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U.S. Border Expulsions Further Jeopardize Asylum Seekers and Unaccompanied Minors in the Time of COVID-19

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Abstract

The Centers for Disease Control and Prevention (CDC) issued a public health order on March 20, 2020, restricting people seeking asylum in the United States, as well as unaccompanied non-citizen children attempting to cross into the United States, from accessing legal protections guaranteed to them under U.S. and international law.¹ Under the order, such individuals are instead immediately expelled from the country in an effort to protect border facilities and the citizenry of the United States from COVID-19.² As the order reasons, these immediate expulsions minimize the introduction of persons into “congregate settings” at border facilities and thereby reduce the spread the disease at these facilities and farther into the country.³

However, the order offers a false dichotomy between our collective obligation to try and keep our citizenry safe from COVID-19 and our righteous commitment to the protection of human rights. In no way are asylum seekers and unaccompanied children more likely to transmit COVID-19 than other travelers, and solutions such as conditional release will alleviate any concerns over congregate settings while upholding our legal obligations to asylum seekers and unaccompanied children.⁴ By authorizing the rapid expulsion of vulnerable persons despite limited epidemiological justification as well as clear legal alternatives, the order stands as a gross violation of the United States’ historical policy to welcome and protect those seeking refuge at our borders.

Overview

On March 20, the CDC issued an order suspending the introduction of undocumented persons traveling from Canada and Mexico into the United States.⁵ In practice, the order requires the Department of Homeland Security to summarily expel undocumented individuals encountered at the border “as rapidly as possible.”⁶ The CDC declared that conducting such

¹ Order Suspending Introduction of Certain Persons From Countries Where a Communicable Disease Exists, 85 Fed. Reg. 17060, 17088 (Mar. 26, 2020).

² Id. at 17061.

³ Id. at 17061.

⁴ Joanna Naples-Mitchell, *There is No Public Health Rationale for a Categorical Ban on Asylum Seekers*, PHYSICIANS FOR HUMAN RIGHTS (April 23, 2020), <https://phr.org/our-work/resources/there-is-no-public-health-rationale-for-a-categorical-ban-on-asylum-seekers/>.

⁵ Id. at 17060, 17088.

⁶ Id. at 17067.

sweeping expulsions was necessary to prevent “an increase in the serious danger of the introduction of COVID-19” into the United States.⁷

Specifically, the order found that because many undocumented persons take longer to process than those with documents, expelling rather than processing them will reduce human traffic within “congregate settings,” defined as common areas at ports of entry (POEs) and border patrol stations where people undergo immigration processing.⁸ Consequently, with fewer people being processed, the danger of COVID-19 transmission within congregate settings at border facilities should decrease.⁹

The order was authorized by an interim final rule,¹⁰ likewise issued by the CDC on March 20, amending section 362 of the 1944 Public Health Service Act (PHSA).¹¹ This amendment grants homeland security the novel authority to expel undocumented persons immediately in the interests of public health.¹² Originally in effect for thirty days, the order has since been extended indefinitely until the CDC director determines that undocumented persons covered by the order, termed “covered aliens,” no longer pose a danger to public health.¹³

For many asylum seekers¹⁴ and unaccompanied minor children¹⁵ who also often seek asylum, the order has meant a wholesale denial of their previously recognized rights to protection. Critically, the order does not address the domestic and international laws designed to ensure asylum seekers and unaccompanied children are always processed.

Instead, it allows these vulnerable persons to be seamlessly lumped into the prohibited class of covered aliens and quickly expelled from the United States.¹⁶ Customs and Border Patrol (CBP) officers previously required to process asylum seekers and unaccompanied children have instead rapidly returned countless of these individuals to “the country from

⁷ Id. at 17061.

⁸ Id. at 17061.

⁹ Id. at 17061.

¹⁰ “Interim Final Rule: When an agency finds that it has good cause to issue a final rule without first publishing a proposed rule, it often characterizes the rule as an ‘interim final rule,’ or ‘interim rule.’ This type of rule becomes effective immediately upon publication.” *A Guide to the Rulemaking Process*, OFFICE OF THE FEDERAL REGISTER, https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf (last visited Aug. 10, 2020).

¹¹ Interim Final Rule, 85 Fed. Reg. 16559, 16567 (Mar. 24, 2020) (to be codified at 42 CFR 71).

¹² Id. at 16599

¹³ The Order was originally in effect for thirty days and applied strictly to land POEs and border patrol stations. 85 Fed. Reg at 17061. It was extended for another thirty days on April 20, 2020. Extension of Order Suspending Introduction of Certain Persons From Countries Where a Communicable Disease Exists, 85 Fed. Reg. 22424, 22427 (Apr. 22, 2020). On May 26, 2020, it was made to additionally apply to coastal POEs and border patrol stations and was indefinitely extended. Amendment and Extension of Order Suspending Introduction of Certain Persons From Countries Where a Communicable Disease Exists, 85 Fed. Reg. 31503, 31509 (May 26, 2020).

¹⁴ Asylum seekers are foreign nationals in the United States or seeking admission at a Port of Entry who are unable or unwilling to return to their home country due to “a well-founded fear of persecution based on race, religion, nationality, political opinion, or membership in a particular social group.” 8 U.S.C.S. § 1158(b)(1)(A) (LexisNexis, approved August 8, 2020).

¹⁵ Unaccompanied minor children are those persons younger than 18 who arrive at the border without their parents or legal guardians in the United States available to “provide care and physical custody.” 6 U.S.C.S. § 279(g) (LexisNexis, approved August 8, 2020).

