

The Honorable Chad Wolf
Acting Secretary
Department of Homeland Security
1880 2nd Street SW
Washington, DC 20024

The Honorable Robert R. Redfield, MD
Director
Centers for Disease Control and Prevention
1600 Clifton Road
Atlanta, GA 30333

April 16, 2020

Re: Expulsions of Unaccompanied Children

Dear Acting Secretary Wolf and Director Redfield:

The undersigned organizations write to express our grave concern over the Department of Homeland Security (DHS)'s expulsions of unaccompanied children at the U.S. southern border. These actions, which do nothing to protect public health and safety, violate the bipartisan Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), run counter to domestic and international law ensuring the right to seek asylum, and place vulnerable unaccompanied children at immediate risk of human trafficking and other harm. We urge you to cease these expulsions and treat arriving children in full conformity with legal requirements.

As you know, unaccompanied children comprise one of the world's most vulnerable groups. They are girls and boys, some under 12 years old, who fled to the United States to escape dangers including extreme violence and sexual exploitation. Many of them face continuing trauma upon arrival. Their 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.¹ This Act, which passed by unanimous consent,² mandates that the U.S. government screen these youth to determine whether they are at risk of trafficking or fear return to their home countries. It also requires that DHS transfer unaccompanied children from noncontiguous countries, as well as unaccompanied children from contiguous countries who are at risk of trafficking, fear return, or are unable to make an independent decision about withdrawing their application for admission, into the care and custody of the Office of Refugee Resettlement (ORR) and place them into full immigration court proceedings.

In significant part, these TVPRA procedures reflect Congress's intent to protect unaccompanied children from human trafficking specifically.³ By mandating screenings, for example, the TVPRA

¹ P.L. 110-457.

² 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/>.

³ *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

helps ensure that U.S. government officials identify signs of prior trafficking indicating that removal of these children could prompt resumption of their exploitation. Similarly, placement into ORR custody and immigration court proceedings give children the time, care, and access essential to processing trauma, obtaining counsel, and gathering evidence—all steps necessary to properly establish past trafficking and susceptibility to trafficking in the future. Congress recognized that, absent such safeguards, the U.S. government would too often return unaccompanied children into the hands of traffickers active in Mexico, Central America, and elsewhere—actors who thrive on the vulnerabilities of this population.

In addition to trafficking, many unaccompanied children also 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.”⁴ 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 or she faces a threat to life or liberty due to a protected ground.⁵

Unfortunately, the regulations and guidance recently issued by the Centers for Disease Control (CDC) and DHS fail to uphold the TVPRA’s legal protections or the right to pursue asylum. Effective March 20, CDC directed DHS to suspend entry of certain individuals to avoid their detention in DHS’s congregate settings such as Border Patrol stations, and CBP barred entry for many persons through ports of entry, except for “essential travel.”⁶ Though DHS authorized CBP to designate further categories of essential travel and make exceptions on a case-by-case basis, neither a March 24 DHS order⁷ nor operational CBP guidance⁸ exempts unaccompanied children, including unaccompanied children seeking protection, from the CDC order’s restrictions.

Media reports confirm what these orders and guidance indicate—that DHS is now expelling unaccompanied children arriving at the U.S. southern border.⁹ Specifically, DHS appears to be summarily returning these children without proper screenings, placement into immigration court proceedings, or referrals to ORR. Reports suggest that, as of April 8, DHS may already have

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.”).

⁴ INA §208(a)(2)(A); *see also* INA §235(b)(ii).

⁵ UN General Assembly, “Convention and Protocol Relating to the Status of Refugees;” <http://www.unhcr.org/en-us/3b66c2aa10>. *See also* 8 U.S.C. § 1231(b)(3)(A).

⁶ “Order Suspending Introduction of Certain persons From Countries Where a Communicable Disease Exists,” 85 FR 17060.

⁷ “Notification of Temporary Travel Restrictions Applicable to Land Ports of Entry and Ferries Service Between the United States and Mexico,” 85 FR 16547.

