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**TASK FORCE ON THE
RULE OF LAW**

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July 8, 2020

Sent via Facsimile & E-Mail

Hon. Chad F. Wolf
Acting Secretary
U.S. Department of Homeland Security
301 7th Street, S.W.
Washington, D.C. 20528

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

Hon. Alex M. Azar II
Secretary
U.S. Department of Health and Human Services
200 Independence Avenue, S.W.
Washington, D.C. 20201

Re: Opposition to the Use of the COVID-19 Pandemic to Undermine Asylum Law and Protections for Unaccompanied Children

Dear Acting Secretary Wolf, Director Redfield and Secretary Azar:

We write on behalf of The New York City Bar Association (the “City Bar”), a voluntary association of over 24,000 lawyers from all parts of our nation that is committed to improving the administration of justice and the rule of law. For the reasons explained below, the City Bar urges the administration to restore protections for asylum seekers and unaccompanied children in compliance with U.S. and international law.

We are deeply concerned by the expulsion of more than 40,000 people, including unaccompanied children and asylum seekers, under new policies during the COVID-19 pandemic.¹ Other nations have ensured that migration restrictions related to the coronavirus contain humanitarian exceptions for protected groups while protecting public health with alternatives such as medical tests or quarantines. However, the United States has failed to implement such measures and, instead, is turning virtually all migrants away at the northern and southern U.S. borders in the name of protecting the U.S. against the further spread of COVID-19.²

Congress established the right to seek asylum in the Refugee Act of 1980, codifying compliance with longstanding international treaties—the 1951 Refugee Convention and the 1967 Protocol.³ In addition, the statute mandates special safeguards for unaccompanied children, such as their transfer to the custody of the Office of Refugee Resettlement (“ORR”) to ensure their care and protection.⁴

On March 20, 2020, the Centers for Disease Control and Prevention (“CDC”) issued an order prohibiting certain noncitizens from entering the United States from Mexico and Canada purportedly to restrict the spread of COVID-19.⁵ Two months later, as much of the U.S. began to reopen, the CDC nonetheless extended the order indefinitely.⁶ Both orders state that they draw their authority from 42 U.S.C. § 265, which permits limiting persons or property from entering the U.S. where there is “serious danger of the introduction” of a disease into the United States from

¹ U.S. Customs and Border Protection, *Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions* (last updated June 12, 2020), <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics> (all websites last visited July 7, 2020).

² See U.N. High Commissioner for Refugees, *Practical Recommendations and Good Practice to Address Protection Concerns in the Context of the COVID-19 Pandemic* (Apr. 9, 2020), <https://www.unhcr.org/cy/wp-content/uploads/sites/41/2020/04/Practical-Recommendations-and-Good-Practice-to-Address-Protection-Concerns-in-the-COVID-19-Context-April-2020.pdf>; Nina Lakhan, *US using coronavirus pandemic to unlawfully expel asylum seekers, says UN*, *The Guardian* (Apr. 17, 2020), <https://www.theguardian.com/world/2020/apr/17/us-asylum-seekers-coronavirus-law-un>.

³ See Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified as amended in sections of 8 U.S.C.); Convention Relating to the Status of Refugees art. 1, July 28, 1951, 189 U.N.T.S. 137, <http://www.refworld.org/docid/3be01b964.html>; Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267, <https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20V/V-5.en.pdf>.

⁴ Trafficking Victims Protection and Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (2008).

⁵ Centers for Disease Control and Prevention (CDC) and Department of Health and Human Services (HHS), 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 (March 26, 2020), <https://www.govinfo.gov/content/pkg/FR-2020-03-26/pdf/2020-06327.pdf>.

⁶ Centers for Disease Control and Prevention (CDC) and Department of Health and Human Services (HHS), Amendment and Extension of Order Under Sections 362 and 365 of the Public Health Service Act; Order Suspending Introduction of Certain Persons From Countries Where a Communicable Disease Exists, 85 Fed. Reg. 31503 (May 26, 2020), <https://www.govinfo.gov/content/pkg/FR-2020-05-26/pdf/2020-11179.pdf>.

another country.⁷ However, the virus already has been introduced into the U.S., which has seen more deaths caused by COVID-19 than any other country in the world.⁸

Notably, the CDC's orders focus on excluding undocumented immigrants traveling to the U.S. by land. They do not exclude permanent residents, U.S. citizens, or those traveling to the U.S. by plane or ship—even though those modes of transportation (as opposed to land travel) necessarily place people in the kinds of congregate settings known to increase disease transmission. Moreover, a travel restriction issued the same day as the March CDC order permits travel into the U.S. in furtherance of education, trade or commerce.⁹ Although purportedly issued to protect public health, the CDC's orders appear to target certain travelers based on their legal status while not excluding many others who may just as easily carry the virus.

