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Submitted via www.regulations.gov

The Honorable Alex M. Azar II
Secretary
U.S. Department of Health and Human Services
200 Independence Avenue, SW
Washington, DC 20201

Robert R. Redfield, MD
Director
Centers for Disease Control and Prevention
1600 Clifton Road NE
Atlanta, GA 30329

Re: Docket No. CDC-2020-0033, RIN 0920-AA76; Comments on the Centers for Disease Control and Prevention Interim Final Rule: Control of Communicable Diseases; Foreign Quarantine: Suspension of Introduction of Persons Into United States From Designated Foreign Countries or Places for Public Health Purposes

Dear Secretary Azar and Dr. Redfield:

We are writing on behalf of the Immigrants’ Rights Clinic at the University of Chicago Law School to express our strong objections to the Centers for Disease Control (CDC) Interim Final Rule, published in the Federal Register on March 24, 2020, that suspends the introduction of persons into the United States from designated places due to public health concerns relating to COVID-19.

The Immigrants’ Rights Clinic provides legal representation to immigrant communities in Chicago and across the Midwest, including individual representation of immigrants in removal proceedings, immigration-related complex federal litigation, and policy and civic education projects on behalf of community-based organizations. Based on our expertise and research, we have concluded that the Interim Final Rule poses several serious issues. These comments will explain that the Interim Final Rule violates the United States’ obligations under the Refugee Act and the Trafficking Victims Protection Reauthorization Act, is arbitrary and capricious, and undermines critical policy considerations.

For these reasons, as detailed in the comments that follow, the CDC should immediately withdraw the Interim Final Rule or, at the very least, amend it to reflect a reasoned consideration of important factors and available alternatives.

Thank you for the opportunity to submit comments on this Rule. For further information, please contact the Immigrants' Rights Clinic by email at irc@uchicago.edu or by phone at 773-702-9611.

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DETAILED COMMENTS in opposition to Docket No. CDC-2020-0033, RIN 0920-AA76; Centers for Disease Control and Prevention Interim Final Rule: Control of Communicable Diseases; Foreign Quarantine: Suspension of Introduction of Persons Into United States From Designated Foreign Countries or Places for Public Health Purposes

1. The Interim Final Rule Does Not Override the United States’ Legal Obligations to “Unaccompanied Alien Children” and Asylum-Seekers

The statutory authority that the Interim Final Rule (hereinafter the “Rule”)¹ relies upon does not override the United States’ obligations under existing domestic and international law. The Interim Final Rule cites Section 362 of the Public Health Service Act of 1944, which provides, in relevant part:

Whenever the [Secretary of Health and Human Services] determines that by reason of the existence of any communicable disease in a foreign country there is serious danger of the introduction of such disease into the United States, and that this danger is so increased by the introduction of persons or property from such country that a suspension of the right to introduce such persons and property is required in the interest of the public health, the [Secretary], in accordance with regulations approved by the President, shall have the power to prohibit, in whole or in part, the introduction of persons and property from such countries or places as he shall designate in order to avert such danger, and for such period of time as he may deem necessary for such purpose.²

The Interim Final Rule interprets the CDC Director’s authority in an extraordinarily broad manner that does not comport with the authorizing statute’s language or legislative history.³ The CDC appears to understand its authority to suspend the “introduction of persons” into the country as encompassing the ability to deport individuals who have already crossed the border and are present in the territory of the United States. However, the legislative history of Section 362’s predecessor statute suggests that the CDC Director’s authority was not intended to regulate or restrict immigration; indeed, lawmakers specifically removed the term “immigration” from an earlier draft of the statute for fear that it might be used to discriminate against immigrants.⁴ The Interim Final Rule itself appears to recognize that the Public Health Service Act does not expand the scope of the CDC’s authority or that of any other federal agency assisting it in implementing CDC orders under Section 262.⁵

As currently written and subsequently implemented in the CDC Director’s March 20

¹ Control of Communicable Diseases; Foreign Quarantine: Suspension of Introduction of Persons Into United States From Designated Foreign Countries or Places for Public Health Purposes, 85 Fed. Reg. 16559 (Mar. 24, 2020) (to be codified at 42 CFR pt. 71) [“Interim Rule”].

