



April 23, 2020

Mr. Kyle McGowan  
Office of the Chief of Staff  
Centers for Disease Control and Prevention  
1600 Clifton Road NE, MS H21-10  
Atlanta, GA 30329

Re: CDC-2020-0033, Control of Communicable Diseases; Foreign Quarantine: Suspension of Introduction of Persons into United States from Designated Foreign Countries or Places for Public Health Purposes, RIN 0920-AA76

Dear Mr. McGowan:

The Centers for Disease Control and Prevention (CDC) has been at the forefront of the response to the global COVID-19 pandemic, and Kids in Need of Defense (KIND) appreciates the agency's efforts during this unprecedented time. We submit the following comments regarding the Interim Final Rule relating to the Suspension of Introduction of Persons into the United States from Designated Foreign Countries or Places for Public Health Purposes (the "Rule"),<sup>1</sup> the related Order Suspending Introduction of Certain Persons From Countries Where a Communicable Disease Exists (the "Order"), and the subsequent extension of that Order.<sup>2</sup> The Rule, which was published in the Federal Register on March 24, 2020 but became effective on March 20, 2020, authorizes the Director of the CDC to issue an order suspending the introduction of designated persons into the United States. Although promulgated as a response to the pandemic, the Rule and accompanying Order in fact will do little to limit the spread of disease but do much to harm vulnerable children and asylum-seekers. Together the

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<sup>1</sup> Centers for Disease Control and Prevention, *Control of Communicable Diseases; Foreign Quarantine, Suspension of Introduction of Persons into the United States from Designated Foreign Countries or Places for Public Health Purposes*, 85 Fed. Reg. 16559 (Mar. 24, 2020).

<sup>2</sup> Centers for Disease Control and Prevention, *Notice of Order Under Sections 362 and 365 of the Public Health Service Suspending Introduction of Certain persons From Countries Where a Communicable Disease Exists*, 85 Fed. Reg. 17060 (Mar. 26, 2020); Centers for Disease Control and Prevention, *Extension of Order Under Section 362 and 365 of the Public Health Service Suspending Introduction of Certain persons From Countries Where a Communicable Disease Exists*, 85 Fed. Reg. 22424 (Apr. 22, 2020).

Rule and the subsequent Order overstate the authority of the CDC, attempting to leverage statutory authority for quarantine measures on individuals seeking to enter the United States into an extraordinary emergency power to supersede all immigration laws. As implemented by DHS<sup>3</sup>, the Order issued under the authority of this Interim Final Rule has been interpreted to permit DHS officials to immediately turn away unaccompanied children and asylum seekers, ignoring the obligations and responsibilities set forth in the Trafficking Victims Protection Reauthorization Act of 2008 (“TVPRA”) <sup>4</sup>, U.S. laws governing asylum and withholding of removal, and international treaty obligations regulating the treatment of refugees and victims of torture. We urge the CDC to rescind the Rule, as its chief effect appears to be to block unaccompanied children, asylum-seekers, and other migrants fleeing dangerous conditions from accessing legal protections, in circumvention of U.S. immigration laws. At a minimum, the scope of the Rule should be dramatically narrowed with specific reference made to the continuing obligations of all federal agencies to follow all immigration laws, observe due process, and protect the specific rights Congress has accorded to certain groups, particularly unaccompanied children.

KIND is a national nonprofit organization dedicated to providing free legal representation and protection to unaccompanied immigrant and refugee children in removal proceedings. 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 and relief for which their clients may be eligible. 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.

Many of KIND’s clients have fled severe violence and threats to their lives in their countries of origin and may be eligible for asylum, Special Immigrant Juvenile Status, or other forms of humanitarian protection; other clients are members of families separated at the border. The extreme danger faced by children on the move has been explicitly recognized by Congress under the TVPRA which requires, among other protections, that all unaccompanied children be screened to identify victims or potential victims of trafficking and other harm, that they receive special care and custody by the Office of Refugee Resettlement (“ORR”), and that their asylum applications be considered by U.S. Citizenship and Immigration Services in a more child-

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<sup>3</sup> See, e.g., Notification of Temporary Travel Restrictions Applicable to Land Ports of Entry and Ferries Service Between the United States and Mexico,” 85 Fed. Reg. 16547; CBP, <https://www.documentcloud.org/documents/6824221-COVID-19-CAPIO.html>.