The CDC regulations include an exception to the entry limitation on “humanitarian” grounds.¹⁰ However, the Department of Homeland Security (“DHS”) has interpreted the CDC's orders as permitting it to turn migrants away without an individualized assessment—and, as a result, it has admitted only two asylum seekers in the two months following the first order.¹¹ As of March, the U.S. Border Patrol was expelling people who crossed the U.S.-Mexico border in an average of just ninety-six minutes.¹² In addition, in March and April alone, the U.S. expelled 899 unaccompanied children.¹³

Asylum seekers who fear persecution in their home countries cannot be appropriately screened in compliance with due process under these circumstances. Moreover, these rapid-fire expulsions put children and families at grave risk of harm upon their return to countries rife with violence and human trafficking.

⁷ 42 U.S.C. § 265. The regulations also cite 42 U.S.C. § 268, which requires customs officers to cooperate with quarantine rules and regulations.

⁸ Coronavirus COVID-19 Global Cases, John Hopkins Center for Systems Science and Engineering (last visited June 7, 2020), <https://coronavirus.jhu.edu/map.html>.

⁹ See <https://www.federalregister.gov/documents/2020/03/24/2020-06253/notification-of-temporary-travel-restrictions-applicable-to-land-ports-of-entry-and-ferries-service>.

¹⁰ 85 Fed. Reg. 31503 at 31507.

¹¹ See U.S. Customs and Border Patrol, COVID-19 CAPIO Memorandum (2020), available at <https://www.documentcloud.org/documents/6824221-COVID-19-CAPIO.html>; Nick Miroff, *Under Trump border rules, U.S. has granted refuge to just two people since late March, records show*, The Washington Post (May 13, 2020), https://www.washingtonpost.com/immigration/border-refuge-trump-records/2020/05/13/93ea9ed6-951c-11ea-8107-acde2f7a8d6e_story.html.

¹² Nick Miroff, *Under coronavirus immigration measures, U.S. is expelling border-crossers to Mexico in an average of 96 minutes* (March 30, 2020), https://www.washingtonpost.com/immigration/coronavirus-immigration-border-96-minutes/2020/03/30/13af805c-72c5-11ea-ae50-7148009252e3_story.html.

¹³ Camilo Montoya-Galvez, *U.S. policy of expelling migrant children during pandemic faces first court challenge*, CBS (June 9, 2020), <https://www.cbsnews.com/news/expelling-migrant-children-during-pandemic-us-policy-faces-first-court-challenge/>. See also Camilo Montoya-Galvez, *U.S. suspends protections for migrant kids at border, expelling hundreds amid pandemic*, CBS (May 7, 2020), <https://www.cbsnews.com/news/coronavirus-immigration-migrant-children-protections-border/?ftag=CNM-00-10aab7e&linkId=88080572>.

Although the administration justifies its use of emergency powers as a public health necessity,¹⁴ medical professionals question this rationale and have suggested viable alternatives to protect public health while preserving the rights of asylum seekers.¹⁵ A coalition of public health experts noted a wide variety of health safety protocols that could be implemented at border crossings, including facilitating social distancing with demarcations and use of outdoor facilities; using plexiglass barriers and face shields to protect officers conducting interviews and identity checks; requiring the use of face masks by both officers and people crossing the border; allowing asylum seekers to await court hearings with their families or other contacts in the U.S.; transferring unaccompanied children to the custody of ORR for prompt reunification with family members or other caregivers in the U.S.; and facilitating self-quarantine in non-congregate settings at destination locations.¹⁶ Indeed, it is worth noting that 92 percent of asylum seekers have family or friends with whom they could shelter in place in the United States to reduce the chance of the virus proliferating in immigrant detention centers.¹⁷

The U.S. Department of State has dismissed the United States' obligations to asylum seekers under international law in a memorandum justifying its policies, stating that international law is not binding, despite extensive domestic implementing legislation codifying the relevant treaties.¹⁸

That the administration has not attempted to implement available alternatives and has instead opted to summarily reject asylum seekers is deeply troubling. Moreover, this policy seems to follow a concerning trend of the administration using emergency powers to accomplish political objectives while bypassing customary legal processes.¹⁹ Over the last three years, the administration has made no secret of its desire to limit access to asylum.²⁰ Indeed, Senior Advisor

¹⁴ U.S. Dep't of State, Question re asylum laws and policy (April 24, 2020), available at <https://foreignaffairs.house.gov/cache/files/1/5/15b9fb59-24f7-44e1-a8dd-b438072a8cc7/40C6CAE6BA2441181901371E291682E4.april-24-opinion.pdf>.

¹⁵ Letter to HHS Secretary Azar and CDC Director Redfield Signed by Leaders of Public Health Schools, Medical Schools, Hospitals, and Other U.S. Institutions (May 18 2020), <https://www.publichealth.columbia.edu/public-health-now/news/public-health-experts-urge-us-officials-withdraw-order-enabling-mass-expulsion-asylum-seekers>.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ See U.S. Dep't of State, Question re asylum laws and policy (April 24, 2020), available at <https://foreignaffairs.house.gov/cache/files/1/5/15b9fb59-24f7-44e1-a8dd-b438072a8cc7/40C6CAE6BA2441181901371E291682E4.april-24-opinion.pdf>; 8 U.S. Code § 1158; see also *supra* note 3.

