

# CURRENT DEVELOPMENTS

## ***PUBLIC HEALTH AS PRETEXT: THE EVISCERATION OF ASYLUM LAW AND PROTECTIONS DURING A PANDEMIC***

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As the United States continues to grapple with the devastation and grief caused by COVID-19,<sup>1</sup> asylum-seekers and refugees are forced to navigate the havoc of COVID-19 alongside aggressive attacks on asylum law by President Donald Trump's administration.<sup>2</sup> During this pandemic, the Administration proposed to: categorically deny asylum claims arising out of gender violence;<sup>3</sup> allow immigration judges to deny asylum-seekers due process rights such as court hearings and testimony presentation;<sup>4</sup> and impose an exorbitant fee of \$975 on immigration-related appeals.<sup>5</sup> The Administration also arbitrarily denied Employment Authorization Documents (EADs) to asylum-seekers;<sup>6</sup> indefinitely closed the U.S. border, expelling more than 100,000 people (including over 2,000

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1. *See, e.g.*, Proclamation No. 9994, 85 Fed. Reg. 15,337 (Mar. 13, 2020) (declaring a national emergency because of COVID-19); *COVID-19's Historic Economic Impact, in the U.S. and Abroad*, JOHNS HOPKINS UNIV. (Apr. 16, 2020), <https://hub.jhu.edu/2020/04/16/coronavirus-impact-on-european-american-economies/>; Denise Lu, *The True Coronavirus Toll in the U.S. has Already Surpassed 200,000*, N.Y. TIMES (Aug. 12, 2020), <https://www.nytimes.com/interactive/2020/08/12/us/covid-deaths-us.html>.

2. *See, e.g.*, *Asylum Seekers & Refugees*, NAT'L IMMIGR. JUST. CTR., <https://immigrantjustice.org/issues/asylum-seekers-refugees> (last visited Sept. 14, 2020).

3. Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 36,264 (proposed on Jun. 15, 2020) (to be codified at 8 C.F.R. pt. 208, 235, 1003, 1208, 1235).

4. *Id.*

5. Executive Office for Immigration Review; Fee Review, 85 Fed. Reg. 11,866 (proposed on Feb. 28, 2020) (to be codified at 8 C.F.R. pt. 1003, 1103, 1208, 1216, 1235, 1240, 1244, 1245).

6. Asylum Application, Interview, and Employment Authorization for Applicants, 85 Fed. Reg. 38,532 (Aug. 25, 2020) (codified at 8 C.F.R. pt. 208, 274).

unaccompanied children) along the U.S.-Mexico border;<sup>7</sup> and created more barriers to obtaining asylum.<sup>8</sup>

Recently, the Administration co-opted the “public health interest” narrative in order to bar asylum-seekers and refugees from entering the United States.<sup>9</sup> On July 9, 2020, the U.S. Department of Justice (“DOJ”) and U.S. Department of Homeland Security (“DHS”) proposed to expand on the Health and Human Services (“HHS”) March 24, 2020 interim final rule that “suspend[ed] the introduction of persons from designated countries or places, if required, in the interest of public health.”<sup>10</sup> Under this July 2020 rule, asylum-seekers and refugees “whose entry would pose a risk of further spreading infectious or highly contagious illnesses or diseases, because of declared public health emergencies in the United States or because of conditions in their country of origin or point of embarkation to the United States,”<sup>11</sup> will be considered a “danger to the security of the United States.”<sup>12</sup> Based on this criteria, DOJ and DHS will have the discretion and authority to effectively bar asylum-seekers and refugees from entering the country.<sup>13</sup>

This comment will explain how the July 2020 rule—also referred to as a “public health ban”—not only violates clearly outlined obligations under domestic and international law, but also endangers the health of the public at large.<sup>14</sup> Additionally, this comment will highlight the hypocrisy of implementing this “public health ban” alongside inhumane conditions at U.S. Immigration and Customs Enforcement (“ICE”) detention centers; this juxtaposition suggests the use of “public health interest” as a pretext to further harm and xenophobia.<sup>15</sup>

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7. The Administration relied on a seventy-five-year-old quarantine law to implement this border closure. See 42 U.S.C. § 265. It is critical to note that Congress has henceforth enacted numerous protections for asylum-seekers and unaccompanied children, overriding this old quarantine law, and making its use obsolete. See Azadeh Erfani, *The Latest Brick in the Wall: How the Trump Administration Unlawfully ‘Expels’ Asylum Seekers & Unaccompanied Children in the Name of Public Health*, NAT’L IMMIGR. JUST. CTR. (Apr. 15, 2020), <https://immigrantjustice.org/staff/blog/latest-brick-wall-how-trump-administration-unlawfully-expels-asylum-seekers>; Michael Garcia Bochenek, *Trump Administration Uses Pandemic as Excuse to Expel Migrants*, HUMAN RIGHTS WATCH (May 20, 2020 5:59 PM), <https://www.hrw.org/news/2020/05/20/trump-administration-uses-pandemic-excuse-expel-migrants#>.