<sup>4</sup> William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, P.L. 110-4573.

appropriate and non-adversarial interview setting, rather than in immigration court. Every day, the KIND team works with unaccompanied children in the United States who were first identified as in need of protection through the TVPRA's critical screening procedures or who were first able to express their fears of persecution, torture, or other harm after time to heal and develop trust in child welfare professionals during ORR custody, legal services providers, and caregivers. The CDC's Rule and Order appear to have been formulated without regard for the important protections unaccompanied children receive under the TVPRA and the general humanitarian protections accorded to asylum seekers and other vulnerable individuals under U.S. law. Consequently, DHS has taken advantage of the broad latitude of CDC Rule and Order as currently written to disregard such legal protections and jettison all measures that ensure unaccompanied children and other vulnerable populations have access to U.S. protection mechanisms.

While we recognize the severity of the COVID-19 pandemic and its impacts on public life, we are deeply concerned by measures suggesting a necessary choice between preventing the spread of a disease so firmly entrenched in the United States and affording due process and legal protections to those fleeing for their lives. Our laws, the public welfare, and fundamental fairness demand that we do both. As we outline below, DHS has already embraced the CDC's Rule and Order to justify sweeping and detrimental departures from immigration laws, and the CDC regulation and Order far exceed the authority granted to the agency by Congress. For those reasons, we ask the CDC to rescind both the Rule and the Order and take only those measures at the border that are consistent with laws designed to protect the rights of unaccompanied children and asylum-seekers.

- I. The Rule and accompanying Order abrogate the government's responsibility to protect unaccompanied children and asylum seekers.

While we believe that the Rule and accompanying Order exceed the authority granted the Director of the CDC under Sections 362a of the Public Health Service Act<sup>5</sup>, we begin with the simple fact that the Rule and Order have created an immediate danger to the health and safety of thousands of individuals, particularly unaccompanied children. The CDC may seek the assistance of other government agencies, such as immigration and customs officials, to carry out its quarantine measures, but such authority does not empower either the CDC or other federal agencies to recast or wholly disregard federal immigration laws and the will of Congress, or international law. Implementation guidance reported by the media indicates that DHS has interpreted the CDC's order as granting it the authority to expel people, including children, without due process and screenings to identify victims of trafficking, persecution or torture.

The danger to unaccompanied children and asylum-seekers is tragically clear. Just weeks after the publication of the Rule and Order, DHS' implementation of these directives has placed

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<sup>5</sup> Public Health Service Act, Sections 362, 42 U.S.C. §§ 264, 265.

thousands of individuals in grave peril,<sup>6</sup> including at least 400 children - from Cuba, Ecuador, El Salvador, Honduras, Guatemala, and Mexico - who have reportedly been expelled to Mexico or their countries of origin.<sup>7</sup> In some cases Border Patrol returns unaccompanied children to Mexico with adults whose relationship to the child has not been verified, placing children at risk of trafficking.<sup>8</sup> Whether returning people to their countries of origin or to Mexico, these actions are exposing individuals to extreme danger. KIND has repeatedly documented the danger unaccompanied children face as a result of recent U.S. programs and policies, and the new Rule and Order will quickly exacerbate those dangers.<sup>9</sup>

In KIND's research into the root causes of child migration from Central America, we have found that violence, in combination with impunity and a failure of protection in the children's countries of origin, causes children to seek safety in the United States. The main forms of violence that we have found unaccompanied children from the Northern Triangle seek to escape are violence inflicted by criminal gangs, drug cartels, or other organized crime; sexual and gender-based violence, including violence and extreme discrimination based on sexual orientation and/or gender identity; and child abuse. KIND has found through its research that lesbian, gay, bisexual, transgender, and intersex (LGBTI) children and youth also face very high level of sexual and gender-based violence in the Northern Triangle; human trafficking of children is also common there. Children are brought from rural to urban areas and across borders or to border areas, where they are exploited or trafficked, in many cases in agricultural, sex, or domestic work. Femicide, or the gender-motivated killing of women and girls, is pervasive in the Northern Triangle countries, and Honduras, El Salvador, and Guatemala are among the ten countries with the highest homicide rates globally.<sup>10</sup>

