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April 23, 2020

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Re: HHS Docket No. CDC-2020-0033

85 FR 16559

To Whom It May Concern,

On behalf of ADL (the Anti-Defamation League), we are writing to oppose in the strongest terms the above-referenced interim final rule, titled “Suspension of Introduction of Persons into United States From Designated Foreign Countries or Places for Public Health Purposes,” DHS Docket No. CDC-2020-0033, in the Federal Register at 85 FR 16559, issued March 20, 2020. We urge that it be immediately withdrawn.

ADL is a leading anti-hate organization founded in 1913 to stop the defamation of the Jewish people and to secure justice and fair treatment for all. We are rooted in a community that has experienced the plight of living as refugees throughout its history. ADL has advocated for fair and humane immigration policy since our founding and has been a leader in exposing anti-immigrant and anti-refugee hate that has poisoned our nation’s debate.

In light of our mission, ADL opposes the interim final rule as drafted and calls on the Department of Health and Human Services to immediately withdraw it, including terminating any proceedings currently pending pursuant to the interim final rule.

ADL is deeply concerned about the harmful impact of this interim final rule (Rule), which authorizes the Director of the Centers for Disease Control and Prevention (CDC) to “prohibit the introduction into the United States of persons from designated foreign countries (or one or more political subdivisions and regions thereof), only for such period of time that the Director deems necessary for the public health,” through issuance of an order.

On the very same day that the rule was issued, the CDC issued an order (Order) invoking its authority under the Rule to suspend the introduction of persons without documentation who seek to enter the United States via Mexico or Canada. The Order clearly illustrates how the Rule is being used to eviscerate asylum protections and legislative safeguards for unaccompanied children while failing to further the public health justifications on which it is purportedly based.

ADL is mindful that Jews have a long history of displacement throughout the world. Many American Jewish families arrived in this country as refugees and asylum seekers. Others were not as fortunate. For instance, the incident of the *St. Louis* is burned into our collective memory and so as a community we are acutely aware of what happens when the United States flatly denies asylum to displaced persons without consideration for the harm they may face once turned away from this country's protection.

In 1939, the German ship *St. Louis* sailed for Cuba carrying 937 passengers. Almost all of them were Jews fleeing Nazi Germany. Most of the Jewish passengers had applied for U.S. visas and were planning to stay in Cuba only until they could enter the United States. However, political conditions in Cuba changed abruptly just before the ship sailed and only 28 passengers were admitted by the Cuban government. The remaining 908 passengers were left in limbo – unable to disembark and be admitted to Cuba and terrified of turning back. The *St. Louis* was ordered out of Cuban waters on June 2, 1939 and sailed so close to Miami that passengers could see its lights. Some of them cabled President Franklin D. Roosevelt asking for refuge. He never responded. Instead, the State Department sent a passenger a telegram stating that passengers must “await their turns on the [visa] waiting list and qualify for and obtain immigration visas before they may be admissible into the United States.”¹

The asylum seekers aboard the *St. Louis* had no choice but to return to Europe. Notably, they did not return to Germany. Jewish organizations were able to negotiate with four European governments to secure entry visas for the passengers – they found refuge in “safe” third countries. Unfortunately, Germany invaded western Europe in May 1940, trapping 532 former *St. Louis* passengers. About half – 254 people – were murdered in the Holocaust.² This Rule – effectively turning away asylum seekers – disregards the tragic lessons the U.S. ought to have learned when we turned our backs on Jewish refugees during World War II.

Through the implementation of this Rule, the Administration is granted expansive powers to expel individuals at the border and from the interior of the United States, including asylum-seekers. As applied, this violates both the United States' domestic and international legal obligations to asylum-seekers.