¹⁶ Lucas Guttentag, *Coronavirus Border Expulsions: CDC’s Assault on Asylum Seekers and Unaccompanied Minors*, JUST SECURITY (Apr. 13, 2020), <https://www.justsecurity.org/69640/coronavirus-border-expulsions-cdcs-assault-on-asylum-seekers-and-unaccompanied-minors/>.

which they entered the United States, or their country of origin, or another location.”^{17, 18} Accordingly, numerous questions have been raised and cases filed concerning the interplay of the public health order and its apparent transgressions of immigration law.¹⁹

Proponents of the order claim it necessary to protect border facilities, the officials who work there, and the larger citizenry of the United States from COVID-19. As Health Secretary Alex Azar reasoned in a White House briefing, “CBP facilities were never designed to hold large numbers of people and to protect agents and migrants from infection during a pandemic.”²⁰ He continued, “When held at border facilities, these migrants risk spreading the virus to other migrants, to CBP agents and border healthcare workers, and even the United States population as a whole.”²¹

Meanwhile, humanitarian organizations, immigrant rights activists, and many public health experts insist that the order’s public health justifications are weak, its failure to address asylum seekers and unaccompanied children unlawful, and its insistence on expulsion unnecessary. Lucas Guttentag, a professor of Law at Stanford and founder of the ACLU Immigrants’ Rights Project, calls the order “a shadow immigration enforcement power . . . designed to accomplish under the guise of public health a dismantling of legal protections governing border arrivals that the Trump administration has been unable to achieve under the immigration laws.”²²

Undoubtedly, COVID-19 has disrupted the economic and social wellbeing of the United States.²³ While states and counties have enacted unprecedented restrictions on personal movement in an effort to slow the spread, the easy transmissibility of the virus continues to overwhelm hospital and healthcare systems.²⁴ The death toll in the United States has far surpassed that of any other developed country, infection rates continue to grow, and the duration of the pandemic remains unknown.²⁵ Introducing more contagious persons into the country will further strain hospitals and endanger the public.

But the order inappropriately singles out undocumented persons as an unmitigable public health threat and ignores the legal obligations and moral aspirations of the United

¹⁷ Order Suspending Introduction of Certain Persons From Countries Where a Communicable Disease Exists, 85 Fed. Reg. at 17067.

¹⁸ Impact of COVID-19 on the Immigration System, AMERICAN BAR ASSOCIATION, https://www.americanbar.org/groups/public_interest/immigration/immigration-updates/impact-of-covid-19-on-the-immigration-system/ (Scroll down to “Effects of Southern Border Closure on Asylum Seekers” for each listed date) (last visited July 28).

¹⁹ G.Y.J.P. v. Wolf, 2020 U.S. Dist. LEXIS 129513; J.B.B.C. v. Wolf, No. 20-cv-01509-CJN (D.D.C.) (Jul. 23, 2020) (Civil Rights Litigation Clearinghouse).

²⁰ *Remarks by President Trump, Vice President Pence, and Members of the Coronavirus Task Force in Press Briefing*, THE WHITE HOUSE (Apr. 7, 2020), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-vice-president-pence-members-coronavirus-task-force-press-briefing-april-7-2020/>.

²¹ *Remarks by President Trump, Vice President Pence, and Members of the Coronavirus Task Force in Press Briefing*, *supra* note 20.

²² Guttentag, *supra* note 16.

²³ *Coronavirus Impact: How a Crisis Is Changing the U.S.*, THE NEW YORK TIMES, <https://www.nytimes.com/live/2020/coronavirus-usa-03-27> (last updated June 9, 2020).

²⁴ *Hospitals and Health Systems Face Unprecedented Financial Pressures Due to COVID-19*, AMERICAN HOSPITAL ASSOCIATION, <https://www.aha.org/guidesreports/2020-05-05-hospitals-and-health-systems-face-unprecedented-financial-pressures-due> (last visited June 22, 2020).

²⁵ German Lopez, *America’s uniquely bad Covid-19 epidemic, explained in 18 maps and charts*, Vox (Aug. 11, 2020, 9:10AM ET), <https://www.vox.com/future-perfect/21353986/coronavirus-covid-pandemic-usa-america-maps-charts-data>.

States. Humanitarian organizations, immigrant rights activists, and numerous public health experts have argued that the order unnecessarily discriminates against asylum seekers and unaccompanied children, stripping them of their Congressionally mandated protections. I wish to build on these procedural arguments by briefly addressing the immorality of this policy in light of America's deeply rooted commitment to welcome and protect those seeking refuge. While the border remains open to so many, this order seeks to expel those who most desperately need to cross it.

In what follows, I analyze who the order covers as well as the legal authority under which it was enacted. Next, I contrast the order's stated rationale with the superior arguments against that rationale offered by the order's many critics. Lastly, I describe the order as a moral failure and violation of American values and human rights.

Asylum Seekers and Unaccompanied Children Expelled as Covered Aliens

"Covered aliens," the individuals targeted for expulsion by the CDC order, are described as people traveling through Canada or Mexico who would face "congregate settings," or common areas, at a POE or border patrol station while undergoing immigration processing.²⁶ However, the order excuses from this class of persons anyone with valid travel documents, regardless of how long or congregate their particular processing may be.²⁷ Accordingly, covered aliens may accurately be understood as undocumented persons seeking entry into the United States. As the order explains, this health measure is intended to cover "aliens seeking to enter the United States at POEs who do not have proper travel documents, aliens whose entry is otherwise contrary to law, and aliens who are apprehended near the border seeking to unlawfully enter the United States between POEs."²⁸ The order demands their expulsion from the country because people without proper documentation typically take longer to process than those with documents and are thus more likely to create human traffic within border facilities leading to the spread of COVID-19.²⁹ Therefore, although the only people summarily expelled by the order are undocumented, homeland security maintains "CBP is prohibiting the entry of certain persons who potentially pose a health risk," and, "[e]xpulsions under Title 42 are not based on immigration status."^{30, 31}

Focused on articulating the public health risks all covered aliens pose and the need to expel rather than process these individuals, the order fails to acknowledge that its broad description of covered aliens includes asylum seekers and unaccompanied children. These undocumented individuals' lives are often in danger, and under United States immigration law they are guaranteed opportunities for refuge upon arriving at our borders. In deciding not to

²⁶ Order Suspending Introduction of Certain Persons From Countries Where a Communicable Disease Exists, 85 Fed. Reg. at 17061.