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<sup>6</sup> Molly O'Toole, Trump Administration, Citing Coronavirus, Expels 10,000 Migrants in Less than 3 Weeks, Los Angeles Times (Apr. 9, 2020), <https://www.latimes.com/politics/story/2020-04-09/trump-cites-coronavirus-expel-migrants-at-border>

<sup>7</sup> See, e.g., Nick Miroff, "Facing coronavirus pandemic, Trump suspends immigration laws and showcases vision for locked-down border," Washington Post (Apr. 3, 2020), [https://www.washingtonpost.com/national/coronavirus-trump-immigration-border/2020/04/03/23cb025a-74f9-11ea-ae50-7148009252e3\\_story.html](https://www.washingtonpost.com/national/coronavirus-trump-immigration-border/2020/04/03/23cb025a-74f9-11ea-ae50-7148009252e3_story.html).

<sup>8</sup> Ted Hesson, Mica Rosenberg, "U.S. deports 400 migrant children under new coronavirus rules" Reuters (Apr. 7, 2020); <https://www.reuters.com/article/us-health-coronavirus-usa-deportations/us-deports-400-migrant-children-under-new-coronavirus-rules-idUSKBN21P354>.

<sup>9</sup> See, e.g., Kids in Need of Defense, Blocked from Safety: Unaccompanied Children along the U.S.-Mexico Border (Apr. 29, 2019), <https://supportkind.org/wp-content/uploads/2019/06/Blocked-From-Safety-KIND-Border-Report-FINAL.pdf>; Kids in Need of Defense, Media Telebriefing: Experts Address Covid-19 Dangers for Unaccompanied Children (Apr. 1, 2020), <https://supportkind.org/press-releases/media-telebriefing-national-experts-to-address-covid-19-dangers-for-unaccompanied-children/>.

<sup>10</sup> This understanding is informed by the United Nations Office on Drugs and Crime (UNODC), Global Study on Homicide (2019), at <https://www.unodc.org/unodc/en/data-and-analysis/globalstudy-on-homicide>.

Expulsions and turn-backs under the Rule and CDC and DHS orders threaten the return of unaccompanied children to the very threats to their lives and safety from which they fled, without any protection screening. Rapid turnbacks are done at all hours of the day or night, in violation of local agreements between the United States and Mexico. Expulsions to children's countries of origin may occur with similar speed and without critical safeguards to ensure the well-being of children once returned.

Once returned, unaccompanied children face difficulties in accessing safety and protection—from both violence and COVID-19—due to weak protection and healthcare systems in the region as well as new restrictions aimed at preventing the spread of COVID-19. For example, restrictions on travel and public transportation have affected the ability of family members in the Northern Triangle of Central America to travel to reception sites to which unaccompanied children are being returned from the U.S. Children may be subject to lengthy quarantines in substandard conditions or may wait for prolonged periods for family to receive them, further exposing them to infection risks. Recent reports of infections occurring in reception centers in countries of origin suggest that the indiscriminate removal or expulsion of people without conducting reasonable health inspections may expose even more people to illness.<sup>11</sup> Shelters run by organizations are often either at capacity or no longer accepting new individuals as a result of the pandemic. Poverty, already widespread in many of the areas to which children must return, has been exacerbated by the pandemic, as families struggle to secure needed food and necessities that are often available only at a distance.<sup>12</sup> As Filippo Grandi, United Nations High Commissioner for Refugees, has noted, “Particularly when people come from relatively fragile countries of origin or transit, with limited public health infrastructure, pushing anyone back at borders may put them and others at risk when quarantine measures are not applied and health care is insufficient.”<sup>13</sup>

Neither the statute nor the regulatory context for the Rule contemplate such drastic results. Yet DHS, with the CDC's acquiescence, has chosen to read the Rule as permission to ignore binding law—with potentially devastating outcomes. These procedures not only risk returning children and other asylum seekers to trafficking or persecution, but also expose thousands to violence,

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<sup>11</sup> See e.g. Maria Martin, *Official Alleges That U.S. Has Deported Many COVID-19 Migrants to Guatemala* (April 15, 2020), <https://www.npr.org/sections/coronavirus-live-updates/2020/04/15/834999661/official-alleges-the-u-s-has-deported-many-covid-19-positive-migrants-to-guatemala>; Caitlin Dickerson and Kurt Semple, *U.S. Deported Thousands Amid COVID-19 Outbreak. Some Proved to be Sick*, *New York Times* (April 18, 2020).