Sending displaced persons seeking asylum to another country – where they will be in danger – is inconsistent with international law. Since turning away the *St. Louis*, the United States has become a signatory to the 1967 Protocol Relating to the Status of Refugees,³ which binds parties

¹ United States Holocaust Memorial Museum, Holocaust Encyclopedia, “Voyage of the St. Louis,” <https://encyclopedia.ushmm.org/content/en/article/voyage-of-the-st-louis> (accessed April 23, 2020).

² Id.

³ United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, [1968] 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 268.

to the United Nations Convention Relating to the Status of Refugees (“Refugee Convention”),⁴ and the 1984 Convention Against Torture (“CAT”).⁵ This obligates the U.S. to comply with the principle of *non-refoulement* – an asylum seeker cannot be sent to another territory or state where they fear threats to their life or freedom on protected grounds or are in danger of being subjected to torture. In 1980, the United States asylum system was codified in statute through the Refugee Act. Along with other measures designed to bring the U.S. domestic legal code into compliance with the Refugee Convention, the Refugee Act created a “broad class” of refugees eligible for a grant of asylum.⁶

Although the Refugee Convention allows signatory states to exclude and/or expel asylum seekers, this is only permitted in limited circumstances. UNHCR, the U.N. Refugee Agency, has clarified in guidance on COVID-19 that states cannot impose “blanket measure[s] to preclude the admission of refugees or asylum-seekers” in response to the COVID-19 pandemic.⁷ Yet the CDC Order implementing the Rule is precisely that: a blanket measure that effectively bans all asylum-seekers from protection. Moreover, guidance reportedly provided to the U.S. Border Patrol instructing agents to expel individuals under the authority provided by this Rule makes no reference to protections for asylum-seekers under the Refugee Protocol or the United States’ obligations thereunder.⁸ This guidance disturbingly illustrates that the administration is interpreting its authority under the Rule as superseding its duty of *non-refoulement* – a duty that is mandatory not just under international treaties but as a matter of the U.S. laws that incorporate and align us with those treaties. The guidance makes clear that in practice, this Rule will result in potential mass *refoulement* of asylum-seekers in violation of U.S. international treaty obligations.

It seems equally likely that this Rule will result in the U.S. violating its Convention Against Torture treaty obligations. The UN Subcommittee on Prevention of Torture has already made clear that treaty *non-refoulement* protections cannot be forgone under the current pandemic.⁹ The “expulsions” that DHS has undertaken under the Rule and Order contemplate return of individuals to the countries they have fled from as well as to Mexican border cities where extreme violence has been reported without appropriate screenings in violations of the principle of *non-refoulement* under CAT. While an internal guidance document reportedly circulated by DHS to U.S. Customs and Border Protection (CBP) indicates that asylum seekers might be

⁴ Convention Relating to the Statute of Refugees, July 28, 1951, 140 U.N.T.S. 1954.

⁵ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, June 26, 1987 (the United States is a party pursuant to the Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277; see 8 C.F.R. § 208.16(c)).

⁶ See *I.N.S. v. Cardoza-Fonseca*, 40 U.S. 421, 423 (1987).

⁷ 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> (accessed April 23, 2020).

⁸ Dara Lind, *Leaked Border Patrol Memo Tells Agents to Send Migrants Back Immediately – Ignoring Asylum Law*, ProPublica (April 2, 2020), <https://www.propublica.org/article/leaked-border-patrol-memo-tells-agents-to-send-migrants-back-immediately-ignoring-asylum-law> (accessed April 23, 2020).