⁸ CBP, “COVID-19 CAPIO,” <https://www.documentcloud.org/documents/6824221-COVID-19-CAPIO.html>.

⁹ *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.

expelled over 350 unaccompanied children.¹⁰ On at least one recent day, CBP failed to refer any unaccompanied children to ORR.¹¹

These expulsions, together with the underlying directives, contravene the TVPRA and the congressional will behind it. The Act's legal requirements are not optional. Indeed, this legislation reflects a bipartisan determination that unaccompanied children's pursuit of protection is so "essential" as to warrant a unique array of due process safeguards. Nothing is more imperative than the life-and-death nature of this vulnerable population's flight.

The expulsions likewise run contrary to laws requiring the U.S. government to refrain from refouling protection seekers and to provide a meaningful opportunity to pursue asylum. The United Nations High Commissioner for Refugees recently affirmed these continuing obligations, noting "that while States may put in place measures which may include a health screening or testing of persons seeking international protection...such measures may not result in denying them an effective opportunity to seek asylum or result in refoulement."¹²

DHS's summary returns threaten to cause children grave harm in the form of human trafficking, persecution, and other harm—precisely the outcomes that Congress intended to prevent. And by risking the expulsion of children directly into the hands of traffickers intent on exploiting them, these actions run counter to President Trump's pledge that, "[m]y Administration will focus on ending the absolutely horrific practice of human trafficking. And I am prepared to bring the full force and weight of our government, whatever we can do, in order to solve this horrific problem."¹³

Making matters worse, the CBP guidance lays bare that DHS is inconsistently applying the statutory definition of "unaccompanied alien children." The Homeland Security Act of 2002 (HSA) defines the term "unaccompanied alien child" as a child under the age of 18 who has no lawful immigration status and for whom there is no parent or legal guardian in the United States, or no parent or legal guardian available to provide care and custody.¹⁴ By law, if such a child arrives at the U.S. southern border with a relative *other* than a parent or legal guardian, CBP must refer the child to ORR custody.

Yet instead of employing the term "unaccompanied alien child," the CBP guidance refers to "unaccompanied juvenile"—a novel construction that the agency defines as a "minor under the age of 18 and NOT accompanied by a relative." The guidance provides that any minor under the age of 18 traveling with a relative—including relatives other than a parent or legal guardian—constitutes a member of a family unit rather than an unaccompanied child. Media reports reveal

¹⁰ 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>.

¹¹ 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.

¹² UN 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.refworld.org/docid/5e7132834.html>.

¹³ President Trump, "President Donald J. Trump is Working to End Human Trafficking" (Mar. 13, 2018); <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-working-end-human-trafficking/>.

¹⁴ 6 U.S.C. 279(g)(2).

that, consistent with this framework, when children under 18 arrive with certain family members who are not their parents or legal guardians, CBP is now expelling these “family units” together.¹⁵

To our knowledge, at present the U.S. government fails to perform *any* screenings to determine whether adults arriving with these children are even their family members. By foregoing TVPRA-mandated screenings and summarily expelling these arriving individuals as a unit, U.S. officials will fail to detect children who are being trafficked by an accompanying adult and may place children at risk of being kept in their trafficking situation or being exploited. And by seeking to administratively limit application of the “unaccompanied alien child” definition codified by the legislative branch, DHS is infringing upon separation of powers principles. Indeed, taken together, the Department’s guidance and actions appear to represent an executive power grab aimed at extinguishing bipartisan statutory protections.

The administration must immediately rectify these illegal policies and practices. To do so, CDC and DHS should rescind the CDC order, DHS order, and CBP operational guidance. Alternatively, CDC and DHS should modify its orders, and CBP its guidance, to recognize unaccompanied children as engaged in “essential travel” exempt from the CDC order’s restrictions. Asylum seekers—including but not limited to unaccompanied children—should likewise be exempted. DHS must ensure that its policies and practices fully adhere to all TVPRA requirements, including the mandate to administer screenings, ensure placement into full immigration court proceedings, and make referrals to ORR, as well as observe the statutory definition of unaccompanied children.