<sup>12</sup> See, e.g., Latin America Working Group, *U.S. Deportations during global pandemic risk spreading COVID-19, Returning migrants and asylum seekers to danger and instability* (Apr. 8, 2020), [https://www.lawg.org/wp-content/uploads/NGO-Statement\\_-U.S.-deportations-during-global-pandemic-risk-spreading-COVID-19-returning-migrants-and-asylum-seekers-to-danger-and-instability-3.pdf](https://www.lawg.org/wp-content/uploads/NGO-Statement_-U.S.-deportations-during-global-pandemic-risk-spreading-COVID-19-returning-migrants-and-asylum-seekers-to-danger-and-instability-3.pdf) (statement by more than 60 U.S.-based organizations).

<sup>13</sup> UNHCR Press Statement, *Beware Long-term Damage to Human Rights and Refugee Rights from the Coronavirus Pandemic* (April 22, 2020), <https://www.unhcr.org/news/press/2020/4/5ea035ba4/beware-long-term-damage-human-rights-refugee-rights-coronavirus-pandemic.html>.

substandard living conditions, and great risk of infection in makeshift camps or in countries of origin that lack adequate systems to safeguard their health or extend humanitarian protection. The CDC must act now to rescind the regulation and order, or to modify both to ensure compliance with existing legal obligations under U.S. immigration law and international law.

- II. The Rule unlawfully overextends the CDC's authority to protect public health, granting the Director authority to prohibit entry of individuals contrary to both the Public Health Service Act and the current regulatory framework.

The Rule amends 42 CFR Part 71 by creating a new section 71.40 that permits the Director of the CDC to issue an order suspending the entry of non-citizens into the United States "for such period of time that the Director deems necessary for the public health." 42 CFR § 71.40. The CDC asserts that the new rule is necessary to give full effect to Section 362 of the Public Health Service Act, which regulates the quarantine powers of the Director of the CDC, as delegated by the Secretary of the Department of Health and Human Services (HHS). Yet the CDC acknowledges that current regulations confer authority only to quarantine or otherwise delay the entry of persons into the United States, but not the power to suspend entry completely. There is good reason for this, however, in that the power to determine admissibility and removability as described within the Immigration and Nationality Act is vested primarily in officials within DHS and the Department of Justice. Neither Section 362 of the Public Health Service Act nor its implementing regulations envision the sweeping authority the CDC director has given to himself.

- A. The Public Health Service Act authorizes a very narrow and limited authority with respect to the entry of persons into the United States, contemplating only those actions necessary to ensure that an individual will not transmit a communicable disease.

The Public Health Service Act encompasses a wide range of duties entrusted to federal authorities to promote and protect the health of the United States public, including the powers of inspection and quarantine. As a threshold matter, the Act's predicate is "the *existence* of any communicable disease in a foreign country" and "serious danger of the *introduction* of such disease into the United States," 42 USC § 265, emphasis added. It is thus not even clear how, if at all, this authorization for prophylactic measures applies where the existence of communicable disease in the U.S. predates existence of that disease in a given foreign country. Further, the Act differentiates between powers affecting property and people, such that the government has broad powers to seize and destroy property that may spread illness in the United States, effectively preventing introduction of an illness or infestation before entering the United States.<sup>14</sup> With respect to people, however, the government's authority under the Public

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<sup>14</sup> 42 U.S.C. 264(a).

