

# ARTICLES

## CO-OPTING CORONAVIRUS, ASSAILING ASYLUM

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### ABSTRACT

*The Centers for Disease Control (CDC) issued an Order on March 26, 2020, under Title 42, Section 265 of the Public Health Service Act, in the name of combatting the spread of coronavirus. The Order has been called the “Asylum Ban” because it effectively has sealed the southern border to protection-seekers, resulting in the pushback of nearly 400,000 asylees and unaccompanied children. This Article argues that the Trump administration has contravened the rule of law by using the coronavirus pandemic as a convenient pretext to end asylum in the U.S., and by violating the rights of protection-seekers. In doing so, this Article makes four unique contributions, it: 1) provides a detailed account of the coronavirus-related travel restrictions and how they have imposed a wholesale ban on asylum in the United States; 2) contextualizes this harm within the Administration’s project to curtail protections for vulnerable persons fleeing persecution and torture; 3) challenges the proffered*

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† This Article was drafted in the summer of 2020. Since the time of writing, the number of individuals affected by the Order has sharply increased, and the figures here are current as of January 9, 2021. However, given the highly dynamic nature of both immigration policy and the pandemic, certain legal developments since late summer 2020—like the Trump administration’s “Death to Asylum Rule” (effective as of Jan 11, 2021)—are not addressed in this Article. *See, e.g.,* Nolan Rappaport, *What Trump’s New ‘Death to Asylum’ Rule Actually Says*, THE HILL (Dec. 14, 2020), <https://bit.ly/3imwW3p>. The status of litigation cited herein also may have evolved since the Article was drafted. Time will tell how the incoming Biden administration and the courts will handle the CDC order and its progeny, and other Trump administration laws that have precluded vulnerable asylum-seekers from accessing protection in the United States.

health justifications for the Asylum Ban as pandemic pretext; and 4) establishes that such measures violate the U.S.'s non-refoulement obligation by preventing all meaningful access to asylum.

While the CDC order is a temporary measure, born of the coronavirus pandemic and the U.S. government's response to it, the concerns raised in this Article extend beyond this current political moment to the long-term implications of leveraging national laws and pretextual health concerns to close the U.S. border to protection-seekers.

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## INTRODUCTION

Since its inception, the Trump administration has aimed to seal the southern border to prevent migrants—including asylum-

seekers<sup>1</sup>—from entering the United States. When the coronavirus (COVID-19) pandemic presented an avenue for the Administration to achieve this goal, it seized the opportunity. Co-opting Title 42, Section 265,<sup>2</sup> a little-known provision of the U.S. Code, the Centers for Disease Control (CDC) issued an Order<sup>3</sup> on March 26, 2020.<sup>4</sup> The Order has effectively ended the U.S. asylum regime and has resulted in the pushback of nearly 400,000 vulnerable protection-seekers<sup>5</sup> and unaccompanied children.<sup>6</sup>

The practice of co-opting health concerns to justify xenophobic and nativist immigration policies is deeply entrenched in this nation's history. Immigration restrictionists in the United States have argued for centuries that migrants pose health risks,<sup>7</sup> whereas the actual magnitude of credible health threats has been overemphasized.<sup>8</sup> These largely unfounded health-based arguments “from the beginning...were used to weed out socially

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1. A note on terminology: An “asylum-seeker” is someone who has fled their country of origin in search of protection. A “refugee” is someone who is identified as having a well-founded fear of persecution because of their race, religion, nationality, membership in a particular social group, or political opinion, and is unable or unwilling to avail himself of the protection of their country of origin or habitual residence. Convention Relating to the Status of Refugees, adopted July 28, 1951, art. 1(a)(2), 19 U.S.T. 6259, 189 U.N.T.S. 137, 150 (entered into force Apr. 22, 1954) [hereinafter 1951 Convention]. The 1967 Protocol expanded the original refugee definition by lifting the territorial and temporal restrictions of the 1951 Convention (the Convention specifically protected those who became refugees due to the events in Europe before January 1951). 1967 Protocol relating to the Status of Refugees, art. 1, para. 3, Oct. 4, 1967, 606 U.N.T.S. 267 [hereinafter 1967 Protocol]. Every refugee is first an asylum-seeker, but not all asylum-seekers are ultimately recognized as refugees.

2. 42 U.S.C. § 265. Enacted in 1944 as part of the Public Health Service Act, the provision allows the government to limit entry to the United States where “by reason of the existence of any communicable disease in a foreign country there is serious danger of the introduction of such disease into the United States.” *Id.*

3. This Article uses “CDC order” and “Asylum Ban” interchangeably when referencing the March 26, 2020 order.

4. 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 (March 26, 2020) [hereinafter CDC order].

5. Under 42 U.S.C. § 265, the U.S. Border Patrol expelled 197,371 individuals and the Office of Field Operations expelled 9,412 individuals from March 2020 through September 2020. *FY 2020 Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions*, U.S. CUSTOMS AND BORDER PROT., <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics-fy2020> [https://perma.cc/4T22-2YKK] (updated Nov. 20, 2020). U.S. Border Patrol expelled 183,552 individuals and Office of Field Operations expelled 7,724 under 42 U.S.C. § 265 from October 2020 through December 2020. *Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions*, U.S. CUSTOMS AND BORDER PROT., <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics> [https://perma.cc/22KN-A9NW] (updated Jan. 7, 2020).

6. 15,848 unaccompanied minors were expelled at the U.S. Southwest land border under Title 42 from FY 2020 thru FYTD 2021. See *Southwest Border Encounters*, U.S. CUSTOMS AND BORDER PROT., <https://www.cbp.gov/newsroom/stats/sw-border-migration> [https://perma.cc/X8HQ-RMV8] (last updated Jan. 7, 2021). On November 18, 2020, the United States District Court for the District of Columbia granted a preliminary injunction enjoining the application of the CDC orders to unaccompanied minors. *P.J.E.S. v. Wolf*, Civ. Action No. 20-2245 (EGS), 2020 WL 6770508 (D.D.C., Nov. 18, 2020).

7. See generally ALAN M. KRAUT, *SILENT TRAVELERS: GERMS, GENES, AND THE IMMIGRANT MENACE* (Basic Books) (1994); Alan M. Kraut, *Immigration, Ethnicity, and the Pandemic*, 125 PUBLIC HEALTH REPORTS 123 (2010); Howard Markel & Alexandra Minna Stern, *The Foreignness of Germs: The Persistent Association of Immigrants and Disease in American Society*, 80 MILBANK Q. 757 (2002).