²⁷ Id.

²⁸ Id.

²⁹ Id.

³⁰ *Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions*, U.S. CUSTOMS AND BORDER PROTECTION, <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics> (last visited August 12).

³¹ "Title 42" refers to Title 42 of the United States Code Service under which Section 362 of the Public Health Service Act authorizes the expulsions described in the Order.

acknowledge asylum seekers and unaccompanied children, the CDC tacitly asserts its emergency public health order supersedes the legal rights of these protected persons. However, as many in opposition of the order point out, the immigration laws protecting these individuals were enacted after the 1944 public health law on which the order is based.³² Accordingly, they argue the order's legal basis fails to contemplate these vital protections and thus cannot be regarded as overriding them.³³

In particular, the immigration laws that protect asylum seekers and unaccompanied children, which the order ignores, include the 1980 Refugee Act, the William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA), and the 1967 United Nations Protocol Relating to the Status of Refugees (1967 Protocol), each of which is catalogued as amendments to the Immigration and Nationality Act (INA).³⁴ Pursuant to the bipartisan 1980 Refugee Act, "[a]ny alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival . . .), irrespective of such alien's status, may apply for asylum in accordance with this section."^{35, 36} Correspondingly, under the Refugee Act, if any immigration officer encounters an undocumented person at or near the border who expresses a fear of returning to their home country or asks to apply for asylum "the officer shall refer the alien for an interview by an asylum officer."³⁷ Additionally, pursuant to the TVPRA, all encountered unaccompanied children (except those from contiguous countries who opt voluntarily to return to that country) must be apprehended by CBP, processed at border facilities to ensure their safety from persecution and trafficking, and transferred within forty-eight hours to the Office of Refugee Resettlement (ORR).^{38, 39} From there, these children must be released to a close relative or sponsor as soon as possible.⁴⁰ Lastly, the 1967 Protocol prohibits the United States from practicing "refoulement," or, expelling persons to a country where their "life or freedom would be threatened" because of their "race, religion, nationality, membership in a particular social group, or political opinion."⁴¹ In authorizing the immediate return of undocumented persons without any mention of asylum seekers or unaccompanied

³² See Azadeh Erfani, *The Latest Brick In The Wall: How The Trump Administration Unlawfully 'Expels' Asylum Seekers & Unaccompanied Children In The Name Of Public Health*, NATIONAL IMMIGRANT JUSTICE CENTER (April 15, 2020), <https://immigrantjustice.org/staff/blog/latest-brick-wall-how-trump-administration-unlawfully-expels-asylum-seekers>.

³³ See Yael Schacher and Chris Beyrer, *Expelling Asylum Seekers Is Not The Answer: U.S. Border Policy In The Time Of Covid-19*, REFUGEES INTERNATIONAL (April 27, 2020), https://www.refugeesinternational.org/reports/2020/4/26/expelling-asylum-seekers-is-not-the-answer-us-border-policy-in-the-time-of-covid-19#_ftn4.

³⁴ "The Immigration and Nationality Act (INA) was enacted in 1952. The INA collected many provisions and reorganized the structure of immigration law. The INA has been amended many times over the years and contains many of the most important provisions of immigration law." Immigration and Nationality Act, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, <https://www.uscis.gov/laws-and-policy/legislation/immigration-and-nationality-act> (last visited Aug. 1, 2020).

³⁵ 8 U.S.C.S. § 1158(a)(1) (LexisNexis, approved August 8, 2020).

³⁶ *Refugee Act of 1980*, NATIONAL ARCHIVES FOUNDATION, <https://www.archivesfoundation.org/documents/refugee-act-1980/> (last visited July 27).

³⁷ 8 U.S.C.S. § 1225(b)(1)(A)(ii) (LexisNexis, approved August 8, 2020).

³⁸ 8 U.S.C.S. § 1232(a)(4) (LexisNexis, approved August 8, 2020).

³⁹ *Trafficking Victims Protection Reauthorization Act Safeguards Children*, NATIONAL IMMIGRATION FORUM (May 23, 2018), <https://immigrationforum.org/article/trafficking-victims-protection-reauthorization-act-safeguards-children/>

⁴⁰ 8 U.S.C.S. § 1232(c)(2)(A) (LexisNexis, approved August 8, 2020).

⁴¹ 8 U.S.C.S. § 1231(b)(3) (LexisNexis, approved August 8, 2020).

children, the CDC order insists circumventing the above protections made to keep these vulnerable populations safe is “necessary to protect the public health.”⁴²

The order does permit CBP officers to consider “the totality of the circumstances” and, with approval from a supervisor, exclude individual covered aliens from removal.⁴³ Immigrant rights organizations insist this highly discretionary allowance falls well short of the legal obligations mentioned above, however, and is further hampered by CBP’s long demonstrated hostility in dealing with asylum seekers and children.⁴⁴ Additionally, this allowance is undercut by the order’s direction to return people “as rapidly as possible” to protect the American public health.⁴⁵ As the order explains, “The faster a covered alien is returned . . . the lower the risk the alien poses of introducing, transmitting, or spreading COVID–19.”⁴⁶ Furthermore, Acting Homeland Secretary Chad Wolf explained no exceptions would be made for vulnerable immigrants when he stated at a White House press briefing, “The CDC order directs the Department to suspend the introduction of all individuals seeking to enter the U.S. without proper travel documentation.”⁴⁷ In the same press briefing Mr. Wolf stated, “we will execute the CDC order by immediately returning individuals arriving without documentation without delay.”⁴⁸ As a result, numerous asylum seekers and unaccompanied children have been quickly returned without receiving proper screening, and some repatriated to the countries in which they fear persecution.⁴⁹