Health Service Act is limited to apprehension, examination, detention, and conditional release of individuals entering the United States and only for the limited purpose of assessing the existence of a communicable disease, treating it, or otherwise restricting an individual's movements.<sup>15</sup> While section 264(c) authorizes limited "suspension" of the introduction of persons or property, this provision has never before been applied to individuals, and has been used only to prohibit the introduction of categories of goods where the likelihood of infestation or contamination was so high that individual inspection was redundant.<sup>16</sup> To now apply this provision to individuals to completely prevent their entry into the United States, based only on the fact that they have traveled through a country where COVID-19 has been diagnosed, relies on an overly broad interpretation of the statute. One could just as easily, and more consistently, read "suspension" in this case to relate to mandatory quarantine, rather than to mandatory expulsion. Such a reading is also more consistent with the statute's legislative history, in which references to regulating immigration were struck from the law on the grounds that U.S. citizens and noncitizens alike could equally introduce an infectious disease into the United States.<sup>17</sup>

The Rule thus appears pretextual in that it authorizes suspension of entry for individuals seeking to enter the United States from a country where a communicable disease has been found, but exempts U.S. citizens, lawful permanent residents, and members of the Armed Forces on the grounds that traditional means of quarantine, isolation, and supervision are sufficient to protect the public health. In practice, the Rule creates an effective ban on entry for many non-citizens without any individualized assessment or screening related to public health or risk of infection. This result is not only outside the scope of the public health law but also ignores significant immigration and other laws that protect unaccompanied children and asylum seekers and prevent their return to persecution, torture, or other harm. It also fails to account for the principles that such protections, based in treaty obligations executed after passage of the 1944 Public Health Service Act, should generally take precedence.<sup>18</sup>

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<sup>15</sup> 42 U.S.C. 264 (b), (c).

<sup>16</sup> In fact, 42 CFR § 71.40, relating to the suspension of goods into the United States, was only codified into regulation effective February 21, 2017 as part of a broad overhaul of the CDC quarantine, inspection, and interdiction authority. It had been invoked for purposes such as suspending the introduction of dogs from Egypt based on the high incidence of rabies in that country. See Centers for Disease Control and Prevention, Final Rule, Control of Communicable Diseases, 82 Fed Reg 6890, January 19, 2017; Notice of Temporary Suspension of Dogs Entering the United States from Egypt, <https://www.cdc.gov/importation/bringing-an-animal-into-the-united-states/Egypt-dogs-temp-suspension.html>.

<sup>17</sup> See Lucas Guttentag, *Coronavirus Border Expulsions: CDCs Assault on Asylum Seekers and Unaccompanied Children*, Just Security, <https://www.justsecurity.org/69640/coronavirus-border-expulsions-cdcs-assault-on-asylum-seekers-and-unaccompanied-minors/>.

<sup>18</sup> See, e.g., Julian G. Ku, "Treaties as laws: A Defense of the Last-in-Time Rule for Treaties and Federal Statutes," 80 Indiana Law Journal 319 (2005).

- B. Implementing regulations further limit the CDC Director's authority, demonstrating that it does not extend to immigration decisions.

The regulations implementing Section 262 of the Public Health Service Act further demonstrate that the Rule overreaches the CDC's authority. On January 19, 2017, HHS and the CDC published a final rule significantly revising Chapters 70 and 71 governing the quarantine of people and property into the United States, motivated in large part by the agency's experiences fighting highly infectious diseases such as Ebola, SARS and MERS.<sup>19</sup> Significantly, the final rule included numerous refinements emphasizing the due process protections accorded to individuals subject to apprehension, detention, quarantine or other containment measures. A review of the lengthy discussion on these issues both within the preamble to the proposed rule and the response to public comments accompanying the final rule shows that the CDC has, in the past, carefully weighed the balance between protecting the public health and individual rights and liberties.<sup>20</sup> Nowhere in these discussions, however, did it contemplate reading its authority to include blanket suspensions of individuals attempting to enter the United States, even though it chose to include new section 71.63, permitting suspension of goods into the United States.<sup>21</sup> So soon after such major revisions, it is difficult to understand why the CDC now believes it is necessary to further expand its authority in a way that threatens the health and safety of so many vulnerable children and asylum seekers.

- C. The Rule is based on limited and incomplete information regarding capacity to effectively assess and contain infectious disease within newly arriving migrant groups.

The Rule applies only to non-citizens without permanent immigration status who arrive at a land port of entry or who have crossed into the United States, based on the faulty assumption that DHS, in conjunction with the CDC, cannot adequately process individuals safely and that

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<sup>19</sup> Department of Health and Human Services, Centers for Disease Control and Prevention, Final Rule, Controlling Communicable Diseases, 82 Fed. Reg. 6890 (Jan. 19, 2017).