8. See *Asylum Seekers & Refugees*, *supra* note 2.

9. Security Bars and Processing, 85 Fed. Reg. 41,201 (proposed on Jul. 9, 2020) (to be codified at 8 C.F.R. pt. 208, 1208).

10. 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. 17,060 (Mar. 20, 2020); 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. 16,559 (Mar. 24, 2020) (codified at 42 C.F.R. pt. 71).

11. Security Bars and Processing, 85 Fed. Reg. 41,201, 41,208 (proposed on Jul. 9, 2020) (to be codified at 8 C.F.R. pt. 208, 1208).

12. *Id.*

13. *Id.*

14. See, e.g., *Key Legal Considerations on Access to Territory for Persons in Need of International Protection in the Context of the COVID-19 Response*, U.N. HIGH COMM. FOR REFUGEES (Mar. 16, 2020), <https://www.refworld.org/docid/5e7132834.html> [hereinafter UNHCR].

15. See, e.g., *COVID-19 Escalating in ICE Detention Centers as States Hit Highest Daily Records—and ICE Deportation Flights into Northern Triangle Continue*, RESCUE.ORG (Aug. 3, 2020), <https://www.rescue.org/press-release/covid-19-escalating-ice-detention-centers-states-hit-highest-daily-records-and-ice>.

I. THE PROPOSED “PUBLIC HEALTH BAN” VIOLATES DOMESTIC AND INTERNATIONAL LAW, AND ENDANGERS THE HEALTH OF THE PUBLIC AT LARGE, ESPECIALLY ASYLUM-SEEKERS AND REFUGEES

Seeking asylum is a core human right, enshrined in both domestic and international refugee law.<sup>16</sup> Under existing international law, States have the authority to put in place measures such as a health screening, testing, and/or quarantine for non-nationals seeking entry. However, States cannot prevent individuals from an effective opportunity to seek asylum, or violate the guaranteed protection from refoulement.<sup>17</sup> International law recognizes the centrality of the principle of non-refoulement within asylum law by “prohibit[ing] states from expelling or returning a refugee in any manner whatsoever to a territory where she or he would be at risk of threats to life or freedom.”<sup>18</sup> The United Nations High Commissioner for Refugees (“UNHCR”) has also made clear that barring admission of refugees—as purported in this proposed rule—without measures to protect against refoulement would be discriminatory and against established international standards.<sup>19</sup> This is true even in the event of any health risks; “denial of access to territory without safeguards to protect against refoulement cannot be justified on the grounds of any health risk.”<sup>20</sup>

In addition to being non-discriminatory and in compliance with international obligations, measures taken in the name of public health should be “necessary, proportionate, and reasonable to the aim of protecting public health.”<sup>21</sup> The measures in the proposed rule are not. Over 170 public health professionals have emphatically denounced the proposed “public health ban” as unnecessary and in fact, detrimental to the health of refugees and the general public.<sup>22</sup> This is because the “public health ban” does not halt disease transmission.<sup>23</sup> Under the proposed rule, refugees who “come into contact” with any “communicable disease of public health significance” such as gonorrhea, syphilis, tuberculosis, and leprosy at any point in the past are barred from re-entry.<sup>24</sup> However, virologists have confirmed that a fourteen-day quarantine is an effective means to reduce disease transmission because “about 97% of the people who get infected and develop symptoms will do so

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16. See 8 U.S.C. § 1158 (1980); *Protocol Relating to the Status of Refugees*, U.N. GEN. ASSEMBLY (Jan. 31, 1967), <https://www.refworld.org/docid/3ae6b3ae4.html>; *Universal Declaration of Human Rights*, art. 14, U.N. (Dec. 10, 1948), <https://www.un.org/en/universal-declaration-human-rights/>.

17. UNHCR, *supra* note 14, at 2 n.i.

18. *Id.* at 2 n.ii.

19. *Id.* at 2.

20. *Id.*

21. *Id.*

22. See *Public Health Experts Urge U.S. Officials to Withdraw Proposed Rule that Would Bar Refugees from Asylum and Other Humanitarian Protections in the U.S.*, COLUMBIA MAILMAN SCH. PUB. HEALTH (Aug. 6, 2020), <https://www.publichealth.columbia.edu/public-health-now/news/public-health-experts-urge-us-officials-withdraw-proposed-rule-would-bar-refugees-asylum-and-and>.

