aliens to third countries rather than having to place them in 240 proceedings.”)

Moreover, requiring that a child prove that his or her potential repatriation to a particular country would be unsafe unlawfully disregards TVPRA provisions tasking the government with evaluating the safety of the country to which an unaccompanied child is to be repatriated. For example, the TVPRA requires that “[t]he Secretary of Homeland Security shall consult the Department of State’s Country Reports on Human Rights Practices and the Trafficking in Persons Report in assessing whether to repatriate an unaccompanied alien child to a particular country.”²⁹ It also provides that “[t]o protect children from trafficking and exploitation, the Secretary of State shall create a pilot program, in conjunction with the Secretary of Health and Human Services and the Secretary of Homeland Security, nongovernmental organizations, and other national and international agencies and experts, to develop and implement best practices to ensure the safe and sustainable repatriation and reintegration of unaccompanied alien children into their country of nationality or of last habitual residence, including placement with their families, legal guardians, or other sponsoring agencies....”³⁰ These responsibilities remain with the government irrespective of a removal decision and cannot be ignored simply because the attempted removal is made under the guise of “national security.” In fact, the Covid-19 pandemic is likely to increase the factors that the government would have to consider in assessing the safety of return generally, whether to the child’s country of origin or an alternative country identified under the Proposed Rule.

By enacting the TVPRA’s procedural safeguards, Congress sought to prevent the return of unaccompanied children to harm or trafficking. Yet the Proposed Rule would grant the government discretion to circumvent the TVPRA’s protections at will. The Proposed Rule’s many overreaches render it ultra vires and warrant withdrawal of the proposal.

IV. The Proposed Rule Bars Access to Protection Based on Flawed Assumptions and Justifications and Substantially Departs from Longstanding Agency Policy Regarding the Health and Well-being of Unaccompanied Children.

In addition to violating the TVPRA’s express mandates, the Proposed Rule represents an arbitrary, capricious, and unsupported shift in longstanding policy. The NPRM declares that “[t]his proposed rule is designed primarily to implement necessary reforms to our Nation’s immigration system so that the Departments may better respond to the COVID-19 crisis, and importantly, may better respond to, ameliorate, and even forestall future public health emergencies.”³¹ The Proposed Rule fails, however, to consider the role of existing agency policies in meeting these needs and the inappropriateness of applying the rule to unaccompanied children in particular.

The Proposed Rule seeks to buttress its blunt analysis of public health risks through reliance on consultation with the Department of Health and Human Services, and asks commenters for feedback on

²⁹ 8 U.S.C. § 1232(a)(5)(B).

³⁰ *Id.* at § 1232(a)(5)(A).

³¹ 85 Fed. Reg. at 41207.

the nature of such consultations.³² Yet the Proposed Rule curiously overlooks that it is precisely this agency—HHS—that is charged with the care and custody of unaccompanied children pursuant to the Homeland Security Act of 2002.³³ The agencies make no effort whatsoever to address ORR’s care of unaccompanied children³⁴ and offer no evidence to suggest that ORR is unable to serve unaccompanied children while protecting public health.

In fact, multiple ORR procedures already exist to facilitate the identification of communicable diseases, including those that could potentially be covered by the Proposed Rule.³⁵ HHS has previously stated that its policy is to provide each unaccompanied child in the agency’s custody with a medical exam consistent with screening recommendations of the American Academy of Pediatrics, the CDC, and the U.S. Preventative Services Task Force.³⁶ Further, ORR’s Policy Guide provides, for example:

Each unaccompanied alien child must receive an initial general medical examination within 48 business hours of admission. The purposes of the initial examination are to assess general health, administer complete immunizations in keeping with U.S. standards, find out about health conditions that require further attention, and detect contagious diseases, such as influenza or tuberculosis. Care providers must ensure that healthcare professionals are following ORR’s latest medical guidance and reporting the findings on ORR forms. Payment for the initial examination is pre-approved.³⁷

Additional agency policies address the management of diseases, providing for example that:

[f]rom intake to release, care providers must observe all children for signs or symptoms of communicable diseases and act accordingly to protect others against possible infection.... ORR has protocols for diseases of public health concern that have been diagnosed in unaccompanied alien children, including varicella and tuberculosis. The care provider is responsible for training all staff about its current communicable disease plan.

³² See, e.g., 85 Fed. Reg. at 41212.

³³ 6 U.S.C. § 279(a).

