To Chief of Staff McGowan and the Centers for Disease Control and Prevention (CDC):

Oxfam America respectfully submits this comment to the Department of Health and Human Services’ interim final rule (hereinafter “IFR” or “Rule”), titled “Suspension of Introduction of Persons Into United States From Designated Foreign Countries or Places for Public Health Purposes,” HHS Docket No. CDC-2020-0033, in the Federal Register at 85 FR 16559, issued March 20, 2020.

We are concerned that the Rule grants broad powers to HSS to regulate immigration in a manner that Congress never intended; that it violates a litany of domestic laws, including the INA and TVPRA, as well as international treaty obligations, including the Refugee Convention and Convention Against Torture; and that it fails to protect public health by arbitrarily rejecting a group of people based exclusively on immigration status while failing to screen entrants who may, in fact, be ill, suggesting that public health protections are serving as a pretext for discrimination against refugees.

1. Oxfam’s Interest

Oxfam is a global organization working to end the injustice of poverty. We help people build better futures for themselves, save lives in disasters, and hold the powerful accountable. As part of this work, we support migrant communities across the world by tackling the drivers of migration, providing humanitarian aid to those fleeing, and advocating that governments respect the human rights of migrants. Given current UN estimates that 70.8 million people worldwide have fled their homes – the highest number since World War II – ensuring that the U.S. offers these communities protection, which is guaranteed by U.S. and international law alike, is more vital than ever. Oxfam works in places with high migrant and internally displaced persons (IDP) populations like Lebanon, Uganda and Bangladesh where we rely upon countries to fulfill their international obligations to allow people to seek asylum. We urge the U.S. government to do the same.
II. Department of Health and Human Services Interim Final Rule

Oxfam America is deeply concerned about the impact of this IFR, which authorizes the Director of the CDC to “prohibit the introduction into the United States of persons from designated foreign countries (or one or more political subdivisions and regions thereof)” through issuance of an order. CDC proceeded to issue an order (Order) suspending entry for any persons without documentation who approached the United States via Mexico or Canada. We are troubled that:

- (1) The Rule has enabled an Order that violates myriad domestic and international law obligations: The Order makes clear that the Rule is being used to upend long-established asylum protections and safeguards for refugees and unaccompanied children, forcing vulnerable communities into incredibly precarious living conditions in violation of the Immigration and Nationality Act (INA), Refugee Convention, Convention Against Torture (CAT) and other human rights obligations.

- (2) The Order places children and women in harm’s way: The Rule does not account for the dangers this poses for unaccompanied minor children or women, and dispenses with the protections afforded children in violation of the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA).

- (3) The Order fails to safeguard public health: The Order simultaneously fails to safeguard the public health of Americans as it purports to do. First, there is no medical basis or data supporting the conclusion that preventing asylum seekers or children from entering the U.S. lessens the exposure of any U.S. citizens. Second, even if some expulsions were medically warranted, the implementation is illogical, as U.S. citizens and permanent residents are still permitted entry without additional screening procedures. The stark mismatch between the communities the Order targets for exclusion, and those who may have been exposed to COVID-19, undercuts any serious argument that the Order was sincerely motivated by public health concerns. In fact, the Order is likely to prolong humanitarian crisis at the southern border, a key factor that HHS failed to take into account when weighing the Rule’s prospective costs and benefits.

III. The IFR Violates Domestic Law

The Rule relies on an unprecedented interpretation of an obscure statute to enact sweeping changes to existing laws, in violation of several U.S. domestic obligations. Through this Rule, the CDC is granting the Trump administration expansive powers to expel individuals at the border and from the interior of the United States, including asylum-seekers and minor children.

A. The Rule Explicitly Violates Asylum Obligations Under the Immigration and Nationality Act

The Rule fails to offer or guarantee any legal process whatsoever to individuals subject to the rule, including asylum seekers and unaccompanied minors. This contravenes the Immigration and Nationality Act (INA), 8 U.S.C. § 1158(a)(1), which affirms that “any alien…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.” The CDC Order thus explicitly breaches this requirement to offer asylum.