8. See Markel & Stern, *supra* note 7, at 758 (“[T]he social perception of the threat of the infected immigrant was typically far greater than the actual danger.”).

undesirable immigrants,”<sup>9</sup> including to target immigrants of certain races.<sup>10</sup> The Trump administration’s rhetoric and actions mirror this history of inappropriately leveraging health concerns to keep unwelcome immigrants out—particularly at the southern border. In fact, Trump raised concerns about Mexican immigrants and “tremendous infectious disease pouring across the border” when he was a presidential candidate.<sup>11</sup> Additionally, the coronavirus pandemic is not the first time that this Administration has attempted to use 42 U.S.C. section 265 to halt immigration.<sup>12</sup>

Since coronavirus-related travel restrictions were only just published in late March and continued to develop throughout spring and summer 2020, few legal scholars have yet analyzed the CDC order. Existing online literature has discussed the U.S. domestic context, arguing that the Order “cannot be reconciled with our history, our laws, or the Constitution.”<sup>13</sup> In the international context, another publication has claimed that the Trump administration is not only ignoring its obligations under international law, but dangerously misunderstands their scope.<sup>14</sup>

This Article intervenes in the conversation at a critical juncture, arguing that the Trump administration has contravened the rule of law by using the

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9. Polly J. Price, *Sovereignty, Citizenship, and Public Health in the United States*, 17 N.Y.U. J. LEGIS. & PUB. POL’Y 919, 931 (2014); see Keith Cunningham-Parmeter, *Alien Language: Immigration Metaphors and the Jurisprudence of Otherness*, 79 FORDHAM L. REV. 1545 (2011) (“Just as infectious diseases threaten our health, illegal aliens contaminate the social body.”); see also Alison Bateman-House & Amy Fairchild, *Medical Examination of Immigrants at Ellis Island*, 10 AMA J. ETHICS 235, 235 (2008) (“The [United States Public Health Service (PHS)] defined its mission rather narrowly—preventing the entrance of disease to the nation—but PHS officers interpreted their job more broadly. In their eyes, the goal was to prevent the entrance of undesirable people—those ‘who would not make good citizens.’”); Markel & Stern, *supra* note 7, at 767 (“[C]ategories of medical exclusion had become closely entwined with racial labels and perceptions of foreigners as inassimilable and diseased.”).

10. See Markel & Stern, *supra* note 7, at 764 (discussing the disparate impact of health-based exclusions in the early 1900s where a much larger percentage of East Asian immigrants were turned away (seventeen percent) compared to European immigrants (one percent)); Bateman-House & Fairchild, *supra* note 9, at 238 (“Influenced by scientific racism, the medical examination procedures differed for European, Latin American, and Asian immigrants.”).

11. Hunter Walker, *Donald Trump Just Released an Epic Statement Raging Against Mexican Immigrants and ‘Disease,’* BUS. INSIDER (July 6, 2015), <https://www.businessinsider.com/donald-trumps-epic-statement-on-mexico-2015-7> (“[T]remendous infectious disease is pouring across the border. The United States has become a dumping ground for Mexico and, in fact, for many other parts of the world.”).

12. See *infra* notes 143–45 and accompanying text (discussing how Stephen Miller, President Trump’s chief adviser on immigration has previously tried to apply this provision).

13. Lucas Guttentag, *Coronavirus Border Expulsions: CDC’s Assault on Asylum Seekers and Unaccompanied Minors*, STANFORD LAW SCHOOL BLOGS: LEGAL AGGREGATE (Apr. 15, 2020), <https://law.stanford.edu/2020/04/15/coronavirus-border-expulsions-cdcs-assault-on-asylum-seekers-and-unaccompanied-minors/>. In his analysis, Guttentag contends that the underlying statute upon which the Order is based does not confer immigration authority or allow for expulsions and, even if it did, it could not support the Order today because such an interpretation would violate the Immigration and Nationality Act (INA) and the Trafficking Victims Protection Reauthorization Act (TVPRA)—both of which take precedence over a 1944 statute under the last-in-time rule. Additionally, Guttentag argues that the Order disregards constitutional guarantees of procedural Due Process. *Id.*

14. Oona Hathaway, *The Trump Administration’s Indefensible Legal Defense of Its Asylum Ban Taking a Wrecking Ball to International Law*, JUST SEC. (May 15, 2020), <https://www.justsecurity.org/70192/the-trump-administrations-indefensible-legal-defense-of-its-asylum-ban/>. In her analysis, Oona Hathaway briefly discusses how the Order violates the U.S.’s *non-refoulement* obligation, but her chief project is establishing—contrary to the Administration’s assertion—that non-self-executing treaties create legal obligations that the U.S. must respect.

coronavirus pandemic as a convenient pretext<sup>15</sup> to end asylum in the U.S., and by violating the rights of protection-seekers under international refugee law.<sup>16</sup> In doing so, this Article makes four unique contributions, it: 1) provides a detailed account of the coronavirus-related travel restrictions and how they have imposed a wholesale ban on asylum in the United States; 2) contextualizes this harm within the Administration's project to curtail protections for vulnerable persons fleeing persecution or torture; 3) challenges the proffered health justifications for the Asylum Ban as pandemic pretext; and 4) establishes that such measures violate the U.S.'s *non-refoulement* obligation by preventing all meaningful access to asylum.

One of law's intrinsic values is that it differentiates actions produced by "sheer power" from those based in "legitimate authority": "Law signals not just that certain outcomes can be produced, but that what is being done is in some sense right or legitimate."<sup>17</sup> Accordingly, in its evaluation of the CDC order, the chairmen of the House Committees on Foreign Affairs, Homeland Security, and the Judiciary, and ranking member of the Senate Committee on Foreign Relations expressed their "deep concern":

[T]he Administration appears to be using the COVID-19 outbreak as a pretext to expel asylum seekers in clear violation of its obligations under domestic and international law to protect individuals fleeing persecution or torture. . . . [The Administration's response] raises serious questions about the accuracy of the Administration's claims of protecting public health, the legality of the Asylum Ban, and the Administration's respect for the rule of law.<sup>18</sup>

A government that adheres to the rule of law is one that promulgates just laws and policies—those that are reasonably defensible and necessary, and respect human rights.<sup>19</sup> The Asylum Ban fails on both counts. Furthermore,

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15. See e.g., *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2578 (2019) (Thomas, J., dissenting) (identifying a pretextual rationale where "the real reason for [a] decision [is] something other than the sole reason [ ] put forward").

16. See *infra* notes 236–242 and accompanying text. While this Article focuses its discussion of asylum-seeker rights in the international refugee law context, the United States has indeed incorporated many of its international refugee law obligations into its domestic law.

17. Monica Hakimi, *Why Should We Care About International Law?*, 118 MICH. L. REV. 1283, 1294–95 (2020).

18. Letter from Eliot L. Engel, Chairman, House Comm. on Foreign Affairs et al., to Mike Pompeo, Sec'y, U.S. Dep't of State et al. (May 12, 2020) [hereinafter May 12 Letter from Congress], [https://foreignaffairs.house.gov/\\_cache/files/0/9/09ede3d-6ec9-4d13-bf16-890da17466da/1481CCA5405564F3519053090EC2B236.5-12-2020.ele-thompson-nadler-menendez-letter-to-pompeo-azar-wolf-on-covid-asylum-ban-pdf.pdf](https://foreignaffairs.house.gov/_cache/files/0/9/09ede3d-6ec9-4d13-bf16-890da17466da/1481CCA5405564F3519053090EC2B236.5-12-2020.ele-thompson-nadler-menendez-letter-to-pompeo-azar-wolf-on-covid-asylum-ban-pdf.pdf).