³⁴ The NPRM does discuss potential impacts on CBP and ICE operations. See, e.g., 85 Fed. Reg. 41204 (“Although CBP has policies and procedures in place to handle communicable diseases, the unprecedented challenges posed by the COVID-19 pandemic (and similar pandemics in the future) cannot reliably be contained by those policies, and procedures, and thus this or another infectious or highly contagious illness or disease could cripple the already-strained capacities at CBP facilities.”); *id.* (“In some ways, the dangers to ICE operations posed by aliens who are at risk of spreading infectious or highly contagious illnesses or diseases are greater than those posed to CBP operations, due to the longer amount of time aliens spend detained in ICE custody. ICE often detains aliens for time periods ranging from several days to any weeks. Including while an alien’s 240 proceeding is pending . . .”).

³⁵ See ORR Policy Guide 3.4.2 Initial Medical Examination, <https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-3#3.4.2>.

³⁶ Jim Daley, Detained Migrant Children Need Continuous Medical Care (July 26, 2019), Scientific American <https://www.scientificamerican.com/article/detained-migrant-children-need-continuous-medical-care1/>.

³⁷ *Id.*

Care providers must have an identified space within the shelter facility that may be used for quarantine or isolation in the event that an unaccompanied alien child must be separated from the general population for a medical reason. The space must be suitable to house a child for days or weeks.³⁸

Importantly, ORR is successfully housing unaccompanied children during the Covid-19 pandemic. Currently operating at only 10% capacity due to impacts of the CDC order, ORR maintains almost 13,000 beds to safely care for children and to quarantine or isolate children as necessary to prevent spread of the virus or other communicable diseases. Moreover, pursuant to the TVPRA, ORR has an established process for vetting sponsors—most often parents and other family members—to whom children may be released from congregate care³⁹ and with whom children could safely quarantine if needed. DHS is not at liberty to simply ignore this carefully crafted framework or the potential harm that might befall thousands of unaccompanied children if they are blocked from these safeguards and instead expelled to countries in which their lives and safety are at risk. Thus both generally, and specifically with respect to unaccompanied children, the rule fails to meet the proportionality test described in Section II of our comment. It is hard to imagine how the removal of a child under these circumstances would further the public good, nor can the government explain why, when alternate measures are available, the NPRM and Proposed Rule jump immediately to a solution of last resort.

Ultimately, the agencies return to the concept of capacity to justify the Proposed Rule, ignoring existing frameworks governing medical care, quarantines, and treatment, in order to empower officials at the border to hazard guesses about the health of any given person. CBP officials, trained in law enforcement and not medical care, are ill-suited to make medical diagnoses and decisions—a fact the NPRM plainly acknowledges.⁴⁰ This is even more so in the case of children. The American Academy of Pediatrics has underscored the need for pediatric-trained medical professionals at the border to evaluate the health needs of children in CBP custody, who are not simply “small adults,” but who frequently present with medical conditions differently.⁴¹ Yet the Proposed Rule would double down on these inadequacies by

³⁸ *Id.* at 3.4.6 Management of Communicable Diseases.

³⁹ 8 U.S.C. 1232(c).

⁴⁰ DHS states that “[a]s a law enforcement agency, CBP is not equipped to provide medical support to treat infectious or highly contagious illnesses or diseases brought into CBP facilities,” 85 FR 41204, and that “[e]ven [] contracted medical support is not currently designed to diagnose, treat, and manage certain infectious or highly contagious illnesses or diseases—particularly novel diseases.” *Id.*

⁴¹ See, e.g., Devin Miller, AAP News, AAP pushes for appropriate medical care for immigrant children (Jan. 31, 2019), <https://www.aappublications.org/news/2019/01/31/washington013119>; Testimony of Julie M. Linton, MD, FAAP, on Behalf of the American Academy of Pediatrics, Before the U.S. House of Representatives

Committee on Energy and Commerce Subcommittee on Oversight and Investigations, “Examining the Failures of the Trump Administration’s Inhumane Family Separation Policy” (Feb. 7, 2019), at 4, <https://docs.house.gov/meetings/IF/IF02/20190207/108846/HHRG-116-IF02-Wstate-LintonJ-20190207-U1.pdf> (“Children are not just small adults. To untrained eyes, they can appear quite healthy even while their systems begin to shut down. We urge our federal agencies to apply a child-focused lens when considering policies that could have an impact on child health and well-being.”); Testimony for the Record on Behalf of the American Academy of Pediatrics before the U.S. House of Representatives Committee on Homeland Security, Subcommittee on Border Security, Facilitation, & Operations, “Assessing the Adequacy of DHS Efforts to Prevent Child Deaths in

allowing DHS officials to make even more expansive decisions about medical symptoms and communicable diseases⁴²--and potentially, whether a child is able to seek humanitarian protection in the U.S. at all. DHS provides no explanation of how substituting longstanding law and ORR policies related to treatment and care of unaccompanied children with categorical⁴³ or ad hoc health determinations by border officials or adjudicators is either lawful or appropriate, and indeed, it cannot. The Proposed Rule exposes significant inadequacies in the treatment of all unauthorized immigrants at the southern border, but it offers no solution to these problems.