What is more, the law enumerates the limited exceptions to the right to apply for asylum, none of which include public health exceptions. Congress carved out exceptions for adult migrants that have passed through safe third countries, 8 U.S.C. § 1158(a)(2)(A), that failed to apply for asylum within one year of entry, 8 U.S.C. § 1158(a)(2)(B), or whose applications were previously denied, § U.S.C. § 1158(a)(2)(C). By enumerating the specific circumstances under which the right to apply for asylum may be denied, and declining to provide a catchall that could include public health concerns, Congress clearly did not intend for asylum to be denied to migrants under these circumstances. The canon *expressio unius est exclusio*
alterius\(^1\) – or “where a statute specifies certain things, the designation of such things excludes all others”\(^2\) – confirms this interpretation. So too does the truism that those interpreting law “cannot insert into statutes terms or provisions which are obviously not there.”\(^3\) If our government wanted a public health exception for asylum seekers, it would have created one in the statute. It did not.

Nor does the authority cited enable HHS to override Congress and justify expelling unaccompanied children and asylum seekers. 42. U.S.C. § 265 does not supersede the United States’ domestic law and international law obligations (detailed below). As Senators Leahy, Feinstein, Klobuchar, Durbin, Whitehouse, Booker, Harris, Hirono, Coons, and Blumenthal observe in a letter to DHS, the agency has “blatantly misrepresented its limited authorities” in an attempt to “override existing federal statutes.”\(^4\) They continue on to confirm that “we are not aware of a single statute, or legal precedent, that authorizes the Executive Branch to defy the law and evade all Congressional oversight.”\(^5\) Nothing has allowed such a derogation from our nation’s legal requirements; as such, the Interim Final Rule and the Order it has spawned violate domestic law.

B. The Rule Violates Obligations to Unaccompanied Children Outlined by the TVPRA

The Rule seeks to permit the CDC, through DHS, to violate the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), a federal law designed to protect unaccompanied children from human trafficking and other harm.

Unaccompanied children are one of the most vulnerable groups, and face heightened risk of unthinkable forms of abuse while migrating. Prior to the passage of the TVPRA unaccompanied children were turned away at the border, which left many in the hands of smugglers and human traffickers who exploited these children for some of the worst forms of slavery and sexual predation.\(^6\) Common sense dictates that many of the children the CDC is now instructing Customs and Border Patrol (CBP) to turn away will now endure similar horrific fates.

Yet such a policy is illegal: it expressly contravenes the plain language and congressional intent behind the TVPRA. The TVPRA – passed unanimously with bipartisan support – mandates that CBP determines whether children are unaccompanied, and if so, transfer them to CBP custody or the Office of Refugee Resettlement (ORR) within 72 hours. 8 U.S.C. § 1232(b). Once in ORR custody, the TVPRA requires the government to attempt to reunify these children with family members. 8 U.S.C. § 1232(c). The TVPRA also requires the government to screen children to determine whether they were survivors of trafficking or at future risk of being trafficked or persecuted in the U.S. or their home countries. Finally, the TVPRA

\(^1\) Defined as “a principle in statutory construction when one of more things of a class are expressly mentioned others of the same class are excluded.” Merriam-Webster Dictionary, https://www.merriam-webster.com/legal/expressio%20unius%20est%20exclusio%20alterius (last accessed April 20, 2020).
\(^5\) Id.
\(^6\) Migration Policy Institute, “Dramatic Surge in Arrival of Unaccompanied Children Has Deep Roots and No Simple Solution,” (June 13, 2014), https://www.migrationpolicy.org/article/dramatic-surge-arrival-unaccompanied-children-has-deep-roots-and-no-simple-solutions (“These children are frequently trafficked, robbed, sexually assaulted, and exploited by a host of bad actors including their smugglers, traffickers, gangs, cartels, and even government authorities. The well-documented horrific experiences many child migrants encounter during their passage north have raised alarm about the need to address the emerging crisis”) (last accessed April 20, 2020).
outlines procedural protections for unaccompanied children’s legal claims, including the right to apply for asylum in a non-adversarial process and to have their cases heard before an immigration judge.