19. See generally Robert A. Stein, *What Exactly is the Rule of Law?*, 57 Hous. L. Rev. 185, 187–89 (2019) (describing rule of law as "government by laws and not by men," which requires laws that are "just and consistent with the norms and standards of international human rights law . . . [and] the avoidance of arbitrariness in the law." The author emphasizes that rule of law commands "that the principles of fairness and justice must be respected."); see also HUGH GIBBONS, *JUSTIFYING LAW: AN EXPLANATION OF THE DEEP STRUCTURE OF AMERICAN LAW*, 3 LAW AND PHILOSOPHY 165, 165 (1984) ("Laws must be justified; they must fit the pattern that allows us to feel that we are doing justice."); JEREMY WALDRON, *THE RULE OF LAW AS A THEATER OF DEBATE*, IN DWORKIN AND HIS CRITICS 319, 332 (Justine Burley ed., 2004) ("A society committed to the rule of law 'encourages each individual to suppose that his relations

scholars have warned against the danger of discrimination in U.S. immigration law where decision-making transgresses rule of law and is “ad hoc or driven by political exigencies or opportunism.”<sup>20</sup>

The Article proceeds in three parts. Part I describes the coronavirus-related travel restrictions that the U.S. government employed to seal its borders to asylees and unaccompanied children—focusing, in particular, on the CDC order issued under the auspices of Title 42, Section 265. Part II addresses pretext. First, it briefly discusses the role pretext may play in reviewing administrative and constitutional law challenges to executive branch decisions. Then, it situates the closure at the border in the larger context of the Trump administration’s practice of impeding protection-seekers’ access to the United States. Finally, it demonstrates how the Administration’s proffered pandemic-related health concerns do not support a blanket ban on asylum-seekers and unaccompanied children at the border. Part III extends beyond pandemic pretext, analyzing whether the U.S. government can institute laws and policies that prevent all meaningful access to asylum, like the CDC order, given its international legal obligations. First it examines two essential rights under international refugee law: the rights to apply for asylum and not to be refouled to danger or harm. Next, it illustrates that the Asylum Ban violates these paramount rights by preventing asylum-seekers from submitting protection claims. Lastly, it assesses the Trump administration’s response regarding the Order’s compliance with international law, and concludes that a wholesale ban on processing asylum-seekers is not only a violation of the U.S.’s *non-refoulement* obligation—it completely unhinges the international refugee protection regime.

While the CDC order is technically temporary,<sup>21</sup> born of the coronavirus pandemic and the U.S. government’s response to it, the concerns raised in this Article extend beyond this current political moment to the long-term implications of leveraging national laws and pretextual health concerns to close the U.S. border to asylees.

## I. THE CORONAVIRUS ASYLUM BAN: SEALING THE BORDER

President Trump declared coronavirus a national emergency on March 13, 2020.<sup>22</sup> In the weeks that followed, the Administration imposed a patchwork

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with other citizens and with his government are matters of justice.”) (citing RONALD DWORKIN, *Political Judges and the Rule of Law*, in *A MATTER OF PRINCIPLE* 32 (1985)).

20. Hiroshi Motomura, *The New Migration Law: Migrants, Refugees, and Citizens in an Anxious Age*, 105 CORNELL L. REV. 457, 466–67, 495 (2020) (emphasizing that decisions related to immigration must be “fact-based, transparent, and consistent. . . [they must] respect the rule of law, not just for fairness generally but to also guard against discrimination”); *id.* at 467 (While the author discusses this principle in the context of permanent residents, the same reasoning applies to immigration laws governing the treatment of asylum-seekers at the U.S. border.); *see also id.* at 495 (“[T]he overall treatment of migrants should reflect an intelligible rationale and serious efforts to apply legal rules fairly . . . . The risk is too great that decision making that is ad hoc or driven by political exigencies or opportunism can lead to cavalier and cruel treatment and mask illegitimate discrimination.”).

21. *See infra* note 63 and accompanying text (as described herein, the current Order is reevaluated every 30 days).

22. Proclamation No. 9994, 85 Fed. Reg. 15,337 (Mar. 13, 2020) (“[T]he COVID-19 outbreak in the United States constitutes a national emergency, beginning March 1, 2020.”).

of restrictions on persons seeking to enter the United States. In order to understand how these measures, and the CDC order in particular, changed processing at the border, it is imperative to highlight several features of U.S. immigration law. An individual who presents herself at the U.S. border (“whether or not at a designated port of arrival”) may apply for asylum.<sup>23</sup> Undocumented arrivals are typically<sup>24</sup> placed in expedited removal proceedings,<sup>25</sup> but individuals who indicate that they wish to apply for asylum or fear persecution must be referred for an interview with an asylum officer.<sup>26</sup> During that interview, if the asylum-seeker successfully demonstrates a credible or reasonable fear of persecution or torture,<sup>27</sup> she will be allowed to present her protection claim before an immigration judge under regular removal proceedings.<sup>28</sup> There is also a screening process to identify arrivals with communicable diseases.<sup>29</sup> However, while individuals with certain communicable diseases may be deemed inadmissible,<sup>30</sup> U.S. law also prohibits sending protection-seekers to countries where they would face persecution or torture (*refoulement*).<sup>31</sup> Instead, these individuals may be paroled into the U.S. temporarily<sup>32</sup> and isolated or quarantined until they are no longer infectious.<sup>33</sup> Unaccompanied minors are afforded additional humanitarian protection

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23. 8 U.S.C. § 1158(a)(1).

24. *In re E-R-M- & L-R-M-*, 25 I. & N. Dec. 520 (B.I.A. 2011) (Under the INA, the Department of Homeland Security has prosecutorial discretion to place arriving aliens in regular removal proceedings (§ 240) instead of expedited removal proceedings (§ 235(b)(1)(A)(i))); 8 U.S.C. § 1232(a)(5)(D) (reading that unaccompanied children are not subject to expedited removal and are placed in regular Section 240 proceedings).

25. *See generally* Fact Sheet: A Primer on Expedited Removal, American Immigration Council (July 22, 2019), <https://www.americanimmigrationcouncil.org/research/primer-expedited-removal> (explaining how expedited removal allows immigration officers to quickly deport undocumented arrivals).

26. 8 U.S.C. § 1225(b)(1)(A)(ii) (credible fear interview); 8 C.F.R. § 1208.31 (2021) (reasonable fear interview for aliens who previously have been ordered removed).

27. The threshold required depends on the alien’s status. *See id.* (credible fear versus reasonable fear interviews). Demonstrating “reasonable fear” is a higher bar than demonstrating “credible fear.” *Compare* 8 C.F.R. § 1208.31(c), *with* 8 U.S.C. § 1225(b)(1)(B)(v).

28. 8 U.S.C. § 1225(b)(1)(B)(ii); 8 C.F.R. § 208.30(f) (2009) (the applicant will receive “full consideration of the asylum and withholding of removal claim in proceedings under section 240 of the Act”).

29. Frequently Asked Questions about the Final Rule for the Medical Examination of Aliens—Revisions to Medical Screening Process, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/immigrantrefugeehealth/laws-regs/revisions-medical-screening/faq.html> (last reviewed Jan. 22, 2016) (“[I]mmigrants and refugees found to have these diseases may not enter the United States or adjust their immigration status until they have been appropriately treated and are no longer infectious.”); 42 C.F.R. § 34.3 (2016).

30. 8 U.S.C. § 1182(a)(1)(A)(i).

31. 8 U.S.C. § 1231(b)(3) (withholding of removal); 8 C.F.R. §§ 208.16–18 (2020) (protection under UN Convention Against Torture).