² 42 U.S.C. § 265. The Interim Rule delegates the Secretary of Health and Human Services’ authority to the Director of the Centers for Disease Control.

³ See generally, Lucas Guttentag, *Coronavirus Border Expulsions: CDC’s Assault on Asylum Seekers and Unaccompanied Minors*, JUST SECURITY (Apr. 13, 2020).

⁴ *Id.* (citations omitted).

⁵ Interim Rule, *supra* note 1, at 16564 (“the CDC Director, in coordination with the Secretary of Homeland Security or the head of the other applicable department or agency, shall explain in the order the procedures and standards by which any authorities or officers or agents are expected to aid in the enforcement of the order, to the extent that they are permitted to do so under their existing legal authorities.”) (emphasis added).

Order (hereinafter “the Order”),⁶ the Interim Final Rule requires the immediate removal of non-citizens – including “unaccompanied alien children” (UACs) – apprehended in the United States.⁷ That course of action is inconsistent with the procedural protections of the 2008 Trafficking Victims Protection Reauthorization Act (TVPRA)⁸ and the rights of non-citizens under the U.S. Refugee Act of 1980.⁹ The TVPRA does not include any exception to its requirement that UACs be screened to ensure they are not trafficking victims or asylees nor does it permit the removal of UACs without formal Immigration Court proceedings.¹⁰ Similarly, the Refugee Act provides that any alien “physically present in” or “who arrives in” the United States may apply for asylum.¹¹ By requiring the immediate removal of apprehended immigrants, including UACs, the Order¹² and the Interim Final Rule under which it was promulgated directly violate both the TVPRA and the Refugee Act.

The Interim Final Rule also fails to account for the United States’ obligations under international law. The Convention Against Torture (CAT)¹³ and the 1951 Refugee Convention¹⁴ both prohibit governments from removing immigrants who may be subject to torture or severe persecution upon return to their home countries.¹⁵ Neither the Rule nor the Order reference these obligations or indicate any exception that acknowledges them. Although a recently leaked CBP enforcement directive suggests that CBP is making exceptions to comply with CAT, the directive does not indicate any accommodation for asylum-seekers.¹⁶

2. The Interim Final Rule is Arbitrary and Capricious

As it is written, the Interim Final Rule is arbitrary and capricious and ought to be withdrawn or, at the very least, revised to reflect a reasoned consideration of important factors and available alternatives. Arbitrary and capricious rules are invalid under § 706(2)(A) of the Administrative Procedure Act.¹⁷ A rule is arbitrary and capricious if it does not show “consideration of the relevant factors” as well as a “rational connection between the facts found and the choice made.”¹⁸ It is also arbitrary and capricious if there is evidence that the true justification is to promote an impermissible goal such as a partisan agenda.¹⁹

The Interim Final Rule is arbitrary and capricious under the prevailing standard for

⁶ See Notice of Order Under Sections 362 and 365 of the Public Health Service Act Suspending Introduction of Certain Persons From Countries Where a Communicable Disease Exists, 85 Fed. Reg. 17060 (Mar. 26, 2020). [“CDC Order”].

⁷ See Interim Rule, *supra* note 1, at 16563-64; see also CDC Order, *supra* note 6.

⁸ 8 U.S.C. § 1232.

⁹ Pub. L. 96-212.

¹⁰ See 8 U.S.C. § 1232(4)-(5).

¹¹ 8 U.S.C. § 1158.

¹² CDC Order, *supra* note 6, at 17067.

¹³ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85, 113. [“Convention Against Torture”].

¹⁴ Convention relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150. [“Refugee Convention”]. The United States assented to the Refugee Convention through ratification of the 1967 Protocol Relating to the Status of Refugees, 19 U.S.T. 6223 (Nov. 6, 1968).

¹⁵ See Guttentag, *supra* note 3.

¹⁶ U.S. Customs and Border Control, *COVID-19 CAPIO*, available at <https://www.documentcloud.org/documents/6824221-COVID-19-CAPIO.html>. [“CBP Directive”].

¹⁷ 5 U.S.C. § 706.