Despite relatively steady immigration flows (represented by “Total Encounters” in the chart below), the expulsion of the vast majority of arriving undocumented individuals (visible by comparing the number of “Total Encounters” with the number of “Title 42 Expulsions”) has led to plummeting Asylum Claims and 30 Day Averages of Unaccompanied Children Referred to ORR. Note that beginning in March, the number of “Apprehensions” includes some individuals who are ultimately expelled under Title 42 and who are only first apprehended as they require a repatriation flight and cannot simply be turned back at a POE.

⁴² Order Suspending Introduction of Certain Persons From Countries Where a Communicable Disease Exists, 85 Fed. Reg. at 17061

⁴³ *Id.*

⁴⁴ *See Erfani, supra* note 32.

⁴⁵ Order Suspending Introduction of Certain Persons From Countries Where a Communicable Disease Exists, 85 Fed. Reg. 17067

⁴⁶ *Id.*

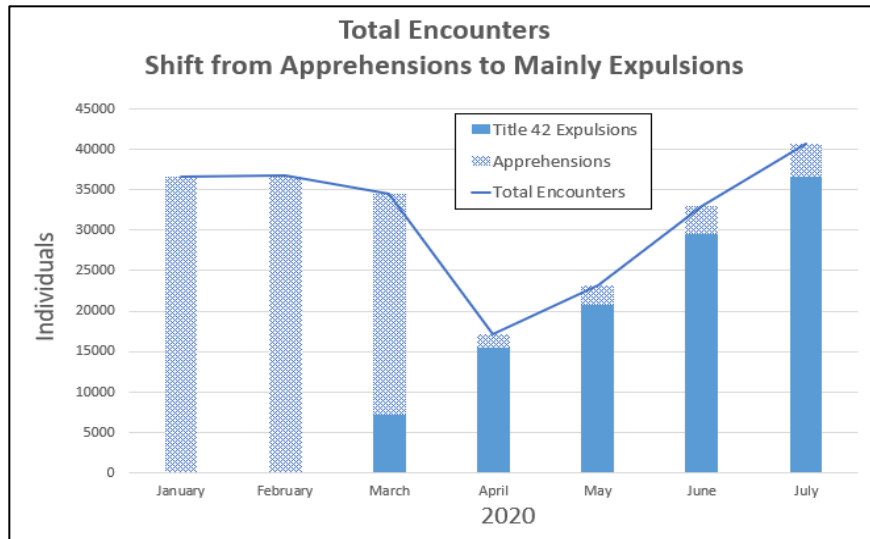
⁴⁷ *Remarks by President Trump, Vice President Pence, and Members of the Coronavirus Task Force in Press Briefing, supra* note 20.

⁴⁸ *Id.*

⁴⁹ Impact of COVID-19 on the Immigration System, *supra* note 18.

*U.S. Border Patrol and Office of Field Operations Monthly Enforcement at the Southwest Border
2020: Title 42 Expulsions and Title 8 Apprehensions^{50,51,52}*

	January	February	March	April	May	June	July
Total Encounters	36,581	36,689	34,440	17,086	23,197	32,935	40,746
Unaccompanied Child Encounters ⁵³	2,680	3,069	2,973	712	965	1,592	2,419
Title 42 Expulsions	N/A	N/A	7,144	15,506	20,836	29,587	36,548
Apprehensions	36,581	36,678	27,296	1,580	2,361	3,348	4,198
Asylum Claims	4,779	4,632	3,638	686	464	657	696
30 Day Averages of Unaccompanied Children Referred to ORR	61	78	60	2	1	2	(unavailable)



Legal Authority for the Order’s Novel Public Health Expulsions

The primary legal authority invoked by the CDC to authorize expelling undocumented persons arriving at the United States border is section 362 of the Public Health Service Act

⁵⁰ *Southwest Border Migration FY 2020*, U.S. CUSTOMS AND BORDER PROTECTION, <https://www.cbp.gov/newsroom/stats/sw-border-migration> (last visited Aug. 14, 2020).

⁵¹ *Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions*, *supra* note 30.

⁵² *Semi-Monthly Credible Fear and Reasonable Fear Receipts and Decisions*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, <https://www.hhs.gov/programs/social-services/unaccompanied-alien-children/latest-uac-data-fy2020/index.html> (last visited Aug. 14, 2020).

⁵³ Unaccompanied Children Encounters are included in the Total Encounters

(PHSA), codified in 42 U.S.C. § 265.⁵⁴ However, it is only by subtly altering section 362’s implementing regulations via an interim final rule and issuing its order pursuant to these rushed alterations, that the CDC justifies expulsion under the public health law. Never before has section 362 been employed to single out undocumented persons or to prohibit the entry of people, documented or not, into the country.⁵⁵

Prior to the interim final rule, the implementing regulations of section 362 only permitted the federal government to quarantine, isolate, or conditionally release people entering the United States, not immediately expel them.⁵⁶ As section 362 states, the Surgeon General (now the CDC director under HHS⁵⁷) may “prohibit . . . the introduction of persons or property” from designated countries and places where there exists a communicable disease when their introduction would increase the “serious danger of the introduction of such disease into the United States.”⁵⁸ Importantly, as the interim final rule explains and section 362’s adjoining provisions demonstrate, this power to prohibit the “introduction” of persons did not authorize excluding them from the United States.^{59, 60} Instead, the public health statute solely permitted the federal government to medically detain travelers within the country’s borders for a reasonable amount of time where they could be monitored by medical personnel.⁶¹ Furthermore, section 362 was intended to apply to both citizens and non-citizens alike.⁶² As the law’s legislative history reveals, Congress deliberately chose the phrase “introduction of persons” to avoid singling out immigrants in recognition that any traveler, regardless of legal status, could carry a contagious disease.⁶³