23. *Id.*

24. Security Bars and Processing, 85 Fed. Reg. 41,201, 41,211 (proposed on Jul. 9, 2020) (to be codified at 8 C.F.R. pt. 208, 1208).

within 11 to 12 days, and about 99% will within 14 days.”<sup>25</sup> Therefore, barring individuals from entry for an exposure to a communicable disease beyond the incubation period serves minimal purpose in reducing the spread of COVID-19. Additionally, many of the communicable diseases covered under this proposed rule such as gonorrhea, syphilis, tuberculosis, and leprosy are not subject to U.S. quarantine laws, are treatable, and do not pose a threat of widespread transmission.<sup>26</sup> Public health experts have also emphasized that “public health bans” in general have proven to be unnecessary and ineffective public health measures.<sup>27</sup> For example, the Centers for Disease Control and Prevention (“CDC”) acknowledged that the immigration ban imposed on individuals living with HIV/AIDs in 1980s was neither effective nor in furtherance of the nation’s public health.<sup>28</sup> Perversely, this rule would strip asylum-seekers who are infected with a communicable disease and have weak immune systems from necessary protections.<sup>29</sup> Research has estimated that individuals with weak immune systems are already at an increased risk of being infected with COVID-19.<sup>30</sup> Accordingly, deporting medically vulnerable asylum-seekers during a pandemic will likely increase their risk to be exposed to COVID-19.<sup>31</sup>

The proposed rule also seeks to authorize DOJ and DHS to consider “emergency public health concerns based on communicable disease due to potential international threats from the spread of pandemics”<sup>32</sup> in order to make determinations for asylum and other humanitarian protections, without any medical training at all.<sup>33</sup> In general, individuals undergo robust education and training in biology, public health, and other sciences for multiple years before becoming a medical or public health professional.<sup>34</sup> DHS officers—who are tasked with the responsibility to determine whether the individual seeking asylum has symptoms “consistent with” a covered disease—do not

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25. Laurel Wamsley & Selena Simmons-Duffin, *The Science Behind a 14-Day Quarantine After Possible COVID-19 Exposure*, NPR (Apr. 1, 2020 1:45 PM), <https://www.npr.org/sections/health-shots/2020/04/01/824903684/the-science-behind-a-14-day-quarantine-after-possible-covid-19-exposure>.

26. *Public Health Experts Urge U.S. Officials to Withdraw Proposed Rule that Would Bar Refugees from Asylum and Other Humanitarian Protections in the U.S.*, *supra* note 22; see also 42 C.F.R. § 34.2 (2016).

27. *Public Health Experts Urge U.S. Officials to Withdraw Proposed Rule that Would Bar Refugees from Asylum and Other Humanitarian Protections in the U.S.*, *supra* note 22.

28. Medical Examination of Aliens—Removal of Human Immunodeficiency Virus (HIV) Infection from Definition of Communicable Disease of Public Health Significance, 74 Fed. Reg. 56,547 (Nov. 2, 2009) (codified at 42 C.F.R. pt. 34).

29. *Public Health Experts Urge U.S. Officials to Withdraw Proposed Rule that Would Bar Refugees from Asylum and Other Humanitarian Protections in the U.S.*, *supra* note 22.

30. *If You are Immunocompromised, Protect Yourself from COVID-19*, CTNS. FOR DISEASE CONTROL & PREVENTION (May 14, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/immunocompromised.html>.

31. *Id.*

32. Security Bars and Processing, 85 Fed. Reg. 41,201, 41,201 (proposed on Jul. 9, 2020) (to be codified at 8 C.F.R. pt. 208, 1208).

33. *Id.*; see also *Public Health Experts Urge U.S. Officials to Withdraw Proposed Rule that Would Bar Refugees from Asylum and Other Humanitarian Protections in the U.S.*, *supra* note 22.