¹⁸ *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

¹⁹ *Department of Commerce v. New York*, 139 S.Ct. 2551 (2019).

several reasons. First, it shows little or no consideration of domestic and international legal obligations that may directly conflict with orders issued pursuant to the Rule, and it similarly fails to consider the urgent national policies that underlie those obligations. Second, it neglects to consider alternative measures that could achieve the same purposes as restrictions on immigration without imposing the same costs on vulnerable immigrant groups. Third, the proffered justifications do not logically support the Rule as written and may be impermissibly motivated by political aims. For the legal and policy reasons provided in these comments, the Rule ought to be withdrawn in its entirety. However, if the CDC chooses to proceed with the Rule, it should at a minimum give due consideration to these issues and revise the Rule so that it acknowledges all relevant concerns, considers alternative methods for achieving the same goal, and is reasonably tailored to achieve its expressed purpose in a manner that is logically consistent with the explanation given.

a. Conflicting Laws and Policies

The Interim Final Rule fails to consider domestic and international legal obligations – and the urgent policies that underlie them – that conflict with blanket restrictions on persons entering the United States. As discussed above, these include the TVPRA and the Refugee Act, which provide special protections for UACs, asylum-seekers, and people fleeing torture, among other groups. On the international level, these include the 1951 Refugee Convention²⁰ and the 1984 Convention Against Torture.²¹ The Interim Final Rule indicates that the CDC Director may “prohibit the introduction into the United States of persons from designated...places,”²² without providing any apparent exceptions. This suggests that it permits blanket prohibitions on all persons from those places. By providing no exception for UACs, asylum-seekers, or people fleeing torture, the Rule conflicts with the statutory requirements of the TVPRA and Refugee Act, as well as with the obligations of the Refugee Convention and the Convention Against Torture; both of these treaties contain non-refoulement provisions prohibiting signatories from returning to people to countries where they face persecution or torture.²³ As discussed above, this likely renders the Rule unlawful, both because the CDC does not have the authority to override other existing legal restraints and because the agencies that would implement a CDC order would not have authority to violate those restraints.

In addition, even if the Interim Final Rule is not unlawful due to its conflict with these laws, it is arbitrary and capricious because it fails to identify a statutory basis for its authority to either override these laws or enable other agencies to do so. As written, it appears that the CDC has superseded its statutory authority by violating other statutes that ought to take priority under the last-in-time rule,²⁴ rendering the Interim Final Rule arbitrary and capricious because it is not “within the scope of the authority delegated to the agency by the statute.”²⁵ If it is not the intent of the Rule to authorize orders that would violate these statutes, the Rule should clarify that there must be exceptions for UACs, asylum-seekers, and people fleeing torture. On the other hand, if the CDC considers it to be within its authority to override other statutes, along with international law obligations, the Rule should explain the statutory basis for such authority. Similarly, nothing in the statutes cited by the Rule authorizes the CDC to expand the statutory authorities of other

²⁰ Refugee Convention, *supra* note 14.

²¹ Convention Against Torture, *supra* note 13.

²² Interim Rule, *supra* note 1, at 16563.

²³ Convention Against Torture, *supra* note 13, art. 3; Refugee Convention, *supra* note 14, art. 33(1).

²⁴ *See, e.g. Whitney v. Robertson*, 124 U.S. 190, 194-5 (1888).

²⁵ *State Farm*, 463 U.S. at 42.

agencies – who otherwise should not be able to enforce the Rule due to its conflict with the TVPRA and other statutes – suggesting the Rule is arbitrary and capricious as beyond the CDC’s authority to the extent it requires enforcement by other agencies. Accordingly, the Rule should clarify that it does not expand the authority of other agencies, or, if it insists that it can expand those authorities, at least identify the source of this asserted authority.