32. 8 U.S.C. § 1182(d)(5) (discretion to parole individuals temporarily into the United States; parole is not considered an admission).

33. By executive order, the President may specify diseases for which quarantine is authorized for the “purpose of preventing the introduction, transmission, or spread of such communicable diseases,” as recommended by the Secretary of the Dept. of Health and Human Services. 42 U.S.C. § 264. The list of quarantinable diseases includes cholera, diphtheria, infectious tuberculosis, plague, smallpox, yellow fever, and viral hemorrhagic fevers (including Ebola), SARS, and influenza “caused by novel or reemerging influenza viruses that are causing, or have the potential to cause, a pandemic.” Revised List of Quarantinable Communicable Diseases Exec. Order No. 13,295, 68 Fed. Reg. 17,255 (Apr. 9, 2003), *as amended* by Exec. Order No. 13,375, 70 Fed. Reg. 17,299 (Apr. 5, 2005) *and as further amended* by Exec. Order No. 13,674, 79 Fed. Reg. 45,671 (Aug. 6, 2014).

under the Trafficking Victims Protection Reauthorization Act.<sup>34</sup> This Part describes the new coronavirus-related travel restrictions, with an emphasis on the recent CDC order that has eviscerated these procedures, resulting in the *refoulement* of vulnerable asylees and unaccompanied children.

Several travel-related restrictions came into effect on March 20, 2020. First, the Department of Homeland Security (DHS) announced, in collaboration with the Mexican government,<sup>35</sup> that all *non-essential travel* would be suspended at the southern U.S. border.<sup>36</sup> The published rule defined non-essential travel as “travel that is considered tourism or recreational in nature,”<sup>37</sup> and affirmed that essential travel would “continue unimpeded” for economic and health-related reasons<sup>38</sup> to allow for “critical supply chains [for] . . . food, fuel, [and] medicine.”<sup>39</sup> Among its exceptions, the notification explicitly listed U.S. citizens and lawful permanent residents (LPRs) returning to the U.S., members of the armed forces, travel for medical and educational purposes, and official diplomatic travel.<sup>40</sup> While the suspension empowers the U.S. Customs and Border Protection (CBP) Commissioner to make humanitarian exceptions for individuals not engaged in “essential travel,”<sup>41</sup> it makes no mention of protection-seekers—either as persons engaged in “essential travel”<sup>42</sup> or as a group that is otherwise exempt from the border closure. The government has extended the initial restriction several times,<sup>43</sup> with the most recent extension

34. Trafficking Victims Protection Reauthorization Act, Pub. L. 110-457, Stat. 5044 (2008) (codified at 8 U.S.C. § 1232) (Establishing that for unaccompanied children who enter the U.S. from Mexico and Canada, an immigration officer must determine whether 1) the child fears returning to their country of nationality, 2) the child has been a victim of human trafficking or is at risk of becoming a victim of human trafficking if returned, or 3) the child is able to make an independent decision to withdraw her application for admission.). Unaccompanied children receive additional protections throughout the asylum process—including direct placement in removal proceedings under INA § 240, instead of first being subjected to expedited removal like other arrivals. 8 U.S.C. § 1232(a)(5)(D).

35. Secretaría de Relaciones Exteriores, *Comunicado No. 92: Iniciativa conjunta de México y Estados Unidos para combatir la pandemia de COVID-19*, Gobierno de México (Mar. 20, 2020), <https://www.gob.mx/sre/prensa/iniciativa-conjunta-de-mexico-y-estados-unidos-para-combatir-la-pandemia-de-covid-19> (announcing the U.S.-Mexico “joint initiative” to close the border to non-essential travel).

36. Press Release, Chad Wolf, Acting Sec’y, Dep’t of Homeland Sec., Joint Statement on US-Mexico Joint Initiative to Combat the COVID-19 Pandemic (Mar. 20, 2020), <https://www.dhs.gov/news/2020/03/20/joint-statement-us-mexico-joint-initiative-combat-covid-19-pandemic>.

37. Notification of Temporary Travel Restrictions Applicable to Land Ports of Entry and Ferries Service Between the United States and Mexico, 85 Fed. Reg. 16,547, 16,548 (Mar. 24, 2020).

38. Joint Statement on US-Mexico Joint Initiative to Combat the COVID-19 Pandemic, *supra* note 36.

39. Notification of Temporary Travel Restrictions, 85 Fed. Reg. 16,547, 16,548 (Mar. 24, 2020).

40. *Id.*

41. *Id.*

42. *See, e.g.*, JORGE LOWEREE, AARON REICHLIN-MELNICK & WALTER EWING, AM. IMMIGR. COUNCIL, THE IMPACT OF COVID-19 ON NONCITIZENS AND ACROSS THE U.S. IMMIGRATION SYSTEM 20 (May 2020) (arguing that “[f]leeing violence and persecution is ‘essential travel’”).

43. Press Release, Chad Wolf, Acting Sec’y, Dep’t of Homeland Sec., Acting Secretary Chad Wolf Statement on Non-Essential Travel (Apr. 20, 2020), <https://www.dhs.gov/news/2020/04/20/acting-secretary-chad-wolf-statement-non-essential-travel> (extending March 20, 2020 restriction on non-essential travel at the shared borders with Mexico and Canada for another 30 days); Press Release, Chad Wolf, Acting Sec’y, Dep’t of Homeland Sec., Acting Secretary Wolf’s Statement on Non-Essential Travel (May 19, 2020), <https://www.dhs.gov/news/2020/05/19/acting-secretary-wolf-s-statement-non-essential-travel> (“The President has made it clear that we must continue to keep legitimate, commercial trade flowing while limiting those seeking to enter our country for non-essential purposes.”); Notification



set to expire January 21, 2021.<sup>44</sup> The Administration also imposed a similar restriction on non-essential travel at the U.S.-Canada Border.<sup>45</sup>

Also effective March 20, 2020, the CDC implemented a rule enabling its Director to suspend the entry of persons who pose a “serious danger of the introduction of . . . disease into the United States.”<sup>46</sup> The Rule does not contemplate individual testing, nor require that orders issued under its authority apply only to persons who actually have the disease of concern.<sup>47</sup> The CDC rule exempts U.S. citizens, LPRs, and members of the armed forces from such orders.<sup>48</sup> In justifying these exceptions, the CDC affirmed that “quarantine, isolation, and conditional release . . . can mitigate any transmission or spread of COVID-19.”<sup>49</sup> Again, an exception related to asylum-seekers fleeing persecution or torture is notably missing from the Rule.

The Rule is based on a little-known provision of the U.S. Code—Title 42, Section 265—enacted in 1944 as part of the Public Health Service Act (Title III, Section 362).<sup>50</sup> The Act was drafted in the post-war period, amidst concerns regarding soldiers returning from foreign countries with “tropical

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of Temporary Travel Restrictions Applicable to Land Ports of Entry and Ferries Service Between the United States and Mexico, 85 Fed. Reg. 31,057 (May 22, 2020); Notification of Temporary Travel Restrictions Applicable to Land Ports of Entry and Ferries Service Between the United States and Mexico, 85 Fed. Reg. 37,745 (June 24, 2020); Notification of Temporary Travel Restrictions Applicable to Land Ports of Entry and Ferries Service Between the United States and Mexico, 85 Fed. Reg. 44,183 (July 22, 2020); Notification of Temporary Travel Restrictions Applicable to Land Ports of Entry and Ferries Service Between the United States and Mexico, 85 Fed. Reg. 51,633 (Aug. 21, 2020); Notification of Temporary Travel Restrictions Applicable to Land Ports of Entry and Ferries Service Between the United States and Mexico, 85 Fed. Reg. 59,669 (Sept. 23, 2020); Notification of Temporary Travel Restrictions Applicable to Land Ports of Entry and Ferries Service Between the United States and Mexico, 85 Fed. Reg. 67,275 (Oct. 22, 2020); Notification of Temporary Travel Restrictions Applicable to Land Ports of Entry and Ferries Service Between the United States and Mexico, 85 Fed. Reg. 74,604 (Nov. 23, 2020).