34. See, e.g., *What to Expect in Medical School*, PRINCETON REV., <https://www.princetonreview.com/med-school-advice/what-to-expect-in-medical-school> (last visited Sept. 14, 2020).

undergo any such training.<sup>35</sup> Making medical determinations without sufficient and relevant training opens the door to confusion and discrimination, both of which are especially troubling in the midst of a global pandemic, and when a majority of asylum-seekers are unrepresented with no access to independent medical assessments.<sup>36</sup>

## II. THE PROPOSED “PUBLIC HEALTH BAN” IN JUXTAPOSITION WITH INHUMANE CONDITIONS AT DETENTION CENTERS SUGGESTS THE USE OF “PUBLIC HEALTH INTEREST” AS A PRETEXT TO FURTHER HARM AND XENOPHOBIA

Beyond the rule in discussion, the Administration has repeatedly claimed to prioritize the public health of the nation. However, the current inhumane conditions and rampant spread of COVID-19 within ICE detention centers reveal a different story.<sup>37</sup>

Individuals in custody at ICE detention centers are at a higher risk of being infected with COVID-19 due to overcrowding and unsanitary conditions in these facilities.<sup>38</sup> In fact, the positive test rate of COVID-19 in ICE detention facilities is nearly three times the current positive rate across the nation.<sup>39</sup> In general, ICE detention centers hold over 50,000 individuals in custody; in Fiscal Year 2019, the average daily population was 50,165.<sup>40</sup> According to numerous reports, detainees are forced to live in “pods” comprising at least fifty to seventy-five detainees.<sup>41</sup> In addition to being confined in overcrowded “pods,” detainees are also deprived of basic necessities—that are especially critical during a pandemic—such as soap and hand-sanitizer.<sup>42</sup> Accordingly, COVID-19 cases spiked nearly 500 percent from late April to late May in ICE detention centers.<sup>43</sup> As of September 30, 2020, ICE detention centers have reported 6,271 positive cases of COVID-19 across the country,

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35. *Public Health Experts Urge U.S. Officials to Withdraw Proposed Rule that Would Bar Refugees from Asylum and Other Humanitarian Protections in the U.S.*, *supra* note 22.

36. *Id.*

37. See, e.g., *COVID-19 Escalating in ICE Detention Centers as States Hit Highest Daily Records—and ICE Deportation Flights into Northern Triangle Continue*, *supra* note 15.

38. *Id.*; Parsa Erfani et al., *A Systematic Approach to Mitigate the Spread of COVID-19 in Immigration Detention Facilities*, HEALTH AFF. (Jun. 17, 2020), <https://www.healthaffairs.org/doi/10.1377/hblog20200616.357449/full>; Amnesty International Statement for Senate Judiciary Committee Hearing on Detention and Incarceration During COVID-19, AMNESTY INT’L (Jun. 1, 2020), <https://www.amnestyusa.org/amnesty-international-statement-for-senate-judiciary-committee-on-detention-and-incarceration-during-covid-19/>.

39. *COVID-19 Escalating in ICE Detention Centers as States Hit Highest Daily Records—and ICE Deportation Flights into Northern Triangle Continue*, *supra* note 15.

40. *Detention Statistics*, ICE, <https://www.ice.gov/detention-management> (last visited Sept. 14, 2020).

41. *Early Experiences with COVID-19 at ICE Detention Facilities* (Jun. 18, 2020), OFF. OF INSPECTOR GEN. <https://www.oig.dhs.gov/sites/default/files/assets/2020-06/OIG-20-42-Jun20.pdf>; Eric Katz, *ICE Struggles to Protect Detained Immigrants as Coronavirus Spreads in its Facilities*, GOV’T EXEC. (Jun. 24, 2020), <https://www.govexec.com/management/2020/06/ice-struggles-protect-detained-immigrants-coronavirus-spreads-its-facilities/166410/>.

42. *Id.*

43. Katz, *supra* note 41.

with at least eight detainee deaths and 657 cases under isolation or monitoring.<sup>44</sup> Although these statistics are staggering on their own, some reports state that the total number of individuals with COVID-19 in detention centers could be fifteen times higher than the current reported number of confirmed COVID-19 cases by ICE.<sup>45</sup> Additionally, ICE has continued to shuffle detainees in its custody, which is not only a direct violation of CDC's express guidance in limiting transfers,<sup>46</sup> but also is responsible for increasing the spread of COVID-19.<sup>47</sup> For instance, COVID-19 cases quadrupled in Texan ICE detention facilities just two weeks after seeing an influx of out-of-state transfer detainees.<sup>48</sup>

In response, ICE created a set of COVID-19 Pandemic Response Requirements ("Pandemic Guideline") for all ICE detention facilities.<sup>49</sup> Per this document, all facilities are required to provide detainees with access to hand soap and face coverings and to follow the CDC guidelines on pandemic response.<sup>50</sup> These guidelines have proved to be insufficient and largely ineffective because they are functionally impossible to implement.<sup>51</sup> For example, in contradiction with its Pandemic Guideline, ICE admitted that "strict social distancing may not be possible" in its sleeping quarters.<sup>52</sup> Similarly, even though CDC guidelines for Correctional and Detention Facilities call for cohorting—that is, "isolating multiple laboratory-confirmed COVID-19 cases together as a group"<sup>53</sup>—only if there are no other options, ICE has continued to routinely use cohorting and admitted it to be unavoidable in its facilities.<sup>54</sup> Shockingly, according to a whistleblower complaint, immigrant

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44. *ICE Detainee Statistics*, U.S. IMMIGR. & CUSTOMS ENF'T, <https://www.ice.gov/coronavirus> (last visited Oct. 2, 2020).