Further, even if the CDC does not consider itself bound by these statutes and obligations, it should acknowledge the vital policy goals embodied in laws such as the TVPRA and the Refugee Act, and it should aim to facilitate those policies to the extent possible. As it is written, the Interim Final Rule makes no reference whatsoever to how it will be applied to children, asylum-seekers, or persons fleeing torture. While the Rule asserts that the CDC would “coordinate with the Secretary of State in order to ensure compliance with the international legal obligations of the United States,”²⁶ there is no evidence that the CDC has done so in the Order, the one action it has already taken pursuant to this Rule.²⁷ Indeed, the Order appears to require summary expulsion of protected classes of people in blatant violation of international law.²⁸ To fully consider relevant factors and promulgate a rule that is not arbitrary and capricious, the CDC must consider domestic and international laws that do not allow for summary expulsion of all persons without documents attempting to enter the country. If the CDC decides that such expulsion may be justified in some cases, even to an extent not normally permissible under domestic and international law, it should provide the reasoning for that conclusion. Moreover, it should provide that the effect of orders on vulnerable groups such as persons fleeing trafficking, persecution, or torture must be considered before any orders are issued. The Rule should expressly state that any orders issued under it should protect those groups to the extent feasible under the circumstances.

b. Alternative Measures

The Interim Final Rule also fails to consider alternative measures besides blanket prohibitions on persons entering the country that could achieve the same public health goals while minimizing the costs, especially in terms of harm to UACs, asylum-seekers, and persons fleeing torture. Failure to consider available alternatives to a given action is arbitrary and capricious.²⁹ Yet in many cases, measures other than total prohibitions on entering persons may mitigate the health risks of immigration from places with communicable diseases. For instance, in the Order the CDC has already issued under this Rule, the CDC stated that the Order was aimed at preventing people from congregating in detention centers. However, releasing those people from detention centers could also prevent congregation. Alternatively, individuals could be processed in the field to ensure they are not at risk of trafficking, persecution, or torture. The Rule ought to consider the possibility that measures such as these, which might obtain the same objective without imposing the same costs on vulnerable groups, may be available. The Rule should only allow prohibitions on entry when no other method of mitigating public health risks would better serve other key policies, such as the goal of protecting victims of child trafficking, persecution, and torture.

²⁶ *Id.* at 16562.

²⁷ CDC Order, *supra* note 6.

²⁸ *Id.*

²⁹ *State Farm*, 463 U.S. 29, 103 S. Ct. 2856, 77 L. Ed. 2d 443.

c. The Policy is Not Justified by the CDC's Explanation

The policy the Interim Final Rule embraces does not follow logically from the CDC's findings. The Interim Final Rule is aimed at implementing the CDC's authority to "prohibit...the introduction of persons" from specified places to avert a "serious danger" of the "introduction" of a "communicable disease" into the United States.³⁰ Accordingly, it focuses entirely on the health risks posed by persons entering the country based on the places such persons are coming from. It does not distinguish on the basis of nationality. Yet the Interim Final Rule does not apply to U.S. citizens or lawful permanent residents, even though immigration status bears little, if any, relation to health risk. Similarly, the Rule defines "introduction" broadly to include situations where a communicable disease is already present in the United States.³¹ This might be justified in some situations, such as if only a few people in the United States had contracted a disease that was widespread elsewhere. However, the United States has the most confirmed COVID-19 cases of any country in the world,³² and the disease has already spread through all fifty states and the District of Columbia.³³ The United States also has one of the highest rates of COVID-19 cases per capita, a rate that is more than double that of Canada and more than thirty times that of Mexico.³⁴ In addition, a study from the U.S. Immigration Policy Center that evaluates monthly data from the CDC since 2000 – a period that includes the H1N1 pandemic in 2009 and the beginning of the COVID-19 pandemic – discovered that "the data show that neither the monthly total number of persons entering the U.S. through southern border ports of entry, the monthly total number of persons requesting asylum, the monthly total number of asylum-seekers who establish credible fear, nor the quarterly total number of USCIS approvals across all visa application types have any effect on the monthly percentage of patients who present at healthcare providers with influenza-like illnesses."³⁵ Given these facts, the Interim Final Rule must explain how prohibiting persons from entering the country across the Canadian or Mexican borders protects public health.