44. Notification of Temporary Travel Restrictions Applicable to Land Ports of Entry and Ferries Service Between the United States and Mexico, 85 Fed. Reg. 83,433 (Dec. 22, 2020).

45. Notification of Temporary Travel Restrictions Applicable to Land Ports of Entry and Ferries Service Between the United States and Canada, 85 Fed. Reg. 16,548 (Mar. 24, 2020).

46. Ctrs. for Disease Control and Prevention, Dep’t of Health and Human Servs., “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, 16,564 (March 24, 2020) [hereinafter CDC Rule]; *see also* 42 C.F.R. § 71.40 (2020) (“[p]rohibiting the introduction of persons from designated foreign countries and places into the United States”).

47. 42 C.F.R. § 71.40(c) (“In any order issued under this section, the Director shall designate the foreign countries (or one or more political subdivisions or regions thereof) or places; the period of time or circumstances under which the introduction of *any persons or class of persons* into the United States shall be suspended; and the conditions under which that prohibition on introduction, in whole or in part, shall be effective, including any relevant exceptions that the Director determines are appropriate.”) (emphasis added).

48. CDC Rule, *supra* note 46, at 16,564; *see also* 42 C.F.R. §§ 71.40(e), (f).

49. CDC Rule, *supra* note 46, at 16,564; *see also* 42 C.F.R. § 71.40(e).

50. 42 U.S.C. § 265 (2018) (“Whenever the Surgeon General determines that by reason of the existence of any communicable disease in a foreign country there is serious danger of the introduction of such disease into the United States, . . . the Surgeon General, . . . shall have the power to prohibit, in whole or in part, the introduction of persons and property from such countries or places as he shall designate in order to avert such danger, and for such period of time as he may deem necessary for such purpose.”).

diseases.”<sup>51</sup> The proliferation of airplane travel also inspired concerns about controlling and defending against disease.<sup>52</sup> Section 265 provides that the government<sup>53</sup> may limit entry to the United States where “by reason of the existence of any communicable disease in a foreign country there is serious danger of the *introduction* of such disease into the United States.”<sup>54</sup> Prior to the CDC rule, no regulation under this provision had been applied in the immigration context—let alone as a mechanism to deport noncitizens<sup>55</sup>—including during recent contagious outbreaks like the Severe Acute Respiratory Syndrome (SARS-CoV) epidemic in 2003, and the Ebola epidemic in 2014-2016.<sup>56</sup>

Immediately following the Rule’s publication, CDC Director Robert R. Redfield issued an Order,<sup>57</sup> also effective March 20, 2020, prohibiting individuals from entering the United States from Canada or Mexico “who would otherwise be introduced into a congregate setting in a land Port of Entry (POE) or Border Patrol station at or near the United States borders with Canada and Mexico.”<sup>58</sup> The suspension on entry applies to all such persons—without individual inspection or limitation to persons who actually have COVID-19.<sup>59</sup> The Order itself, issued in consultation with DHS,<sup>60</sup> acknowledges that the majority of persons affected by this suspension would be “aliens who lack valid travel documents.”<sup>61</sup> In this way, the Order is a

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51. 90 CONG. REC. 4796 (1944) (statement of Mr. Brown); *see also A Bill to Codify the Laws Relating to the Public Health Service, and for Other Purposes: Hearing on H.R. 3379 Before the Subcomm. of the H. Comm. on Interstate and Foreign Com.* 78th Cong. 46 (1944).

46 (1944) (“It is quite likely that special quarantine measures will have to be taken to prevent the wartime introduction into this country of certain diseases. . . .”) (statement of Dr. Parran).

52. *Hearing, supra* note 51, at 45 (statement of Dr. Parran) (emphasizing “the fact that the revolution in travel brought about by the airplane has necessitated the revolution of our methods of control and our defense against disease.”).

53. Originally, the Surgeon General was granted this power, which now falls under the purview of the Secretary of Health and Human Services. *See* 42 U.S.C. § 265. The CDC is a part of the Department of Health and Human Services.

54. *Compare* 42 U.S.C. § 265 (“introduction”), *with* 42 U.S.C. § 264 (“introduction, transmission, or spread”) (broader language governing “the introduction, transmission, or spread of communicable diseases” included in other sections of the Public Health Service Act is explicitly omitted from Section 265, implying that, under *expressio unius est exclusio alterius* (the “negative-implication canon” of statutory interpretation), the suspension of entries provision was limited to the “introduction” of disease into the United States).

55. *See* Guttentag, *Coronavirus Border Expulsions, supra* note 13 (“The regulations under Section 362 and adjacent provisions (until the current emergency rule) confirm the statute’s role as preventing the introduction of goods and authorizing the quarantine of people (both citizens and noncitizens). The regulations never before—in over seventy-five years—sought to use the statute as a substitute or mechanism for regulating admission under the immigration laws or for authorizing a noncitizen’s deportation or return to their home country.”).

56. *See* Centers for Disease Control and Prevention, “Severe Acute Respiratory Syndrome (SARS),” CDC (last updated Dec. 6, 2017), <https://www.cdc.gov/sars/index.html>; Centers for Disease Control and Prevention, “2014-2016 Ebola Outbreak in West Africa,” CDC (last updated March 8, 2019), <https://www.cdc.gov/vhf/ebola/history/2014-2016-outbreak/index.html>.

57. CDC order, *supra* note 4.

58. *Id.* at 17,061.

59. *See generally id.* at 17,065-66.

60. *Id.* at 17,067.

61. *Id.* at 17,061.

blanket ban preventing asylum-seekers from entering the U.S. because individuals who seek protection at the border necessarily arrive without travel documents as there is no “asylum-seeker visa.”<sup>62</sup> The initial suspension order was set to expire after 30 days, but it has since been extended indefinitely—until the CDC “determine[s] that the danger” has subsided.<sup>63</sup> This extension also amended the Order’s scope, applying the suspension to both land *and coastal* ports of entry and border patrol stations.<sup>64</sup>

While the Order enables DHS to immediately return individuals without providing them with an opportunity to apply for asylum,<sup>65</sup> DHS officers may determine “with approval from a supervisor” that humanitarian considerations warrant an exemption.<sup>66</sup> However, the most recent data available reveals that only two individuals have received protection under this exception.<sup>67</sup> In what the Administration named “Operation Capiro,” Border Patrol agents have been instructed to “immediately” return persons subject to the CDC order to Mexico or Canada.<sup>68</sup> If return to their point of transit is not possible, the guidance states that individuals will be expelled to their “country of citizenship.”<sup>69</sup>

Operation Capiro provides one very limited measure related to protection-seekers under the Convention Against Torture (CAT).<sup>70</sup> However, agents are

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62. In making clear that asylum-seekers are not welcome under this Order, the text states: “DHS has informed CDC that persons who are traveling from Canada or Mexico (regardless of their country of origin), and who must be held longer in congregate settings in POEs or Border Patrol stations to facilitate immigration processing, would typically be aliens seeking to enter the United States at POEs who do not have proper travel documents, aliens whose entry is otherwise contrary to law, and aliens who are apprehended near the border seeking to unlawfully enter the United States between POEs. This order is intended to cover all such aliens.” *Id.*

63. 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. 31,503, 31,504 (May 26, 2020) [hereinafter CDC order Amendment and Extension] (“I am extending the duration of the Order until I determine that the danger of further introduction of COVID-19 into the United States has ceased to be a serious danger to the public health, and continuation of the Order is no longer necessary to protect the public health.”). *Id.* (The CDC will review the Order every 30 days.)