45. Nina Siulc, *Vera's New Prevalence Model Suggests COVID-19 is Spreading through ICE Detention at Much Higher Rates than Publicized*, VERA INST. OF JUST. (Jun. 4, 2020), <https://www.vera.org/blog/covid-19-1/veras-new-prevalence-model-suggests-covid-19-is-spreading-through-ice-detention-at-much-higher-rates-than-publicized>; Tom Jawetz & Nicole Prchal Svajlenka, *Data on the Coronavirus Outbreak in Immigration Detention Offer More Questions than Answers*, CTRS. FOR AM. PROGRESS (Jun. 16, 2020 9:01 AM), <https://www.americanprogress.org/issues/immigration/news/2020/06/16/486338/data-coronavirus-outbreak-immigration-detention-offer-questions-answers/>.

46. *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 23, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html>.

47. Lisa Riordan Seville & Hannah Rappleye, *ICE Keeps Transferring Detainees Around the Country, Leading to COVID-19 Outbreaks*, NBC NEWS (May 31, 2020), <https://www.nbcnews.com/politics/immigration/ice-keeps-transferring-detainees-around-country-leading-covid-19-outbreaks-n1212856>.

48. Elizabeth Trovall, *Texas COVID-19 Cases in Immigrant Detention Quadruple in Two Weeks, as ICE Transfers Continue*, HOUSTON PUB. MEDIA (May 7, 2020), <https://www.houstonpublicmedia.org/articles/news/health-science/coronavirus/2020/05/07/368941/texas-covid-19-cases-in-immigrant-detention-quadruple-in-two-weeks-as-ice-transfers-continue/>.

49. *U.S. Immigration and Customs Enforcement and Removal Operations*, ICE (Sep. 4, 2020), <https://www.ice.gov/doclib/coronavirus/eroCOVID19responseReqsCleanFacilities.pdf> [hereinafter *Pandemic Guidance*].

50. *Id.*

51. Erfani et al., *supra* note 38.

52. *Pandemic Guidance*, *supra* note 49, at 19.

53. *Guidance for Correctional & Detention Facilities*, CTRS. FOR DISEASE CONTROL & PREVENTION (Jul. 22, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html#QuarantiningCloseContacts>.

54. Jude Joffe-Block & Valeria Fernández, *ICE Tactics to Limit Spread of COVID-19 in Detention Centers Stir Controversy*, ARIZ. CTR. FOR INVESTIGATIVE REPORTING (Apr. 16, 2020), <https://azcir.org/news/2020/04/16/ice-cohorting-immigrant-detention/>.

detainees in the Irwin County Detention Center are being subject to “jarring medical neglect” including “refusal to test detainees for the novel coronavirus and an exorbitant rate of hysterectomies being performed on immigrant women.”<sup>55</sup> None of these current measures within ICE facilities are in furtherance of public health.

All evidence including established laws and expert public health opinions showcase how the proposed rule is aimed at disproportionately harming asylum-seekers and refugees, eviscerating asylum law, and endangering the health of the public at large. As COVID-19 continues to wreak havoc on communities in the United States, with a heightened burden on marginalized communities, it is critical to invest in sound and evidence-based public health measures, instead of using public health as a pretext to further exacerbate harm and xenophobia.

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55. See, e.g., Jerry Lambe, *'Like an Experimental Concentration Camp': Whistleblower Complaint Alleges Mass Hysterectomies at ICE Detention Center*, L. & CRIME (Sept. 14, 2020), <https://lawandcrime.com/high-profile/like-an-experimental-concentration-camp-whistleblower-complaint-alleges-mass-hysterectomies-at-ice-detention-center/>; Rachel Treisman, *Whistleblower Alleges 'Medical Neglect,' Questionable Hysterectomies of ICE Detainees*, NPR (Sept. 16, 2020 4:43 AM), <https://www.npr.org/2020/09/16/913398383/whistleblower-alleges-medical-neglect-questionable-hysterectomies-of-ice-detaine>.