¹⁹ E.g., Bobby Magill and Stephen Lee, *Trump Uses 'Emergency' to Speed Up Infrastructure Projects*, Bloomberg Law (June 4, 2020), <https://news.bloomberglaw.com/environment-and-energy/trump-expected-to-use-covid-19-emergency-to-speed-up-projects>; Claudia Grisales, *These Are The Military Projects Losing Funding To Trump's Border Wall*, NPR (Sept. 4, 2019), <https://www.npr.org/2019/09/04/757463817/these-are-the-11-border-projects-getting-funds-intended-for-military-constructio>. See also Meagan Flynn and Meagan Flynn, *Trump says his 'authority is total.' Constitutional experts have 'no idea' where he got that.*, The Washington Post (April 14, 2020), <https://www.washingtonpost.com/nation/2020/04/14/trump-power-constitution-coronavirus/>.

²⁰ Caitlin Dickerson and Michael D. Shear, *Before Covid-19, Trump Aide Sought to Use Disease to Close Borders*, The New York Times (May 3, 2020), <https://www.nytimes.com/2020/05/03/us/coronavirus-immigration-stephen-miller-public-health.html>; *How the Trump Administration is eliminating asylum in the U.S.*, International Rescue Committee (Feb. 4, 2020), <https://www.rescue.org/article/how-trump-administration-eliminating-asylum-us>; Molly

to the president Stephen Miller began exploring disease as a basis to bar entry to the United States even prior to the current pandemic.²¹

The administration must not circumvent Congress to chip away at humanitarian protections. Using the pandemic to bypass the duly enacted immigration statute not only undermines the rule of law, but also erodes confidence in the CDC and public health recommendations during a pandemic.

We urge that the CDC's orders be withdrawn and that the administration restore these critical humanitarian protections in compliance with U.S. and international law, and out of respect for the rule of law which forms the foundation of our free and democratic society.

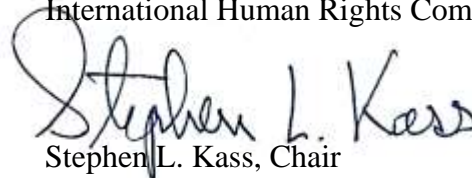
Respectfully,



Victoria F. Neilson, Chair
Immigration & Nationality Law Committee



Lauren Melkus, Chair
International Human Rights Committee



Stephen L. Kass, Chair
Task Force on the Rule of Law

Cc:

Hon. Lamar Alexander, Chair, U.S. Senate Health, Education, Labor & Pensions Committee
Hon. Dianne Feinstein, Ranking Member, U.S. Senate Judiciary Committee
Hon. Lindsey Graham, Chair, U.S. Senate Judiciary Committee
Hon. Ron Johnson, Chair, U.S. Senate Homeland Security & Governmental Affairs Committee
Hon. Jim Jordan, Ranking Member, U.S. House of Representatives Judiciary Committee
Hon. Kevin McCarthy, Republican Leader, U.S. House of Representatives

O'Toole, *Trump moves to eliminate nearly all asylum claims at U.S. southern border*, Los Angeles Times (July 15, 2019), <https://www.latimes.com/politics/la-na-pol-central-americans-asylum-protections-20190715-story.html>;
Charles Davis, *Bureaucracy as a weapon: how the Trump administration is slowing asylum cases*, The Guardian (Dec. 23, 2019), <https://www.theguardian.com/us-news/2019/dec/23/us-immigration-trump-asylum-seekers>.

²¹ Caitlin Dickerson and Michael D. Shear, *Before Covid-19, Trump Aide Sought to Use Disease to Close Borders*, The New York Times (May 3, 2020), <https://www.nytimes.com/2020/05/03/us/coronavirus-immigration-stephen-miller-public-health.html>; see also Nick Miroff and Josh Dawsey, *Stephen Miller has long-term vision for Trump's 'temporary' immigration order, according to private call with supporters*, The Washington Post (April 24, 2020), https://www.washingtonpost.com/immigration/stephen-miller-audio-immigration-coronavirus/2020/04/24/8eaf59ba-8631-11ea-9728-c74380d9d410_story.html.

Hon. Mitch McConnell, Majority Leader, U.S. Senate
Hon. Patty Murray, Ranking Member, U.S. Senate Health, Education, Labor & Pensions
Committee
Hon. Jerry Nadler, Chair, U.S. House of Representatives Judiciary Committee
Hon. Frank Pallone, Jr., Chair, U.S. House of Representatives Energy & Commerce Committee
Hon. Nancy Pelosi, Majority Leader, U.S. House of Representatives
Hon. Gary Peters, Ranking Member, U.S. Senate Homeland Security & Governmental Affairs
Committee
Hon. Chuck Schumer, Democratic Leader, U.S. Senate
Hon. Greg Walden, Ranking Member, U.S. House of Representatives Energy & Commerce
Committee