⁹ U.N. Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Advice of the subcommittee on prevention of torture to states parties and national preventive mechanisms relating to the coronavirus pandemic, March 25, 2020, available at <https://www.ohchr.org/Documents/HRBodies/OPCAT/AdviceStatePartiesCoronavirusPandemic2020.pdf> (accessed April 23, 2020).

referred to an asylum officer if the asylum seeker makes an “affirmative, spontaneous, and reasonably believable claim” that they might be tortured, in practice, this quasi-screening effort will be ineffectual, as it is extremely unlikely that someone who was tortured would communicate this effectively and without any prompting to a uniformed (and likely armed) officer.¹⁰

Of particular concern, the Rule puts unaccompanied children at exceptional risk of harm. It seeks to permit the CDC, through DHS, to bar and expel individuals at the U.S. border without taking into account the requirements of the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA). This federal law, designed to protect unaccompanied children from human trafficking and other harm, requires CBP to determine whether children it encounters are unaccompanied, and if they are, to transfer them from CBP custody to the custody of the Office of Refugee Resettlement (ORR) within 72 hours. Once in ORR custody, the TVPRA then requires the government to make efforts to reunify these children with family members or other sponsors while their legal claims are decided, and 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. The TVPRA provides important procedural protections for unaccompanied children’s legal claims, including the right to apply for asylum in a non-adversarial process, and for their removal cases to be heard by an immigration judge.¹¹ Despite these very clear legal obligations – which passed with a large bipartisan majority – reporting now indicates that DHS is summarily expelling unaccompanied children without providing them proper screening, placing them into immigration court proceedings, or referring them to ORR.¹²

The *de minimis* safeguards contemplated in the Rule to ensure compliance with international law are facially inadequate. Although the text accompanying the interim final rule states that CDC will consult with the Department of State regarding U.S. international legal obligations in fashioning orders based on the rule, the Rule itself does not explicitly reference any such relevant international obligations nor does it provide an exception for individuals seeking asylum protection in the United States. By contrast, earlier COVID-19 related travel restrictions on China (Proclamation 9984), Iran (Proclamation 9992), the Schengen zone (Proclamation 9993), and the United Kingdom (Proclamation 9996) have all included explicit exceptions for those seeking protection in the United States. The result of this lack of care for the needs of displaced people at our own borders and the U.S.’s own treaty obligations is evident in the Order issued by the CDC on the same day and under the powers granted by this Rule. The Order fails to even reference U.S. domestic and international obligations to asylum-seekers, demonstrating that the Rule is being applied with disregard to and in violation of those obligations.

¹⁰ Lind.

¹¹ 22 U.S. Code §§ 7101-14.

¹² Arelis Hernandez and Nick Miroff, *Facing coronavirus pandemic, Trump suspends immigration laws and showcases vision for locked-down border*, The Washington Post (April 3, 2020), https://www.washingtonpost.com/national/coronavirus-trump-immigration-border/2020/04/03/23cb025a-74f9-11ea-ae50-7148009252e3_story.html (accessed April 23, 2020).

Dara Lind, *Leaked Border Patrol Memo Tells Agents to Send Migrants Back Immediately – Ignoring Asylum Law*, ProPublica (April 2, 2020), <https://www.propublica.org/article/leaked-border-patrol-memo-tells-agents-to-send-migrants-back-immediately-ignoring-asylum-law> (accessed April 23, 2020).

Jews learn from the rabbis in *Pirke Avot* (1:5) to “let your house be open wide, always treating the poor as members of your own family.” In the Talmud, Rabbi Eliezer says that the Torah “warns against the wronging of a *ger* (a stranger).” (Baba Metsia 59b). We should take these principles to heart; most Americans were once strangers in a strange land.

ADL is extremely concerned that this interim final rule is unduly harsh and lacks compassion for those seeking asylum at our border. As applied, this Rule violates the United States’ domestic and international obligations to refugees and asylum-seekers. This is not about public safety – other COVID-19 related travel restrictions have included explicit exceptions for refugees and asylum-seekers. The very real and grave threat posed by COVID-19 should not be used as a pretext for enacting an increasingly draconian set of immigration policies that have no real-world relationship to that threat. Accordingly, this interim final rule should be withdrawn.

Sincerely,



Steven M. Freeman
Vice President, Civil Rights



Karen Levit
National Civil Rights Counsel



Max Sevillia
Vice President, Government
Relations, Advocacy, and
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