<sup>20</sup>See, e.g., *id.* at 6893 to 6901 (general procedures and rights), 6908 to 6910 (rights with respect to screening and medical review), 6912 to 6917 (discussing due process issues), 6925 to 6926 (contemplating the terms under which an individual might avoid spreading infection after being issued a travel permit). See also Department of Health and Human Services, Centers for Disease Control and Prevention, Notice of Proposed Rulemaking, *Controlling Communicable Diseases*, 81 Fed. Reg. 54230 (Aug. 16, 2016) (discussing in detail the reasons for codifying many internal procedures to ensure transparency of process).

<sup>21</sup> As explained in the Notice of Proposed Rulemaking, the CDC authored new § 71.63 to clarify existing authority to impose an import embargo. Nowhere in the lengthy discussion of clarifying procedures and review did the CDC raise the possibility of suspending the entry of persons, despite a discussion of highly contagious diseases that could spread to the United States without efficient management. See 81 Fed. Reg. at 54237. For example, this section has been used to ban the importation of dogs from Egypt. <https://www.cdc.gov/importation/bringing-an-animal-into-the-united-states/Egypt-dogs-temp-suspension.html>.



the only option is to hold them in detention and other settings where the risk of infection is high. But this ignores the circumstances of many individuals seeking entry into the United States, including asylum-seekers and unaccompanied children.

This is particularly true with respect to unaccompanied children, for whom ORR bears the responsibility of providing immediate housing and identification of appropriate sponsors to whom unaccompanied children may be released for the duration of their immigration proceedings. Focusing on rapidly and efficiently placing children in appropriate home settings with a family member or other sponsor is well within ORR's knowledge and authority; indeed ORR is obligated to "make and record prompt and continuous efforts toward family reunification," and to "release without unnecessary delay" children for whom an appropriate sponsor is identified.<sup>22</sup> Most unaccompanied children are released to a parent or other family member in the United States. In FY 2018, for example, around 88 percent of the children released to individual sponsors were released to parents or close relatives.<sup>23</sup>

Yet neither the preamble to the Rule nor the accompanying Order acknowledge the special provisions Congress has enacted to protect and house unaccompanied children. This is particularly unfortunate, given not only that the CDC and ORR are both housed within the Department of Health and Human Services, but that ORR's placement decisions should be made with the best guidance available from public health experts. For the CDC to fail to take this dynamic into account is unpardonable. This oversight suggests that the rule is based on an insufficient understanding of the laws governing the treatment of unaccompanied children. This is particularly true in the execution of the current Order, which is based solely on the observation of one processing facility and no independent analysis of the legal requirements and options available to DHS and HHS in processing persons without valid travel documents, the care and custody responsibilities of ORR, or the resources available to these agencies to manage the flow of people.<sup>24</sup>

The Rule similarly misstates and inadequately considers the alternatives available for asylum seekers more generally. Many asylum seekers have friends or family in the United States who could house them. For example, an October 2019 study of 607 asylum-seekers subject to the Remain in Mexico program found that nearly 92 percent had family or close friends in the United States.<sup>25</sup>

Further, DHS is not required to hold asylum-seekers in holding or detention facilities, such as in the custody of Customs and Border Protection (CBP) or Immigration and Customs Enforcement (ICE). DHS has legal authority to expeditiously parole asylum-seekers into the United States to

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<sup>22</sup> See *Flores v. Lynch*, 2:85-cv-04544-DMG-AGR, Docket #829 at 14 (Aug. 21, 2015).

<sup>23</sup> See Statement of Steven Wagner, Admin. for Children and Families, U.S. Dep't of Health & Human Services, Before the Permanent Subcommittee on Investigations, Senate Committee on Homeland Security and Governmental Affairs, 3 (Apr. 26, 2018), *available at* <https://www.hsgac.senate.gov/imo/media/doc/Wagner%20Testimony.pdf> ("In FY 2018, we have released 90 percent of children to individual sponsors and of those sponsors, 41 percent were parents, 47 percent were close relatives, and 11 percent were other-than-close relatives or non-relatives.").

<sup>24</sup> See 85 Fed. Reg. at 17065 to 17067.