The Order, promulgated pursuant to the Interim Final Rule and which requires the summary expulsion of immigrants trying to enter the United States across either land border, demonstrates that the Rule is not supported by its asserted justification. The Order explains that its goal is to avoid congregating people together.³⁶ However, preventing people from congregating together is an entirely separate concern from preventing the introduction of persons from specified places. That goal is not supported by the text of the statute or the Rule, and the fact that the Order relies on this justification suggests that the Order cannot be supported by any risks arising from immigration. Accordingly, the Order highlights the fact that the Rule itself fails to logically connect its methods to its stated goal—preventing the "introduction" of a broad class of persons, distinguished by citizenship rather than by health risk, into a country that already has hundreds of thousands of cases spread nationwide, is not "required in the interest of the public

³⁰ 42 U.S.C § 265.

³¹ Interim Rule, *supra* note 1, at 16563.

³² World Health Organization, *Coronavirus disease 2019 (COVID-19) Situation Report – 92* (Apr. 21, 2020), https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200421-sitrep-92-covid-19.pdf?sfvrsn=38e6b06d_6.

³³ Centers for Disease Control and Prevention, *Coronavirus Disease 2019 (COVID-19): Cases in the US* (Apr. 21, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>.

³⁴ Worldometer, *COVID-19 Coronavirus Pandemic* (Apr. 22, 2020), <https://www.worldometers.info/coronavirus/>.

³⁵ Tom K. Wong, *COVID-19 and the Remaking of U.S. Immigration Policy? Empirically Evaluating the Myth of Immigration and Disease*, U.S. IMMIGRATION POLICY CENTER, Apr. 22, 2020, <https://usipc.ucsd.edu/files/usipc-myth-immigration-disease-final.pdf>.

³⁶ CDC Order, *supra* note 6.

health.”³⁷ While a prohibition on introduction of persons may be justifiable under different circumstances, the Rule is arbitrary and capricious to the extent that it allows orders such as the one that has been issued. If the CDC insists on authorizing blanket prohibitions on persons entering the country, the Rule must specify what circumstances actually require such a prohibition in the interest of the public health. As broad as the Interim Final Rule is, it simply cannot be justified on the grounds provided, as the Order already issued clearly illustrates.

Finally, if the CDC does not better tailor the Interim Final Rule to its given justification, it is arbitrary and capricious because it appears to be pretextual. The current administration has openly advocated for restrictions on immigration – especially across the southern border – including immigration of asylum-seekers and other vulnerable groups.³⁸ This Rule allows the summary expulsion of such individuals, circumventing existing legal protections as discussed above. Because the justifications given in the Rule do not logically support the breadth of the Rule itself, or its total lack of limiting parameters or exceptions, there is reason to believe that the Rule is politically motivated and that the reasons offered may be mere pretext. This is especially true considering that the majority of immigrants arriving without documentation are already subject to expedited removal, such that the primary effect of the Order issued under this Rule will be to deprive asylum-seekers and UACs of procedural protections.³⁹ If this Rule is motivated by a political agenda rather than legitimate public health concerns, then the Rule is arbitrary and capricious and therefore unlawful.⁴⁰ As such, the CDC must either withdraw the Interim Final Rule, justify its breadth and lack of constraints, or tailor it so that it is fully justified by the public health concerns it is supposed to address.

3. The Interim Final Rule Fails to Consider the Critical Policies Underlying the Refugee Act and the TVPRA

The Interim Final Rule presents several critical concerns that stem from its effective targeting of asylum-seekers and UACs who arrive at the United States-Mexico border.⁴¹ The Order issued under this Rule applies broadly to “persons traveling from Canada or Mexico (regardless of their country of origin) who would otherwise be introduced into a congregate setting in a land Port of Entry (POE) or Border Patrol station at or near the United States borders with Canada and Mexico.”⁴² The Order, as well as the Rule, then excepts U.S. citizens, legal permanent residents, persons with valid travel documents, and persons participating in the Visa Waiver Program from its prohibitions.⁴³ Notably missing from the exceptions are asylum-seekers and UACs, who most often arrive at land POEs along the U.S.-Mexico border without valid travel documents and who are, because of CBP’s processing and detention practices, “introduced into a congregate setting.”⁴⁴

³⁷ 42 U.S.C. § 265.