With the issuance of its interim final rule, the CDC transformed the implementing regulations of section 362 by adding, effective immediately, section 71.40 to the PHSA.⁶⁴ Meekly described as a “more efficient regulatory mechanism to exercise section 362 authority,” section 71.40 redefines significant terminology in section 362 granting it new authority to expel undocumented persons.⁶⁵ Firstly, the amendment redefines “introduction into the United States” by a foreigner as the “movement of a person from a foreign country . . . or place” bringing that person “into contact with persons . . . or property in the United States.”⁶⁶ Accordingly, suspending or preventing introduction under section 362, when it comes to foreigners, no longer means delaying their entry into the United States via medical quarantine,

⁵⁴ Order Suspending Introduction of Certain Persons From Countries Where a Communicable Disease Exists, 85 Fed. Reg. at 17060.

⁵⁵ Guttentag, *supra* note 16.

⁵⁶ 42 U.S.C.S. § 264 (LexisNexis, approved August 8, 2020).

⁵⁷ Authority to “prohibit introduction” shifted from the President to the Surgeon General in 1944, and in 1966, from the Surgeon General to the Secretary of Health and Human Services (HHS). HHS has since delegated this authority to the CDC. *Legal Authorities For Isolation and Quarantine*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/quarantine/aboutlawsregulationsquarantineisolation.html> (last visited Aug. 2, 2020)

⁵⁸ 42 U.S.C.S. § 265 (LexisNexis 2020).

⁵⁹ Interim Final Rule, 85 Fed. Reg. at 16560.

⁶⁰ 42 U.S.C.S. § 264 (LexisNexis, approved August 8, 2020).

⁶¹ 42 U.S.C.S. § 265(d) (LexisNexis, approved August 8, 2020).

⁶² Cong. Rec. 759 (January 21, 1893), <https://www.govinfo.gov/content/pkg/GPO-CRECB-1893-pt1-v24/pdf/GPO-CRECB-1893-pt1-v24-30.pdf> (statement of Mr. Lind on 759).

⁶³ *Id.*

⁶⁴ Interim Final Rule, 85 Fed. Reg. at 16563.

⁶⁵ *Id.* at 16560.

⁶⁶ *Id.* at 16566.

but instead, “rapidly moving them outside the United States.”⁶⁷ Second, the amendment redefines the phrase, “serious danger of the introduction of such communicable disease into the United States” to mean, “the potential for introduction of vectors of the communicable disease into the United States, even if persons or property in the United States are already infected.”⁶⁸ As such, the disease may already be sweeping across the nation and arriving immigrants may not be infected and still, preventing their chance of admittance into the country may be required. Lastly, the amendment insists section 362 will no longer apply to U.S. citizens or lawful permanent residents.⁶⁹ Through these definitional changes, section 71.40 converts section 362 into an immigration enforcement authority that justifies the CDC’s order.

Notably, typical public notice and comment processes for this sort of agency rulemaking pursuant to the Administrative Procedure Act were forgone. The CDC deemed section 71.40’s implementation urgent and delay “contrary to public health” allowing for the regulation to take immediate effect.⁷⁰ The interim final rule contends that no other law authorized the comprehensive expulsion of undocumented persons needed at present to protect the public health.⁷¹ It points out, for example, that while Section 212(a)(1)(A)(i) of the INA (8 U.S.C. § 1182(1)(A)(i)) authorizes the exclusion of any noncitizen “who is determined to have a communicable disease of public health significance,” implementing the order pursuant to this law would require testing persons before removing them.⁷² However, as no rapid COVID-19 test exists and none have been cleared for use in non-clinical settings, CBP would need to transport immigrants to medical institutions for testing and detain them while awaiting results.⁷³ This would be “impractical due to the number of persons involved, logistical challenges and CDC resource and personnel constraints.”⁷⁴ Additionally, while Section 212(f) of the INA has been used by the Trump administration to enact a number of travel restrictions to slow the transmission of COVID-19 into the country, this provision only applies to the “entry,” or the physical admission of immigrants into the country while section 362 of the PHSA applies to their “introduction,” or their simply coming in contact with U.S. personnel and or property.⁷⁵ Accordingly, 212(f) would not necessarily prohibit all undocumented persons, such as asylum seekers and unaccompanied children, from setting foot in POE or border patrol stations. Furthermore, asylum seekers would likely be able to bypass an order pursuant to 212(f) for, as the Supreme Court clarified in *East Bay Sanctuary Covenant v. Trump*, a previous section of the INA guarantees the right to seek asylum and thus, 212(f) should not restrict that right.⁷⁶ All of the administration’s other travel restrictions under 212(f) to limit the spread of COVID-19 include explicit exceptions for those seeking protection in the United States.⁷⁷

⁶⁷ Id. at 16563.

⁶⁸ Id. at 16566, 16567.

⁶⁹ Id. at 16567.

⁷⁰ Id. at 16559.

⁷¹ Id. at 16564.

⁷² Id. at 16564.

⁷³ Id. at 16565.

⁷⁴ Id. at 16565.

⁷⁵ Id. at 16565.

⁷⁶ *E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242 (9th Cir. 2020) (explaining the Trump administration could not use section 212(f) to limit access to asylum to points of entry because that would conflict with the plain Congressional intent instilled in 8 U.S.C.S § 1158(a)).