<sup>25</sup> Tom K Wong, "Seeking Asylum: Part 2," US Immigration Policy Center, University of California-San Diego (Oct. 29, 2019), <https://usipc.ucsd.edu/publications/usipc-seeking-asylum-part-2-final.pdf>.

await their asylum proceedings in U.S. immigration courts.<sup>26</sup> The choice is not between detention or expulsions, as DHS could employ non-discriminatory screening and self-isolation measures that would respond to public health concerns while complying with the obligation to preserve the right to seek asylum and protections for unaccompanied children.

Taken as a whole, the Rule is neither consistent with the CDC's statutory authorities nor with existing immigration laws and other laws that provide for numerous options in managing the apprehension and release of individuals who may have been exposed to the novel coronavirus. The interim Rule lacks the rigor and specificity to adequately protect the rights of the people it attempts to control.

### III. The Rule and resulting Order violate specific provisions of law that protect unaccompanied children and asylum seekers from summary expulsion.

Unaccompanied children comprise one of the world's most vulnerable migrant groups. They are girls and boys under 18, increasingly of tender age, who fled to the United States to escape dangers including extreme violence and sexual exploitation. Many of them face continuing trauma upon arrival. A child's age, developmental stage, and trauma history present obstacles to navigating the complex U.S. immigration system and accessing potentially life-saving relief. To prevent their unjust return, and in recognition of their unique vulnerabilities, Congress accorded unaccompanied children special legal protections under the TVPRA. This Act, which passed both houses of Congress by unanimous consent,<sup>27</sup> mandates that the U.S. government screen these children to determine whether they are at risk of trafficking or fear return to their countries of origin. It also requires that DHS transfer into the care and custody of ORR all unaccompanied children from noncontiguous countries and those from contiguous countries who are at risk of trafficking, fear return, or are unable to make an independent decision about withdrawing their applications for admission. Moreover, if federal officials seek to remove such unaccompanied children from the United States, they must first be afforded removal proceedings before an immigration judge under section 240 of the Immigration and Nationality Act. In significant part, these TVPRA procedures reflect Congress's intent to protect unaccompanied children from human trafficking specifically.<sup>28</sup> By mandating screenings, for example, the TVPRA helps ensure that U.S. government officials identify signs of prior

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<sup>26</sup>8 USC § 1182(d)(5)(A); 8 CFR § 212.5.

<sup>27</sup> Brian Resnick, *Why We Don't Immediately Send the Border Kids Back*, *The Atlantic* (Jul. 8, 2014), <https://www.theatlantic.com/politics/archive/2014/07/why-we-dont-immediately-send-the-border-kids-back/453345/>.

<sup>28</sup> See, e.g., Cong. Record (House), William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Dec. 10, 2008, at H10902, Statement of Rep. Smith (NJ) ("By protecting the victims and not sending them back to their home country where they are often exploited in a vicious cycle of exploitation, we say to the victims we will make every effort to make you safe and secure."); *id.* at 10903, Statement of Rep. Loretta Sanchez (CA) (the TVPRA "provides additional protections for trafficking survivors who are threatened by trafficking perpetrators, and for children who are at risk of being repatriated into the hands of traffickers or abusers.").

trafficking indicating that removal of these children could prompt resumption of their exploitation. Similarly, requiring placement in ORR custody and immigration court proceedings affords children the time, care, and access to services that are essential to processing trauma, obtaining legal counsel, and gathering evidence—all steps necessary to prove past trafficking or harm, or susceptibility to future trafficking or other harm. Congress recognized that, absent such safeguards, the U.S. government would too often return unaccompanied children into the hands of traffickers, abusers, or persecutors active in Mexico, Central America, and elsewhere—actors who thrive on the vulnerabilities of this population.