³⁸ The White House, *Immigration*, <https://www.whitehouse.gov/issues/immigration/> (describing the need to build a border wall, ensure “swift removal of unlawful entrants,” and eliminate “chain migration” and the Visa Lottery while “moving the country to a merit-based entry system.”); The White House, *Statement from the Press Secretary* (Feb. 28, 2020), <https://www.whitehouse.gov/briefings-statements/statement-press-secretary-117/> (stating that over 60,000 asylum-seekers have been forced to return to Mexico while their asylum claims are pending, and describing this outcome as “hugely successful”).

³⁹ Guttentag, *supra* note 3.

⁴⁰ *Department of Commerce v. New York*, 139 S.Ct. 2551 (2019).

⁴¹ See generally Guttentag, *supra* note 3.

⁴² CDC Order, *supra* note 6.

⁴³ *Id.*

⁴⁴ *Id.*; see also Guttentag, *supra* note 3, at 1.

In addition, persons arriving from Mexico at a land POE without valid travel documents are already subject to expedited removal by the Department of Homeland Security (DHS) pursuant to its authority under Section 235(b)(1) of the Immigration and Nationality Act. However, that authority does not extend to persons without valid travel documents who indicate either fear of persecution or an intent to apply for asylum,⁴⁵ nor does it apply to UACs due to protections guaranteed under the TVPRA.⁴⁶ The effect of this Interim Final Rule, which fails to except either UACs or persons who indicate a fear of persecution or intent to apply for asylum, is to deprive them of those protections offered by existing law. The Interim Final Rule and subsequent Order appear to have been drafted in a manner that targets the very population of non-citizens who otherwise have protection against expedited removal.⁴⁷

The fact that other travel restrictions issued recently provide exceptions for asylum-seekers draws attention to the Interim Final Rule's failure to do so. In the two months preceding this Rule, the President issued Proclamations suspending entry into the United States of persons coming from China,⁴⁸ Iran,⁴⁹ Europe's Schengen Area,⁵⁰ and the United Kingdom and Ireland.⁵¹ Each of these Proclamations explicitly clarifies that "nothing in this proclamation shall be construed to affect any individual's eligibility for asylum, withholding of removal, or protection under the regulations issued pursuant to the legislation implementing the Convention Against Torture."⁵² Moreover, the leaked CBP directive implementing the Order includes only an exception for CAT claims, but it does not provide protections for TVPRA or asylum claims.⁵³

It is true that the Interim Final Rule and the subsequent Order leave open the possibility of a case-by-case exception based on the "totality of the circumstances," including humanitarian interests.⁵⁴ This is insufficient protection. First, actors carrying out the Order are unlikely to be aware of urgent humanitarian interests unless they screen for them. This is precisely why statutes such as the TVPRA require screening procedures—vulnerable groups such as UACs, who may be very young or may not speak the same language as the officials who apprehend them, may be unable to affirmatively assert the rights guaranteed to them. Yet the Interim Final Rule and Order allow apprehending agents to forego screening procedures entirely.

Additionally, the text of both the Interim Final Rule and the Order instructs DHS officials to consider public safety and public health interests in addition to humanitarian concerns.⁵⁵ Given that the CDC issued the Rule and Order explicitly to "protect the public health,"⁵⁶ it seems unlikely that DHS officials would find that humanitarian interests outweigh public health and safety concerns. Moreover, because the Rule and Order circumvent the TVPRA and Refugee Act but offer no other procedural protections for asylum-seekers and UACs, the text provides no guidance for systematically making case-by-case determinations. For example, in March 2020

⁴⁵ 8 U.S.C. § 1225(b)(1)(A)(i).

⁴⁶ 84 Fed. Reg. 35409, 35410 (July 23, 2019).

⁴⁷ See Guttentag, *supra* note 3, at 5.

⁴⁸ Proclamation No. 9984, 85 Fed. Reg. 6709 (Jan. 31, 2020).

⁴⁹ Proclamation No. 9992, 85 Fed. Reg. 12855 (Feb. 29, 2020).

⁵⁰ Proclamation No. 9993, 85 Fed. Reg. 15045 (Mar. 11, 2020).