The undersigned organizations recognize that CDC and DHS issued the referenced orders and guidance amidst an ongoing pandemic. We support comprehensive measures to protect public health and safety during this crisis. But far from advancing public health in the United States and region, DHS’s expulsions of vulnerable children undermine it.¹⁶ Instead, DHS should institute robust health and safety measures for unaccompanied children, including screening and testing protocols no less rigorous than the ones the Department applies to travelers already deemed “essential.” Any choice between protecting public health and upholding legal requirements is a false one. Our nation can and should do both.

Every day that these expulsions continue, returned children face the risk of trafficking, violence, and death. The United States must not turn its back on our laws or the children whose lives depend on them.

Thank you for your attention to these matters. If you have any questions, please don’t hesitate to contact Jennifer Podkul, Vice President of Policy and Advocacy, KIND, at jpodkul@supportkind.org.

¹⁵ 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.

¹⁶ *See, e.g.*, Physicians for Human Rights, Human Rights First, et al., “Responding to the COVID-19 Crisis While Protecting Asylum Seekers – Update” (Mar. 25, 2020); <https://www.humanrightsfirst.org/press-release/responding-covid-19-crisis-while-protecting-asylum-seekers-update>.

Sincerely,

ADL (Anti-Defamation League)
Advocating Opportunity
Al Otro Lado
American Federation of Teachers
American Immigration Lawyers Association
ASISTA
Bellevue PSOT
Bethany Christian Services
Capital Area Immigrants' Rights (CAIR) Coalition
Casa de Esperanza
Catholic Legal Immigration Network, Inc.
Catholic Legal Services, Archdiocese of Miami
Center for Constitutional Rights
Center for Immigrant Representation
Center for Law and Social Policy
Center for Safety & Change
Center for Victims of Torture
Church World Service
Coalition for Humane Immigrant Rights (CHIRLA)
Coalition on Human Needs
Columbia Law School Immigrants' Rights Clinic
Families Belong Together
Fordham Law School's Feerick Center for Social Justice
Freedom Network USA
Haitian Bridge Alliance
Harvard Immigration and Refugee Clinical Program
HIAS
Hispanic Federation
Hope Border Institute
Human Rights First
Human Rights Initiative of North Texas
Immigrant Allies of Marshalltown (Iowa)
Immigrant Defenders Law Center
Immigrant Families Together
Immigrant Justice Corps
International Refugee Assistance Project
International Rescue Committee
Institute for Women in Migration A.C. (IMUMI)
Justice for Our Neighbors Houston
Justice in Motion
Kids in Need of Defense
Kino Border Initiative
Latin America Working Group (LAWG)
Lawyers' Committee for Civil Rights of the San Francisco Bay Area

Lawyers For Children
Lutheran Immigration and Refugee Service
Mobilization for Justice, Inc.
Morris County Organization for Hispanic Affairs
National Immigrant Justice Center
National Immigration Law Center
National Immigration Project of the National Lawyers Guild
National Justice for Our Neighbors
National Network for Immigrant and Refugee Rights
New Jersey Consortium for Immigrant Children
New York Immigration Coalition
Northern Illinois Justice for Our Neighbors
Pangea Legal Services
Physicians for Human Rights
Public Counsel
RAICES
Refugees International
Rian Immigrant Center
Safe Passage Project
San Antonio Region Justice For Our Neighbors
Sanctuary for Families
Save the Children Action Network
Services, Immigrant Rights & Education Network (SIREN)
Southern Border Communities Coalition
Southern Poverty Law Center
Southwestern Law School Legal Clinics
Tahirih Justice Center
The Door
The Florence Immigrant & Refugee Rights Project
Tulane's Immigrants' Rights Clinic
Union for Reform Judaism
U.S. Committee for Refugees and Immigrants
Washington Office on Latin America
Witness at the Border
Women's Refugee Commission