Finally, current DHS practices in response to the CDC order have actually increased the risk to children's health and well-being while in DHS custody. Rather than follow the TVPRA and other provisions of law, DHS has potentially exposed children to greater risks of Covid-19 infection under cover of the CDC order.⁴⁴ Since March 2020, DHS has held more than 200 unaccompanied children for days or weeks in unlicensed hotel rooms until they become "amenable" to expulsion under Title 42.⁴⁵ Yet the Proposed Rule could permit a border officer, asylum officer, or immigration judge to bar an unaccompanied child's application for asylum or other humanitarian protection on the basis of symptoms or illness acquired *while in* CBP, ICE, or ORR custody under conditions managed not by the child, but the government. Public health rationales are being crudely exploited for the Administration's long-desired policy end—preventing asylum seekers from accessing the U.S. and requesting protection.

Custody" (Jan. 14, 2020), <https://downloads.aap.org/DOFA/Jan%202020%20Hearing%20Statement%20for%20the%20Record%20-%20AAP.pdf> ("As pediatricians, we know that children are not little adults. Children's vital signs (breathing rate, heart rate, blood pressure) have different normal parameters than adults, and these parameters vary by age. When children begin to get sick, they present with subtle findings, and they tend to get sick more quickly.")

⁴² See, e.g., 85 FR 41211 ("Specifically, in determining whether an alien or a class of aliens can reasonably be regarded as a danger to the security of the United States under section 208(b)(2)(A)(iv) of the Act, the Secretary and the Attorney General may determine whether the alien exhibits symptoms consistent with being afflicted with any contagious or infectious disease or has come into contact with such a disease, or whether the alien or class of aliens is coming from a country, or a political subdivision or region of a country, or has embarked at a place, where such disease is prevalent or epidemic (or had come from that country, subdivision, or region, or had embarked at that place during a period in which the disease was prevalent or epidemic there if....." (FR 41211)....")

⁴³ 85 FR 41208 ("[T]he Departments are proposed to clarify that they can categorically bar from eligibility for asylum, statutory withholding of removal and withholding of removal under CAT regulations as dangers to the security of the United States aliens who potentially risk bringing in deadly infectious disease to, or facilitating its spread within, the United States.").

⁴⁴Emily Kassie and Barbara Marcolini, 'It Was Like a Time Bomb': How ICE Helped Spread the Coronavirus, New York Times, July 10, 2020, <https://www.nytimes.com/2020/07/10/us/ice-coronavirus-deportation.html>

⁴⁵ See, e.g., Camilo Montoya-Galvez, Lawsuit challenges imminent expulsion of migrant children previously held at Texas hotel (July 24, 2020), CBS News, <https://www.cbsnews.com/news/lawsuit-challenges-detention-of-migrant-children-at-texas-hotel-and-their-imminent-expulsion/>.

V. The Proposed Rule Prevents Fair Consideration of the Rule’s Provisions, Costs and Benefits by the Public through Piecemeal and Redundant Rulemaking.

In addition to the substantive deficiencies of the Proposed Rule, its promulgation reflects a haphazard and burdensome approach to rulemaking, undermining the public’s right under the Administrative Procedure Act to a full and fair opportunity to comment. Not only does the NPRM ignore the presumptive 60-day comment period generally provided for substantive rule-making,⁴⁶ but it blatantly acknowledges that its proposed changes to expedited removal procedures in the Proposed Rule differ from those in a Proposed Rule published by the agencies on June 15, 2020.⁴⁷ The agencies contend that they “will reconcile the procedures set forth in the two proposed rules at the final rulemaking stage, and request comment regarding how to best reconcile the procedures set forth in the proposed rules.” (85 Fed. Reg. at 41211). This double-dealing makes it impossible for the public to meaningfully suggest mechanisms for reconciling disparate proposals that perhaps cannot be reconciled and at a minimum will require further opportunity for comment once the government has attempted to address problems that should have been tackled prior to issuing both Proposed Rules within a few weeks of each other.