⁷⁷ *Presidential Proclamations on Novel Coronavirus*, U.S. DEPARTMENT OF STATE – BUREAU OF CONSULAR AFFAIRS (June 29, 2020),

In protest of the rule's immediate effectiveness, immigrant rights advocates insist the rule fails to sufficiently consider alternative measures of preventing congregate settings that do not involve evading public and Congressional oversight, such as conditional release.⁷⁸ Additionally, a letter from a number of United State Senators addressed to Acting Homeland Secretary Chad Wolf on April 7 argued that while the pandemic requires "extraordinary governmental response," it does not grant the executive branch a free pass to violate rights guaranteed to asylum seekers and unaccompanied children.⁷⁹

The Order's Public Health Rationale for Expelling Asylum Seekers and Unaccompanied Children

The CDC's public health rationale for expelling asylum seekers and unaccompanied children can be summarized in four main points.

(1) Undocumented immigrants would typically be held longer in congregate settings because they take longer to process than properly documented individuals.⁸⁰ As facilities are reportedly "not designed" to enforce social distancing, prolonged processing times pose a greater risk to disease transmission than the shorter processing times of documented persons.⁸¹ Further, any equipment used to reduce the risk of infection in these congregate settings along the border would be drawn from an American healthcare system already strained to fight the virus.⁸²

(2) Conditionally releasing asylum seekers into the interior to reduce processing times is "not a viable solution" because "many aliens covered by this order may lack homes or other places in the United States where they can self-isolate."⁸³ Additionally, the CDC does not have the resources to monitor immigrants who may be conditionally released into the country.⁸⁴

(3) An influx of COVID-19 positive immigrants could overburden border town healthcare systems.⁸⁵ POE and border patrol stations do not have near adequate medical care to treat the sick and transferring them to local hospitals might exhaust domestic healthcare resources.⁸⁶

<https://travel.state.gov/content/travel/en/News/visas-news/presidential-proclamation-coronavirus.html> (Scroll down to access links to the various proclamations).

⁷⁸ See Guttentag, *supra* note 16.

⁷⁹ Letter from multiple United States Senators, to Chad Wolf, Acting Secretary of Department of Homeland Security (April 7, 2020),

<https://www.leahy.senate.gov/imo/media/doc/4.7.20%20FINAL%20Jud%20letter%20to%20DHS%20re%20Title%2042%20-%20SIGNED.pdf>.

⁸⁰ Order Suspending Introduction of Certain Persons From Countries Where a Communicable Disease Exists, 85 Fed. Reg. at 17061.

⁸¹ *Id.*

⁸² *Id.* at 17067.

⁸³ *Id.* at 17067.

⁸⁴ *Id.* at 17066.

⁸⁵ *Id.* at 17061.

⁸⁶ *Id.* at 17061.

(4) CBP officers expelling covered aliens are not in violation of normal legal procedures for processing immigrants because they are “not operating pursuant to” their authority under immigration law and instead are acting under the emergency public health order.⁸⁷

Opposition to the Order’s Public Health Rationale

In response to the CDC’s public health rationale for expelling asylum seekers and unaccompanied children, humanitarian organizations, immigrant rights activists, and many public health experts who oppose the order make the following arguments.

(1) Simple protective measures outlined on the CDC’s webpage can and should be taken to limit the possibility of disease transmission during processing at POEs and border patrol stations.⁸⁸ These include but are not limited to, requiring face coverings for CBP and persons crossing into the United States, utilizing outdoor space to increase airflow during processing, demarcating waiting lines providing travelers with requisite distance, and providing hand sanitizer for officers and applicants.⁸⁹

(2) Expulsion is not the only alternative to a crowded, unsanitary CBP or detention facility as arriving asylum seekers and unaccompanied children can instead be conditionally released into the interior where they can safely wait for their hearings.⁹⁰ Instead of ignoring calls from the most vulnerable among us, the secretary of homeland security may legally authorize temporary admission into the United States “for urgent humanitarian reasons.”⁹¹ According to a 2019 study conducted by the US Immigration Policy Center, roughly 92% of asylum seekers have family or close friends whom they can stay with in the United States.⁹² While the vast majority of individuals have places to stay, the remaining eight percent can be helped by non-governmental shelters.⁹³ Furthermore, conditionally releasing asylum seekers and unaccompanied children is considerably cheaper than operating detention facilities, promotes far better health outcomes among immigrants, and has proven high compliance rates with immigration appointments and court hearings.⁹⁴

(3) The virus is non-discriminatory, and there is no reason why asylum seekers or unaccompanied children would be any more likely to contract or transmit COVID-19 than any

⁸⁷ Guttentag, *supra* note 16.

⁸⁸ *Public Health Experts Urge U.S. Officials to Withdraw Order Enabling Mass Expulsion of Asylum Seekers*, COLUMBIA PUBLIC HEALTH (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>.

⁸⁹ *Public Health Experts Urge U.S. Officials to Withdraw Order Enabling Mass Expulsion of Asylum Seekers*, *supra* note 88.

⁹⁰ 8 U.S.C.S. § 1182(b)(5)(A) (LexisNexis, approved August 8, 2020).

⁹¹ *Id.*

⁹² Tom K. Wong, *Seeking Asylum: Part 2*, US IMMIGRATION POLICY CENTER (Oct. 29 2019), <https://usipc.ucsd.edu/publications/usipc-seeking-asylum-part-2-final.pdf>.

⁹³ Naples-Mitchell, *supra* note 4.