Despite these requirements, civil society organizations and media outlets confirm that DHS has started summarily expelling unaccompanied children without providing them with the required screening, referring them to ORR or placing them into immigration court proceedings. Leaked guidance to border patrol agents reveals similar disregard for children’s legal protections, with no reference to the TVPRA’s mandated protections.

That the CDC, an agency ostensibly tasked with protecting human health, would issue an Order that jeopardizes unaccompanied children by placing them at risk of human trafficking and sexual assault is immoral and illegal.

The TVPRA is not optional. There is no legal justification for CDC to instruct CBP to dispense with these life-saving, mandatory processes required under the TVPRA. As prominent Members of Congress noted, beyond the illegality of this Order, “[c]hildren do not have to be put in harm’s way to protect us from the coronavirus pandemic. DHS has the ability and capacity to protect both these children and the public.”

IV. The IFR Violates International Treaty Obligations

In addition to the serious violations of U.S. domestic law, the Rule contravenes a spectrum of U.S. treaty obligations.

A. The Rule Violates the Refugee Convention

Most obviously, expelling individuals without affording them the right to apply for asylum contravenes U.S. obligations under the Refugee Convention and the Refugee Protocol. Refugee Act of 1980, Pub. L. No. 96-212. Under this law, the U.S. has committed to protecting those fleeing persecution and affording them the opportunity to explain why they fit into a protected group. Along similar lines, Article 14(1) of the Universal Declaration of Human Rights (UDHR), the founding document of international human rights protections that was principally authored by the American delegation to the UN, guarantees the right of refugees to seek asylum. As with the domestic analogue the INA, while certain exceptions are provided for, there is no exception imagined in the Refugee Convention or the UDHR for pandemics.

On the contrary, a litany of international authorities confirm that the Refugee Convention, UDHR, and associated protections can and must be respected during the COVID-19 crisis, in recognition that international human rights protections can be upheld while maintaining the safety of host populations. For example,

- The United National High Commissioner for Refugees (UNHRC), Office of the High Commissioner on Human Rights (OHCHR), World Health Organization (WHO), and International Organization for Migration (IOM) released a joint statement confirming the Refugee Convention and other rights for refugees, migrants, and stateless peoples must be respected during the pandemic;\(^{12}\)
- A cohort of 24 United Nations human rights experts, or special rapporteurs, declared that UN member states must continue to respect refugee rights during the pandemic, and that emergency powers should not be used to target particular discriminated against groups;\(^{13}\) and
- The UNHRC has issued guidance on COVID-19 that confirms states may not impose “blanket measure[s] to preclude the admission of refugees or asylum seekers” due to the pandemic.\(^{14}\)

The CDC’s Order to suspend all immigrants clearly violates the asylum protection obligations outlined by international treaties, and more recently confirmed as remaining in place by international authorities.

**B. The Rule Violates Non-refoulement and the Convention Against Torture**

Perhaps more alarming than the CBP dispensing with protections under the Refugee Convention is the agency’s decision to ignore the principle of non-refoulement, a fundamental principle of international law that prohibits states from expelling refugees to countries where they may face serious harm.\(^{15}\) The U.S. is bound by this law. This precept is enshrined in the Refugee Convention, the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment (CAT), and customary international law.\(^{16}\)

The administration is not at liberty to interpret its authority under the Rule as somehow superseding the mandatory duty of non-refoulement. Ignoring the requirements of non-refoulement, a principle long respected by Republican and Democratic administrations alike, will endanger the lives and wellbeing of thousands of migrants, and places the CDC’s Order at odds with a central pillar of international human rights law.

In a similar vein, the Rule violates the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), to which the U.S. is a party. Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277; see 8 C.F.R. § 208.16(c). Article 3 of the Convention

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\(^{14}\) 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, (March 16, 2020), available at https://www.refworld.org/docid/5e7132834.html (last accessed 21 April 2020).