⁵¹ Proclamation No. 9996, 85 Fed. Reg. 15341 (Mar. 14, 2020).

⁵² *Id.*; see also Guttentag, *supra* note 3, at 6-7.

⁵³ CBP Directive, *supra* note 16.

⁵⁴ CDC Order, *supra* note 6, at 17061; Interim Rule, *supra* note 1, at 16567.

⁵⁵ *Id.*

⁵⁶ See generally CDC Order, *supra* note 6; Interim Rule, *supra* note 1.

alone, CBP apprehended 2,949 UACs along the United States-Mexico border.⁵⁷ Without the procedural requirements of the TVPRA or similar guidelines, it is doubtful that DHS officials will evaluate each of the almost 3,000 minors on a case-by-case basis, especially when the Rule’s primary instructions are to immediately suspend entry and return the minors to their countries of origin. Nor would a case-by-case determination comply with the requirements of the TVPRA and the Refugee Act.

The failure of the Interim Final Rule to provide for the legally required statutory protection for asylum-seekers and UACs is alarming and violates the well-understood legislative intent behind the TVPRA and the Refugee Act of 1980. The TVPRA originates with the Victims of Trafficking and Violence Protection Act (TVPA) of 2000, which considers trafficking a “contemporary manifestation of slavery whose victims are predominantly women and children.”⁵⁸ The TVPA calls the United States and the international community to action to respond to the at least 700,000 persons trafficked internationally annually, including about 50,000 trafficked into the United States each year.⁵⁹ The TVPRA of 2008 is a reauthorization of the TVPA and is the result of several years of proposed legislation attempting to solidify protections for threatened UACs.⁶⁰ A report from the House Committee on Foreign Affairs that accompanied the reauthorization legislation in 2007 emphasizes the “developing horror” of human trafficking as well as a commitment to “preventing the trafficking of unaccompanied alien children found in the United States by ensuring that they are not repatriated into the hands of traffickers or abusive families, and are well cared for.”⁶¹ The Interim Final Rule undermines two decades’ worth of congressional concern for victims of human trafficking. Especially considering that the TVPRA does not provide exceptions related to public health and safety, it is dismaying that the Rule deliberately ignores the TVPRA’s protections.

Similarly, in the Refugee Act of 1980, Congress codified the non-refoulement principle from the Refugee Convention, amending the Immigration and Nationality Act to clarify that “the Attorney General shall not deport or return any alien (other than an alien described in section 241(a)(19)) to a country if the Attorney General determines that such alien’s life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.”⁶² According to the Office of the UN High Commissioner for Refugees, governments cannot implement measures that deny individuals an opportunity to seek asylum or that result in refoulement: “Denial of access to territory without safeguards to protect against refoulement cannot be justified on the grounds of any health risk.”⁶³ In pursuing a policy that both denies individuals an opportunity to seek asylum and results in refoulement, the Interim Final Rule fails to uphold the United States’ legal, international, and moral obligations.

⁵⁷ U.S. Customs and Border Protection, *Southwest Border Migration FY 2020*, <https://www.cbp.gov/newsroom/stats/sw-border-migration> (last visited Apr. 22, 2020).

⁵⁸ 22 U.S.C. § 7101(a).

⁵⁹ *Id.* at § 7101(b)(1).

⁶⁰ Karen S. Baker, *Is the United States Safely Repatriating Unaccompanied Children? Law Policy, and Return to Guatemala*, 73 U. MIAMI L. REV. 781, 793-94 n. 41 (2019).

⁶¹ H.R. Rep. No. 110-430, at 34, available at <https://www.congress.gov/congressional-report/110th-congress/house-report/430/1>; cited in Baker, *supra* note 60, at 794.

⁶² Pub. L. 96-212.

⁶³ United Nations High Commissioner for Refugees, *Key Legal Considerations on access to territory for persons in need of international protection in the context of the COVID-19 response* (Mar. 2020), <https://www.unhcr.org/cz/wp-content/uploads/sites/20/2020/04/UNHCR-Legal-Considerations-on-Access-to-Territory-in-the-Covid-19-Pandemic-March-2020.pdf>; cited in Guttentag, *supra* note 3, at 7-8.