⁹⁴ *The Real Alternatives to Detention*, AMERICAN IMMIGRATION LAWYERS ASSOCIATION, LUTHERAN IMMIGRATION AND REFUGEE SERVICE, NATIONAL IMMIGRANT JUSTICE CENTER, WOMEN’S REFUGEE COMMISSION, MIGRATION & REFUGEE SERVICES (June 2019), <https://justiceforimmigrants.org/wp-content/uploads/2019/06/The-Real-Alternatives-to-Detention-June-2019-FINAL-v.2.pdf>.

other category of people.⁹⁵ In fact, border region hospitals are currently overwhelmed by COVID-19 positive U.S. citizens who live in Mexico but are now, with permission from the CDC order, freely crossing the border to obtain healthcare.⁹⁶ Additionally, COVID-19 is already widespread in the United States and expelling asylum seekers and unaccompanied children without even testing them for the virus will not substantially reduce the domestic burdens of the pandemic.⁹⁷

(4) The CDC order disregards the international and domestic legal obligations of the United States to provide asylum seekers and unaccompanied children with refuge. Namely, the order forgets the 1980 Refugee Act, the Trafficking Victims Protection Reauthorization Act, and the 1967 Protocol, which together ensure vulnerable persons are not rejected at the border without first having the opportunity to apply for protection in the United States. The single sentence in the CDC order which grants CBP officials the discretion to allow certain persons to bypass expulsion fails to meet the procedural requirements of the aforementioned immigration laws.⁹⁸ Furthermore, nothing in the 1944 public health law on which the CDC order is based suggests it should supersede the subsequently enacted legal protections granted to asylum seekers and unaccompanied children.⁹⁹ Lastly, the interim final rule provides insufficient justification for its immediate implementation absent public comment or Congressional oversight.¹⁰⁰

(5) Finally, this order is nothing more than an underhanded continuation of the Trump administration's blunt policy attacks on U.S. asylum laws. Along the Mexico-U.S. border these interwoven attacks have included the following.

(a) Metering: the practice of limiting the number of asylum seekers who can present themselves at POEs to make claims for protection resulting in asylum seekers waiting days or months before being processed in the United States.¹⁰¹ (This practice was challenged beginning on July 12, 2017, in the case of *Al Otro Lado, Inc. v. Wolf* and remains pending.¹⁰²)

(b) Migrant Protection Protocols (MPP or Remain in Mexico): the practice of sending asylum seekers back to dangerous makeshift camps in Mexico where they are forced to wait for months, and in some cases up to a year, before having their asylum claims heard in court.¹⁰³ (The program was struck down in February 2020 by the 9th Circuit, but

⁹⁵ Naples-Mitchell, *supra* note 4.

⁹⁶ Catherine E. Schochet, *People with Coronavirus are crossing the US-Mexico border for medical care*, CNN (June 29, 2020, 7:24AM ET) <https://www.cnn.com/2020/06/29/health/border-hospitals-coronavirus/index.html>.

⁹⁷ Kyle McGowan, *Human Rights Watch Comment on CDC Interim Final Rule Suspending Entry of Persons into the US*, HUMAN RIGHTS WATCH (April 23, 2020, 5:00PM ET).

⁹⁸ McGowan, *supra* note 97.

⁹⁹ Guttentag, *supra* note 16.

¹⁰⁰ Letter from multiple United States Senators, *supra* note 79.

¹⁰¹ *'Metering' Policy At The Southern Border Faces Renewed Scrutiny*, NPR (July 3, 2019), <https://www.npr.org/2019/07/03/738586876/metering-policy-at-the-southern-border-faces-renewed-scrutiny>.

¹⁰² *Challenging Customs and Border Protection's Unlawful Practice of Turning Away Asylum Seekers*, AMERICAN IMMIGRATION COUNCIL, <https://www.americanimmigrationcouncil.org/litigation/challenging-customs-and-border-protections-unlawful-practice-turning-away-asylum-seekers> (last visited Aug. 4).

¹⁰³ *Policies Affecting Asylum Seekers at the Border*, AMERICAN IMMIGRATION COUNCIL (Jan. 29, 2020), <https://www.americanimmigrationcouncil.org/research/policies-affecting-asylum-seekers-border>.

granted an emergency stay by the Supreme Court upon request from the Trump administration “citing concerns of chaos and disruption at the border if the . . . program were to be disbanded.”¹⁰⁴)

(c) Transit-Country Asylum Ban: banning asylum seekers from asserting a claim for protection in the United States if they pass through another country on their way to the United States and cannot demonstrate they were denied asylum there.¹⁰⁵ (On July 6, 2020, this practice was struck down in a federal appeals court which concluded “the government did ‘virtually nothing’ to make sure that another country is ‘a safe option’ for those fleeing persecution.”¹⁰⁶)

(d) Asylum Cooperation Agreements (ACAs, or Safe Third-Country Agreements): Deporting asylum seekers to Guatemala to seek asylum there in concert with the Transit-Country Asylum Ban.¹⁰⁷ Similar agreements with Honduras and El Salvador have been signed but not yet implemented.¹⁰⁸ (A federal judge and Trump appointee struck down this policy on July 1, 2020, insisting the rules immediate implementation inappropriately bypassed the Administrative Procedure Act.¹⁰⁹)

The Order Is A Transgression of American Values

The humanitarian organizations, immigrant rights activists, and numerous public health experts opposing the order are right. By camouflaging itself as an attempt to protect our own citizenry at the cost of protecting fundamental human rights, the order unnecessarily discriminates against asylum seekers and unaccompanied children and strips them of their Congressionally mandated rights. Furthermore, the avoidable transgression of these rights demonstrates a reprehensible violation of the moral aspirations our nation’s laws intend to uphold.