64. *Id.* at 31,507.

65. CDC order, *supra* note 4, at 17,067 (“[Using] repatriation flights to move covered aliens on a space-available basis” either to Mexico or to their country of origin.)

66. *Id.* at 17,061.

67. Nick Miroff, *Under Trump Border Rules, U.S. Has Granted Refuge to Just Two People Since Late March, Records Show*, WASH. POST (May 13, 2020), [https://www.washingtonpost.com/immigration/border-refuge-trump-records/2020/05/13/93ea9ed6-951c-11ea-8107-acde2f7a8d6e\\_story.html](https://www.washingtonpost.com/immigration/border-refuge-trump-records/2020/05/13/93ea9ed6-951c-11ea-8107-acde2f7a8d6e_story.html) [<https://perma.cc/9BXF-9JGH>] (From March 21, 2020 to May 14, 2020, border agents provided relief to only two protection-seekers under CAT, “according to unpublished U.S. Citizenship and Immigration Services data obtained by *The Washington Post*”). While not a perfect comparison, to understand how low this figure is compared to normal admission rates: From FY2015-FY2019, the U.S. granted asylum to an average of 322.79 asylees per month from Mexico and the Northern Triangle alone. See *infra* note 118 (detailing total grant figures for these countries over the 5-year period); see also *Asylum Decisions by Custody, Representation, Nationality, Location, Month and Year, Outcome and More*, TRAC IMMIGR., <https://trac.syr.edu/phptools/immigration/asylum/> (The U.S. granted protection to 50.42% of asylum-seekers in FY2015, and to 30.8% in FY2019).

68. Covid-19 Capiro, U.S. CUSTOMS AND BORDER PATROL (2020) [hereinafter Operation Capiro Memo], <https://www.documentcloud.org/documents/6824221-COVID-19-CAPIO.html> [<https://perma.cc/GKR4-78HF>] (last accessed Feb. 27, 2021).

69. *Id.*

70. See *id.*

not empowered to ask individuals if they fear torture in Mexico or their country of origin as they normally would;<sup>71</sup> it is incumbent upon the protection-seeker to make an “affirmative, spontaneous and reasonably believable claim.”<sup>72</sup> Even if agents wish to make exceptions, they must “seek Supervisory Guidance.”<sup>73</sup> Additionally, there is no measure to except individuals seeking asylum—meaning those who have a well-founded fear of persecution (not necessarily torture) on any of the other protected grounds that U.S. and international law afford, including race, nationality, political opinion, religion, or membership in a particular social group.<sup>74</sup> There is also no exception for unaccompanied children.<sup>75</sup>

Accounting for the Order’s excepted populations, like U.S. citizens and LPRs, and for U.S. laws that already allow the government to expeditiously remove noncitizens unless they claim asylum or some other form of humanitarian protection,<sup>76</sup> the only group that the Order affects are protection-seekers. In this way, the Order is like “a bullseye drawn on the side of the barn around the arrow that has already been shot.”<sup>77</sup>

In addition to the above measures, President Trump also issued several proclamations restricting international travel, suspending the entry of foreign nationals who visit China,<sup>78</sup> Iran,<sup>79</sup> Schengen Countries,<sup>80</sup> the UK or Ireland,<sup>81</sup> and Brazil<sup>82</sup> fourteen days before attempting to enter the United States. However, among the litany of exceptions in these proclamations, there is a clear prohibition on applying the restrictions to those seeking protection in the United States: “Nothing in this proclamation shall be construed to limit the ability of an individual to seek asylum, refugee status, withholding of removal, or protection under [CAT].”<sup>83</sup> The President also issued a

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71. See, e.g., *Claims of Fear*, U.S. CUSTOMS AND BORDER PROT., <https://www.cbp.gov/newsroom/stats/sw-border-migration/claims-fear> [<https://perma.cc/Z6YW-G6YF>] (last updated Oct. 23, 2019) (CBP agents and officers question apprehended individuals directly “regarding any fear they may have of returning to their country of origin, to ensure that each detainee is afforded the ability to articulate claims of fear.”).

72. Operation Capiro Memo, *supra* note 68, at 4 (emphasis added).

73. *Id.*

74. 8 U.S.C. § 1101(a)(42); 1951 Convention, *supra* note 1, art. 1(a)(2).

75. See Letter from Dianne Feinstein, Ranking Member, Senate Judiciary Comm., et al., to Chad F. Wolf, Acting Sec’y, U.S. Dep’t of Homeland Security (Mar. 30, 2020), [https://judiciary.house.gov/uploadedfiles/3.30.2020\\_letter\\_to\\_dhs\\_re\\_tvpra.pdf](https://judiciary.house.gov/uploadedfiles/3.30.2020_letter_to_dhs_re_tvpra.pdf) (noting concerns that DHS is summarily removing unaccompanied children under the coronavirus Order “in violation of their legal rights under the [TVPR].”); see also 8 U.S.C. § 1232(a)(2); *supra* note 34 (discussing unaccompanied children’s rights under the TVPRA); *supra* note 6 (The District Court for the District of Columbia enjoined the application of the CDC orders to unaccompanied minors on November 18, 2020.).

76. 8 U.S.C. § 1225 (expedited removal procedure).

77. Guttentag, *Coronavirus Border Expulsions*, *supra* note 13 (explaining “the Order is crafted to target the population of noncitizens seeking asylum and protection from persecution at the southern border and renders them subject to a summary CDC expulsion while denying them the opportunity to claim asylum or protection from persecution under existing law.”).