\(^{15}\) UN General Assembly, Convention Relating to the Status of Refugees, UNTS 189 (July 28, 1951), at Art. 33.

confirms that “[n]o State Party shall expel, return or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.” For many asylum seekers and unaccompanied minors, this is the very fate the CBP is condemning them to face. While the administration would like to circumvent these international treaty obligations, the UN Subcommittee on Prevention of Torture stated this protection cannot be forgone during the current pandemic.17

The expulsions DHS has undertaken under the Rule and Order contemplate the return of individuals to the countries they have fled, as well as to dangerous Mexican border cities without appropriate screenings, in violations of CAT. Multiple reports confirm that migrants have in fact been tortured in these Mexican cities.18 It is beyond dispute that automatic expulsion of these vulnerable populations places the U.S. in violation of its obligations under CAT.

V. The Public Health Pretext Does Not Withstand Light Scrutiny

Although purportedly based on public health concerns, the Rule fails to meaningfully address those concerns; instead, it appears tailored to prevent asylum seekers and unaccompanied children from obtaining protection in the United States.

A. The Rule Is Unsupported by Medical Science

Importantly, epidemiological research on pandemic travel bans show that they are ineffective and do not prevent the spread of disease, particularly when the pandemic has already spread,19 as it has in the U.S. The Rule thus does little to protect Americans while doing much to harm those we are legally bound to assist.

Medical experts agree that an individual’s immigration status is irrelevant to the presence of COVID-19. As Dr. Ronald Waldman, physician and professor of global health at GW University and President of Doctors of the World-USA affirms, “the virus is a non-discriminating agent. There is no reason why asylum seekers would be more likely to be at risk of contracting or transmitting the virus than any other group of people.”20 This sentiment is widely shared throughout the medical community: Professor Lawrence Gostin, Director of the O’Neil Institute for National and Global Health Law at Georgetown University, observes, “It makes no sense. In public health, any time there is a categorical classification—any time there is a category about who you apply your measure to or who you don’t—is highly suspect. The courts suspect it. Public health people suspect it. There is no scientific evidence for


**B. Safe Alternatives to Expulsion**

The CDC order that DHS relies upon to justify expulsions is predicated on the false assumption that the only possible alternative to detaining asylum-seekers in unsafe, overcrowded border facilities for lengthy periods of time is to turn them away. In fact, CBP could expeditiously parole those seeking asylum into the United States, where the vast majority have ties to families, friends, or faith-based communities: an October 2019 study of asylum-seekers subject to the Remain in Mexico program found that a staggering 92.3% were seeking to be reunited with family in the United States.\(^2\)

Furthermore, DHS is not required to hold asylum-seekers in congregate settings, such as in the custody of CBP or Immigration and Customs Enforcement (ICE). DHS wields the authority to parole asylum seekers into the U.S. to await their asylum proceedings in immigration courts. 8 U.S.C. § 1182(d)(5)(A); 8 C.F.R. § 212.5. Given the aforementioned high rate of family connections, these vast majority of these migrants would be safely integrated into homes with family.

It also bears emphasis that instead of expulsions or detention, and regardless of an asylum seeker’s ability to move in with family in the U.S., **DHS could engage in non-discriminatory screening and self-isolation measures that would respond to public health concerns while preserving the right to seek asylum and protections for unaccompanied children.** Medical experts support this approach. As Physicians for Human Rights, Doctors Without Borders, and allied groups confirm, to ensure safety for all, certain low-cost and common sense steps should be followed:

“All outbreak response measures should be based on data and known public health best practice. **U.S. border officials should continue to allow people to follow the legal process to request asylum, providing for non-discriminatory screening and referral to health facilities as necessary.** Asylum seekers should then be released to homes and non-governmental shelters, through parole or other community-based alternatives to detention, where they can appropriately socially distance and be permitted to continue their case in immigration court. The medical literature has shown that community-based alternatives to detention support substantially improved health outcomes.”\(^2\)

The WHO Director-General and UN Under-Secretary General for Humanitarian Affairs have echoed these sentiments, calling on countries to continue supporting refugees and other humanitarian exigencies.


during the pandemic.\textsuperscript{24} Simply put, the world’s leading health authorities agree that protecting refugees is entirely consistent with public health concerns.