The United States has long stood proud of our global legacy of welcoming refugees fleeing violence and persecution. Troubled as our walk towards forming that “more perfect union” has been and continues to be, we know ourselves as a nation of immigrants, and a democracy striving to uphold human rights and lead by example.¹¹⁰ With the bipartisan 1980 Refugee Act signed into law by President Ronald Reagan, the United States codified our moral commitment to resettle refugees and welcome asylum seekers. As the Act states, “Congress

¹⁰⁴ *U.S. Supreme Court lets ‘Remain in Mexico’ asylum policy stay in place; an “anti-immigrant” order, says Darius Amiri, chairman, Rose Law Group Immigration Department*, ROSE LAW GROUP (March 15, 2020), <https://roselawgroupreporter.com/2020/03/u-s-supreme-court-lets-remain-in-mexico-asylum-policy-stay-in-place-an-anti-immigrant-order-says-darius-amiri-chairman-rose-law-group-immigration-department/>.

¹⁰⁵ Miriam Jordan, *Appeals Court Strikes Down Trump Administration’s Asylum Ban*, THE NEW YORK TIMES (July 6, 2020), <https://www.nytimes.com/2020/07/06/us/trump-asylum-ban-ninth-circuit.html>.

¹⁰⁶ Jordan, *supra* note 105.

¹⁰⁷ *Deportation with a Layover*, HUMAN RIGHTS WATCH (May 19, 2020), <https://www.hrw.org/report/2020/05/19/deportation-layover/failure-protection-under-us-guatemala-asylum-cooperative>.

¹⁰⁸ *Deportation with a Layover*, *supra* note 107.

¹⁰⁹ Spencer S. Hsu, *Federal judge strikes down Trump asylum rule targeting Central Americans*, THE WASHINGTON POST (July 1, 2020), https://www.washingtonpost.com/local/legal-issues/us-judge-strikes-down-trump-asylum-rule-targeting-central-americans/2020/07/01/96e57616-bb4a-11ea-bdaf-a129f921026f_story.html.

¹¹⁰ *The Constitution of the United States: A Transcription*, NATIONAL ARCHIVES <https://www.archives.gov/founding-docs/constitution-transcript> (last visited Aug. 12, 2020)

declares that it is the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands,” and further, “that it is the policy of the United States to encourage all nations to provide assistance and resettlement opportunities to refugees to the fullest extent possible.”¹¹¹ Thus, our laws guaranteeing protection to asylum seekers and unaccompanied children are central to our national project.

The recent CDC order is a choice by the current administration to contravene these noble promises in the face of a clear solution that will uphold them, namely conditional release. Processing asylum seekers and unaccompanied children into the country through conditional release would ameliorate concerns around congregate settings at border facilities and ensure these vulnerable populations are provided opportunities for protection. In refusing to recognize this plain remedy to the government’s own processing issues, the administration indifferently violates our moral commitments to preserve human dignity and protect the persecuted as well as endangered children. Under the INA, conditional release may be authorized when there are “urgent humanitarian reasons” that require forgoing typical processing procedures.¹¹² Must we wait for another time when there are more obvious urgent humanitarian concerns than a global pandemic threatening to end fundamental human rights protections?

As we wait for that time, allegedly too concerned that allowing vulnerable persons to enter might increase the possibility COVID-19 will be introduced into the country, we continue to allow extensive cross border travel by those who carry the proper documents. Hundreds of thousands of trucks stream across our borders each month, and many Americans continue to travel to and from Mexico on vacation.^{113, 114} The disease does not prefer the undocumented over the documented.¹¹⁵ Moreover, these trucks and their commercial operations do not have special provisions enshrined in federal law ensuring their right to pass into and out of the country, and these recreational trips are probably not necessary to maintain these citizen’s human rights. By excluding from crossing the border those who need to do so most, the order mocks our national tradition and relies on the bigoted misconception that asylum seekers and unaccompanied children are vectors of disease.

When we deny these persons their human right to seek refuge in the United States, we send them back to the places from which they fled or to makeshift refugee camps along the border that serve as tinder boxes for COVID-19.¹¹⁶ The order, founded on the false notion that expulsions are necessary to protect the public health, therefore principally serves to jeopardize the lives of those already worse off. The COVID-19 pandemic is a months-long public health crisis that effects everyone, but many asylum seekers and unaccompanied children have been living an urgent crisis of health for years.

¹¹¹ 8 U.S.C.S. § 1521 (Other provisions: Congressional declaration of policies and objectives) (LexisNexis, approved August 8, 2020).

¹¹² 8 U.S.C.S. § 1182(b)(5)(A) (LexisNexis, approved August 8, 2020).

¹¹³ Laura Dannen Redman, *Can Americans Visit Mexico Right Now?* AFAR (Aug. 14, 2020), <https://www.afar.com/magazine/can-americans-visit-mexico-right-now>.

¹¹⁴ *Border Crossing Entry Data*, THE BUREAU OF TRANSPORTATION STATISTICS, <https://explore.dot.gov/views/BorderCrossingData/Monthly?:isGuestRedirectFromVizportal=y&:embed=y> (last viewed Aug. 13, 2020)

¹¹⁵ Naples-Mitchell, *supra* note 4.

¹¹⁶ *Three asylum seekers at camp near US border test positive for coronavirus*, THE GUARDIAN (June 20, 2020), <https://www.theguardian.com/us-news/2020/jun/30/us-asylum-seekers-covid-19-mexico-matamoros>.

The CDC order is detrimental to the wellbeing of the many asylum seekers and unaccompanied children who continue to be turned away. Further, neglecting the legal protections guaranteed to these vulnerable populations in the face of clear alternatives demonstrates a reprehensible violation of the moral aspirations our nation's laws aim to promote. Instead of enacting senseless and harmful immigration restrictions we should instead understand this time of COVID-19 as an opportunity to express our most deeply held national values. The United States should exemplify how to maintain the rights of asylum seekers and unaccompanied children by reversing the order and utilizing conditional release to safely release these persons into the country. A global pandemic is not the time to let fundamental human rights disappear.