78. Proclamation No. 9984, 85 Fed. Reg. 6,709, 6,710 (Jan. 31, 2020).

79. Proclamation No. 9992, 85 Fed. Reg. 12,855, 12,856 (Feb. 29, 2020).

80. Proclamation No. 9993, 85 Fed. Reg. 15,045, 15,046 (Mar. 11, 2020).

81. Proclamation No. 9996, 85 Fed. Reg. 15,341, 15,342 (Mar. 14, 2020).

82. Proclamation No. 10041, 85 Fed. Reg. 31,933, 31,934 (May 24, 2020).

83. Proclamations No. 9984, § 2(b); 9992, § 2(b); 9993, § 2(b); 9996, §2(b); 10041, § 2(b).

proclamation suspending the entry of foreign nationals located outside of the U.S. who do not have a valid visa or “an official travel document other than a visa” for 60 days to protect the U.S. labor market.<sup>84</sup> This restriction lists several exceptions, including the same language excepting protection-seekers.<sup>85</sup> However, while these proclamations demonstrate that including explicit language to protect asylum-seekers is possible, these exceptions do not actually help individuals in need of protection; visa policies and carrier sanctions mean that the vast majority of persons seeking asylum must enter the U.S. at a land border to lodge their protection claims.<sup>86</sup> The CDC order has effectively ended that possibility—explaining why it has been labeled the “Asylum Ban.”<sup>87</sup> In less than ten months under the Order, almost 400,000 asylum-seekers have been expelled across the U.S. border.<sup>88</sup> This includes at least 15,848 unaccompanied children.<sup>89</sup>

## II. PANDEMIC PRETEXT

The coronavirus pandemic has provided a convenient pretext for the Trump administration’s unabashed anti-immigrant agenda. In order to fully understand the Asylum Ban’s true motivations, it is essential to situate the closure at the border in the larger context of the Administration’s transparent political project to prevent asylum-seekers from accessing protection in the U.S. Below, Section A provides a high-level discussion of the role pretext may play in reviewing administrative and constitutional law challenges to executive branch decisions. Next, Section B turns to this Part’s primary project: establishing that the CDC order was based on unsupported, pretextual justifications. In furtherance of this endeavor, it first describes the Administration’s anti-immigrant rhetoric and the law and policy measures it instituted to dismantle protection opportunities in the United States, pre-COVID-19. Then, it analyzes the CDC’s Asylum Ban in light of this established project, critically

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84. Proclamation No. 10,014, 85 Fed. Reg. 23,441, 23,442 (Apr. 22, 2020). This prohibition was extended through December 31, 2020); Proclamation No. 10,052, 85 Fed. Reg. 38,263, 38,264 (June 22, 2020).

85. Proclamation 10,014, 85 Fed. Reg. 23,441, 23,443 (Apr. 22, 2020).

86. See, e.g., DAVID SCOTT FITZGERALD, *REFUGEE BEYOND REACH: HOW RICH DEMOCRACIES REPEL ASYLUM SEEKERS* 58–70 (Oxford Univ. Press 2019) (describing the “Dome over the Golden Door,” whereby mechanisms including visas and carrier sanctions are used to prevent undocumented persons, including asylum-seekers, from accessing flights to the United States); see also Shalini B. Ray, *Optimal Asylum*, 46 VAND. J. TRANSNAT’L L. 1215, 1230–31 (2013) (“[B]ecause satisfying the definition of a refugee is not a basis for receiving a U.S. visa, ‘as a practical matter, most asylum seekers cannot use the normal migration procedures to reach U.S. . . . soil and apply for asylum.’ . . . Thus, the asylum system expects and relies upon illegal or deceptive entry.”).

87. See May 12 Letter from Congress, *supra* note 18, at 1.

88. CUSTOMS AND BORDER PROT., *FY 2020 Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions*, *supra* note 5; CUSTOMS AND BORDER PROT., *Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions*, *supra* note 5.

89. See CUSTOMS AND BORDER PROT., *Southwest Border Encounters*, *supra* note 6 (establishing that 15,848 unaccompanied minors were expelled at the U.S. Southwest land border under Title 42 from FY 2020 thru FYTD 2021) (last updated Jan. 7, 2021).

evaluating the U.S. government's proffered justifications for the Order as a public health measure.

### A. *Pretext and the Law*

This Section briefly contemplates the justiciability of claims alleging that the government has provided false justification for its actions as a cover for its true, impermissible motivations.<sup>90</sup>

The Supreme Court expressly (and exclusively) invalidated an agency decision on the basis of pretext for the first time in 2019.<sup>91</sup> In *Dep't of Commerce v. New York*, the Court held that the Secretary of Commerce's proffered justification for reinstating a citizenship question on the 2020 census was "contrived" and remanded the case to the agency.<sup>92</sup> In its opinion, the majority underscored that "meaningful judicial review" requires that an agency "disclose the basis" for its action and, further, that it is appropriate for courts to "inquire into 'the mental processes of administrative decision-makers' upon a 'strong showing of bad faith or improper behavior.'"<sup>93</sup> The Court clarified that administrative law's "reasoned explanation requirement . . . is meant to ensure that agencies offer *genuine justifications* for important decisions" to allow for meaningful judicial review.<sup>94</sup> While some scholars question the broader applicability of this case,<sup>95</sup> other courts also have held that agency decisions based on pretextual justifications must be set aside for

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90. See *supra* notes 15–20 and accompanying text (describing the Article's goals and discussing rule of law concerns where the government proffers unsupported justifications in bad faith). A comprehensive analysis of how pretext informs judicial review of agency decisions is beyond the scope of this project. This Article is concerned with the fundamental issue of establishing that the CDC order was justified using the pandemic as a pretext and situating the measure in the context of the Administration's political motivations to curtail asylum protections. See, e.g., Shalini Bhargava Ray, *The Emerging Lessons of Trump v. Hawaii*, 29 WM. & MARY BILL RTS. J. xxx, xxx (forthcoming 2021), available at <https://srn.com/abstract=3632485> (considering the implications of *Trump v. Hawaii* for rights-based challenges to executive action in immigration law under both administrative and constitutional law challenges). For deeper analysis of recent immigration law claims alleging impermissible pretextual justifications, see Tally Kritzman–Amir & Jaya Ramji–Nogales, *Nationality Bans*, 2 U. ILL. L. REV. 563, 581–93 (2019) (discussing the U.S. nationality bans under the Trump administration); *Id.* at 597–602 (analyzing nationality bans as pretextual).

91. *Dep't of Commerce v. New York*, 139 S. Ct. at 2578 (Thomas, J., dissenting).

92. *Id.* at 2559 (the action "reveal[ed] a significant mismatch between the Secretary's decision and the rationale he provided . . . [and that the] stated reason—seems to have been contrived").

93. *Id.* at 2573–74 (internal citations omitted).

94. *Id.* at 2575–76 (emphasis added) (agencies must provide "genuine justifications . . . reasons that can be scrutinized by courts and the interested public. Accepting contrived reasons would defeat the purpose of the enterprise. If judicial review is to be more than an empty ritual, it must demand something better than the explanation offered for the action taken in this case.").