In addition to trafficking dangers, many unaccompanied children fear persecution on account of a protected ground. Domestic and international law ensures their right—and the right of all asylum seekers—to a full and fair opportunity to apply for asylum in the United States. Section 208 of the Immigration and Nationality Act, for instance, provides that “any alien who is physically present in the United States or who arrives in the United States...may apply for asylum.”<sup>29</sup> Similarly, Article 33 of the Convention and Protocol Relating to the Status of Refugees, to which the United States is a signatory and which the U.S. Congress implemented through the 1980 Refugee Act, prohibits the U.S. government from returning an individual to a country where he or she faces a threat to life or liberty due to a protected ground.<sup>30</sup>

These laws and protections are not superseded by the Public Health Service Act and must be accounted for. Members of Congress have expressed concern about the expulsions of unaccompanied children by DHS and underscored the need to comply with the TVPRA’s protections during the current pandemic.<sup>31</sup> Additionally, the UN Refugee Agency recently underscored that in responding to the COVID-19 pandemic, States may implement reasonable measures to safeguard public health, but such measures cannot deprive individuals of the ability to seek asylum or lead to refoulement of asylum seekers.<sup>32</sup>

Despite these critical protections—and the dire results risked by denying children and other vulnerable populations access to them—neither the Rule nor the CDC Order categorically exempt unaccompanied children, trafficking survivors, or asylum seekers from suspension of entry into the U.S. While the CDC Order suggests that exceptions from the order’s application

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<sup>29</sup> INA § 208(a)(2)(A); see also INA § 235(b)(ii).

<sup>30</sup> UN General Assembly, “Convention and Protocol Relating to the Status of Refugees,” <http://www.unhcr.org/en-us/3b66c2aa10>. See 8 U.S.C. § 1231(b)(3)(A).

<sup>31</sup> See, e.g., Letter from Sens. Dianne Feinstein and Richard Durbin, and Reps. Jerrold Nadler and Zoe Lofgren, to DHS Acting Secretary Chad Wolf (March 30, 2020), *available at* [https://judiciary.house.gov/uploadedfiles/3.30.2020\\_letter\\_to\\_dhs\\_re\\_tvpra.pdf](https://judiciary.house.gov/uploadedfiles/3.30.2020_letter_to_dhs_re_tvpra.pdf); Press Release, Congressional Hispanic Caucus Calls on the Trump Administration to Stop Turning Away Hundreds of Unaccompanied Children Seeking Safety at the Border (Apr. 17, 2020), <https://chc.house.gov/media-center/press-releases/congressional-hispanic-caucus-calls-on-the-trump-administration-to-stop>.

<sup>32</sup> 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> [accessed 19 April 2020].

may be made on a case-by-case basis based on several factors, including humanitarian concerns, recently reported CBP guidance makes clear that such exceptions will be seldom, if ever, made. More troubling still, the guidance casts aside the TVPRA's critical screening procedures and other protections while failing to provide any meaningful protection screening or legal process to ensure that unaccompanied children or others are not turned back or expelled to trafficking, persecution, or other harm. Indeed, the guidance suggests that only those who spontaneously express a fear of harm to a DHS official should be accorded any screening. This is not only contrary to the requirements of the TVPRA, which mandates screening of all unaccompanied children, but is a threshold far too high for children, assuming a legal knowledge and agency that is inconsistent with general principles of child welfare.

In sum, it is hard to see how CDC's attempt to confer this power on CBP to ignore the basic legal requirements for child welfare honors its Hippocratic obligations as an expert medical agency or the limited authority granted it under the Public Health Services Act.

#### IV. Conclusion

We are alarmed by the grave impact of DHS' implementation of the CDC Rule and Order on unaccompanied children and other vulnerable populations, and urge CDC to swiftly ensure that the U.S.' response to the current public health crisis prevents not only the spread of COVID-19 but also the return of any child or asylum-seeker to conditions in which their lives or safety are threatened.

We urge CDC to maintain the integrity of its mission and to make clear that any conditions or procedures imposed with respect to medical screening and isolation of individuals coming to the U.S. must not lead to expulsion of unaccompanied children and asylum seekers without due process, protection screenings, and other protections afforded by U.S. and international law. KIND urges the CDC to rescind the Rule and its recent order, which is being used to circumvent existing immigration laws and other provisions designed to protect the rights of those seeking to enter the United States, particularly unaccompanied children and asylum-seekers. We urge the CDC to balance its authority to protect the public health with the equally compelling legal obligations to protect unaccompanied children and asylum-seekers from harm. To do otherwise is to erode public trust and unnecessarily expose thousands of people to harm.

Sincerely,

A handwritten signature in black ink that reads "Jennifer Podkul". The signature is written in a cursive, flowing style.

Jennifer Podkul  
Vice President for Policy and Advocacy