Finally, the Rule fails to consider the humanitarian crisis that it is fomenting by forcing migrants to assemble in border towns without adequate hygienic facilities, prolonging the health crisis. While self-interested parties in the U.S. may suspect that disease ravaging the Mexican side of the southern border will never impact them, that supposition is untrue. The inevitability of human movement – particularly the continued travel of U.S. citizens and lawful permanent residents from Mexico into the U.S. – means that every American concerned about their health, and their families’ health, should prioritize the health and safety of populations in Mexico. By forcing refugees into dangerous living conditions that increase their risk of contracting disease, the administration has predestined a treacherous fate for those Americans that will inevitably come into contact with populations that are moving freely between Mexico and the U.S. In its cost-benefit analysis, HHS failed to take these very real costs that will accrue not only to asylum seekers and unaccompanied children, but to Americans living in every corner of the country.

\textit{C. The Rule Targets a “Health” Issue Based Exclusively on Immigration Status, Making It Both Overinclusive and Underinclusive, and Undercutting the Purported Justification}

In addition to the lack of medical justification, the Rule is poorly tailored to meet its ostensible goals. The Rule is simultaneously overinclusive – it expels a broad category of people based on immigration status, rather than health status – and underinclusive – it fails to consider screening measures for many classes of people that may have been exposed to COVID-19.

The Rule claims to be aimed at preventing entry for individuals for whom quarantine is not a practical solution and where individuals have been in congregate settings “(i.e., ships, aircraft, trains, and road vehicles) or terminals with shared sitting, sleeping, eating, or recreational areas, all of which are conducive to disease transmission.” However, the Rule does not actually apply to such individuals universally. Significant populations that could have been exposed are exempt:

- The Rule exempts U.S. citizens and permanent residents, even if these individuals lack places to self-isolate and/or have been in congregate settings, such as cruise ships, where significant outbreaks of COVID-19 have already occurred;
- The Rule applies only to land borders, even though, as the rule itself notes, transportation hubs, like airports and cruise terminals, are congregate settings “conducive to disease transmission.” The Rule does not bar travel by tourists arriving by plane or ship, even though these modes of transportation are explicitly listed as congregate settings with higher risk of disease transmission.
- A travel restriction issued by DHS on March 20 limits cross-border U.S.-Mexico traffic to “essential travel,” yet provides broad exceptions for travel related to education, trade and commerce, as well as other non-essential travel at the discretion of the Commissioner of Customs and Border Protection. 85 FR 16547.

None of these exemptions can be grounded in public health justifications. These exceptions that have nothing to do with health status and everything to do with immigration status, contradicting the administration’s stated goal of putting public health concerns at the forefront of border control decisions.

The converse is also true: the Rule is overinclusive. It denies entry to asylum seekers and unaccompanied children based solely on their immigration status, as opposed to their health or potential exposure to COVID-19. The administration is silent as to why refugees are more likely to be public health threats – because they are not, which countless medical professionals have confirmed as detailed above.

Far from being designed to protect public health, this new policy has proven itself to be another attempt to shut down access to asylum at the border, endangering more lives while doing nothing to protect Americans. The Rule’s purported “public health” justification does not withstand even light scrutiny; it is quite evident that the underlying motivation is, in fact, forwarding the administration’s discriminatory and xenophobic agenda.

**Conclusion**

Oxfam America respectfully submits that the HHS Rule and accompanying CDC Order should be reconsidered. They violate asylum protections under the INA, Refugee Convention, and UDHR; violate protection for minor children guaranteed under the TVPRA; and ignore prohibitions on torture and non-refoulment prescribed by the CAT and customary international law.

In addition to the array of domestic and international legal violations, the public health justifications confound logic. Medical experts agree there is no public health benefit to expelling asylum seekers or unaccompanied minors. HHS and CDC can point to no such evidence, as none exists. Furthermore, there are simple steps to ensuring the safety of asylum seekers and U.S. nationals alike: allow asylum seekers to stay with their families or shelters arranged by non-profits, and engage in non-discriminatory health screenings and quarantine protocols where necessary. Finally, the public health justification appears ill tailored to the issue it claims to seek to addresses, as it targets populations based on immigration status rather than health.

For these reasons, Oxfam America request that HHS and CDC reconsider the IFR and resultant Order.

Respectfully,

Abby Maxman
President and CEO
Oxfam America