At least one example of the extraordinary challenges the compressed timeline and inadequate explanations pose occurs in the revisions to 8 CFR 1208.30 (g)(2)(iv)(A) governing procedures for an immigration judge’s concurrence in a negative credible fear finding. Under the current regulation, an immigration judge’s concurrence in DHS’s negative credible fear finding results in a return of the case to DHS for removal. DHS may, however, of its own accord, “reconsider a negative credible fear finding that has been concurred upon by an immigration judge after providing notice of its reconsideration to the immigration judge.” This safety measure allows DHS to use its discretion to reconsider the case where circumstances warrant. It is stripped from the Proposed Rule language, however, with no justification or explanation. Proposed Rule 8 CFR 1208.30(g)(2)(iv)(A). Without adequate time to consider all the ramifications of the Proposed Rule, the likelihood that substantive changes are being made without adequate notice is real, as this example suggests.

While the APA does not impose a rigid requirement that agencies modify a regulation all at once, a series of executive orders and judicial interpretations of the APA and related statutes make clear that it is arbitrary and capricious for an agency to so carve up its regulatory activity to evade comprehensive evaluation and comment.

It is hard to evaluate, for example, whether these multiple overlapping proposals to amend the same asylum provision abide by Executive Order 12866’s directive that “[e]ach agency shall avoid regulations that are inconsistent, incompatible, or duplicative with its other regulations or that of other Federal agencies,” or take into account costs and benefits, with so many different proposals seeking to

⁴⁶ See Regulatory Planning and Review, E.O. 12866, 58 Fed. Reg. 190 (Oct. 4, 1993) (“each agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days.”).

⁴⁷ 85 FR 41211 (“The Departments acknowledge that procedures for processing individuals in expedited removal proceedings who are subject to the danger to national security bar differ from expedited removal procedures set forth in the Notice of Proposed Rulemaking, “Procedures for Asylum and Withholding of Removal: Credible Fear and Reasonable Fear Review,” 85 FR 36264 (June 15, 2020)).

accomplish the same (unlawful) goal of blocking meritorious asylum claims from being granted.⁴⁸ It would be arbitrary and capricious for the agency to be counting costs and benefits in favor of *this* proposal that are simply the same as the costs and benefits already priced into the other revisions of the same provision.⁴⁹ The NPRM admits with respect to expedited removal that there has been no effort to identify such overlap within their own regulatory framework, let alone in connection to the current HHS regulation.

The resulting confusion represents a hurried and disingenuous approach to rule-making that reveals a fundamental flaw in the NPRM that cannot be repaired or reconciled. To the degree that it purports “to seek to mitigate the risk of another deadly communicable disease being brought to the United States, or being further spread within the country, by the entry of aliens from countries where the disease is prevalent” (85 Fed. Reg. at 41208) it is redundant, given that HHS “recently published an interim final rule to ‘implement a permanent regulatory structure regarding the potential suspension of introduction of persons into the United States in the event a serious danger of the introduction of communicable disease arises in the future.’” (85 Fed. Reg. at 41207-08). To the degree that it seeks to amend the asylum regulations, it has failed to provide a coherent rationale for these changes in light of much broader reform to the system proposed only weeks before this NPRM was published. And to the degree that it seeks to block asylum seekers from entry into the United States, it is a rule addressing admissibility, clothed as a bar to asylum, which seeks to completely upend the current Congressional scheme for regulating expedited removal and screening for legitimate asylum claims and authorizes new grounds of inadmissibility without any authorization from Congress or without providing adequate notice to the public of the actual nature of these changes.

Conclusion

The Proposed Rule is antithetical to United States law and our international treaty obligations to protect those fleeing persecution. It completely ignores the special protections accorded to children under the TVPRA that are designed to ensure that they are safe from harm, from trafficking, and from the dangers of migrating alone. It ignores the advice of public health experts and the weight of international law with respect to providing asylum seekers protection during a health crisis. And it undermines the public’s right to fairly assess proposed changes to regulations, using the Covid-19 pandemic as an excuse to adopt categorical, far-ranging and disproportionate bars to asylum irrespective of eligibility. The rule is fundamentally flawed and must be withdrawn.

Sincerely,



Jennifer Podkul
Vice President for Policy and Advocacy

⁴⁸ Regulatory Planning and Review, E.O. 12866, 58 Fed. Reg. 190 (Oct. 4, 1993), § 1(b)(10).

⁴⁹ See *CSX Transp., Inc. v. Surface Transp. Bd.*, 754 F.3d 1056, 1065-66 (D.C. Cir. 2014) (holding it arbitrary and capricious for agency to rely on unexplained double-counting of regulatory costs).