95. See, e.g., Jennifer Nou, *Census Symposium: A Place for Pretext in Administrative Law?*, SCOTUS BLOG (June 28, 2019), <https://www.scotusblog.com/2019/06/census-symposium-a-place-for-pretext-in-administrative-law/> ("Whatever the explanation, administrative law has and will likely continue to tolerate some forms of pretext. A potentially new principle introduced in this case, however, is the idea that such pretext must at least be plausible. . . . [W]hen the available evidence suggests that the only stated rationale is implausible, not credible, then agencies run afoul of the APA."); Samuel Estricher, "Pretext" and Review of Executive Decisionmaking in the Citizenship Census Question Case, VERDICT (July 9, 2019), <https://verdict.justia.com/2019/07/09/pretext-and-review-of-executive-decisionmaking-in-the-citizenship-census-question-case>.

violating the Administrative Procedure Act (APA).<sup>96</sup> It is unclear how the Court will treat future allegations of pretext in the administrative law arena, but there are alternative standards of review<sup>97</sup> it may use to set aside agency decisions that are based on false, politically motivated justifications.<sup>98</sup>

Additionally, false justifications also may be reviewed in the context of constitutional law violations—such as equal protection or establishment clause claims alleging that a decision was motivated by discriminatory animus. When a law or policy is issued in bad faith, courts may “look behind” its stated purpose to assess whether it is pretextual.<sup>99</sup> However, in the immigration law context, constitutional challenges face an uphill battle.<sup>100</sup> Under the plenary power doctrine, courts accord great deference to the political branches’ immigration law and policy decisions.<sup>101</sup> While scholars have questioned the doctrine’s absolute nature,<sup>102</sup> the Supreme Court’s decision in *Trump v. Hawaii*<sup>103</sup> paints a less optimistic picture. In upholding the President’s Travel Ban,<sup>104</sup> the Court found the Administration’s national

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96. See, e.g., *Woods Petroleum Corp. v. U.S. Dep’t of the Interior*, 18 F.3d 854, 859 (10th Cir. 1994) (setting aside agency action for abuse of discretion where the justification provided for Secretary’s administrative order constituted “a pretext for [the agency’s] ulterior motive”).

97. Agency actions may be set aside for a number of reasons, including where they are deemed “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). Agency actions are generally reviewable, except in very limited circumstances where “statutes preclude judicial review” or “agency action is committed to agency discretion by law. 5 U.S.C. § 701(a); see also *Abbott Labs. v. Gardner*, 387 U.S. 136, 139–41 (1967) (announcing presumption in favor of judicial review); *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (noting that the agency discretion exception is “very narrow”); Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV., 690, 691 (1990) (the “agency discretion” exception is “quite small” and some scholars have questioned whether it “exists in a meaningful sense.”).

98. The Court has historically relied on the arbitrary and capricious standard of review to assess the role of political judgments in agency decision-making. See, e.g., Case Comment, *Census Act—Review of Administrative Action—Judicial Review of Pretext—Department of Commerce v. New York*, 133 HARV. L. REV., 372, 377–78 (2019) (“‘Hard look’ arbitrary and capricious review provides an opportunity for courts to determine if an administrative judgment is impermissibly inflected by politics.”).

99. *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554, 590–91 (4th Cir. 2017), *vacating as moot* 138 S. Ct. 353 (2017) (citing *Kerry v. Din*, 135 S. Ct. 2128, 2141 (2015) (Kennedy, J., concurring) (“[W]here a plaintiff makes ‘an affirmative showing of bad faith’ that is ‘plausibly alleged with sufficient particularity,’ courts may ‘look behind’ the challenged action to assess its ‘facially legitimate’ justification.”).

100. Ray, *The Emerging Lessons of Trump v. Hawaii*, *supra* note 90, at 19 (noting that “many classes of immigrants lack strong constitutional rights”). Furthermore, “*Trump v. Hawaii* and its use in the district courts reveals the inadequacy of constitutional rights-based claims for protecting immigrants’ well-being. . . . [But] “[t]raditional administrative law claims offer some hope [for immigrants’ rights], as evidenced in the [recent] TPS, DACA, humanitarian parole, and waiver litigation.” *Id.* at 31.

101. See *Chae Chan Ping v. United States (Chinese Exclusion Case)*, 130 U.S. 581, 599–600 (1889) (establishing practice of extreme deference to Congress and the executive branch regarding immigration law and policy decisions); see also David A. Martin, *Why Immigration’s Plenary Power Doctrine Endures*, 68 OKLA. L. REV. 29 (2015) (explaining the plenary power doctrine).

102. See, e.g., Shalini Bhargava Ray, *Plenary Power and Animus in Immigration Law*, 80.1 OHIO ST. L.J. 13, 13 (2019) (questioning whether improper or mixed motives, particularly “explicit presidential animus,” affects this deferential standard of review); see also Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 606 (1990) (describing the plenary power doctrine’s “steady erosion”).

103. *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (holding that the Travel Ban does not violate the Establishment Clause).

104. Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 27, 2017) (barring the entry of nationals from six majority-Muslim nations, as well as Venezuela and North Korea).

security justification sufficient to support the action, despite plaintiffs' claim that the ban was motivated by impermissible racial animus.<sup>105</sup> The dissent, however, disagreed with the majority's lenient standard of review,<sup>106</sup> and further asserted that the Proclamation should fail *even under rational basis scrutiny* since "the policy [was] 'inexplicable by anything but animus.'"<sup>107</sup> Indeed, the action at the heart of *Trump v. Hawaii* is very different from the CDC order discussed herein. *Trump v. Hawaii* concerned a presidential proclamation issued under the authority of the INA, in the name of national security. Here, the CDC order is an agency action promulgated under the authority of a public health law, justified in the name of public health. Given that this Order was not animated by national security concerns, and that the plenary power doctrine does not apply outside of immigration law measures, courts should not afford the CDC's action any special deferential review.<sup>108</sup>

Again, it is unclear how courts will use evidence of pretextual justifications in reviewing administrative and constitutional law challenges to agency actions like the CDC order. Yet the *Dep't of Commerce v. New York* decision suggests that the Supreme Court is willing to invalidate agency decisions on the basis of pretext. Constitutional law challenges could also be viable—particularly since the plenary power doctrine would not apply to the Order. Future litigation will continue to clarify the justiciability of pretext in this context but, for now, scrutinizing how the Order itself was justified on pretextual grounds is an important, initial step. The next Section examines the insincerity of the CDC's proffered justifications for its Asylum Ban.

### B. "Racism Masquerading Poorly as Immigration Policy"<sup>109</sup>

From the first step on the campaign trail, extending throughout his presidency, Donald Trump and his administration have employed xenophobic and racist rhetoric to describe migrants, including asylum-seekers. The Administration also has a well-documented pattern of implementing extreme policies to stymie migration—particularly at the southern border. This collection of language and actions, starting well before the pandemic, support the

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105. *Trump v. Hawaii*, 138 S. Ct. at 2417.

106. *Id.* at 2441 (Sotomayor, J., dissenting) ("That approach is perplexing, given that in other Establishment Clause cases, including those involving claims of religious animus or discrimination, this Court has applied a more stringent standard of review.")

107. *Id.* (internal citation omitted). The dissent also noted that the Court has "recogniz[ed] that classifications predicated on discriminatory animus can never be legitimate because the Government has no legitimate interest in exploiting 'mere negative attitudes, or fear' toward a disfavored group." *Id.* (citing *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 448 (1985)).

108. For an in-depth analysis of exclusion orders issued in the immigration law context under the auspices of national security, where there is also direct evidence of racial or religious animus, see Ray, *Plenary Power and Animus in Immigration Law*, *supra* note 102, at 101–02.

109. John Bowden, *Blumenthal: Trump's 'S-hole' Comment Is 'Racism Masquerading Poorly as Immigration Policy'*, THE HILL (Jan. 11, 2018, 7:21 PM), <https://thehill.com/blogs/blog-briefingroom/news/368628-blumenthal-trumps-s-hole-comment-is-racism-masquerading-poorly> [<https://perma.cc/WLT2-TTZ7>].



contention that justifying new restrictions in the name of combatting COVID-19 is pretextual.<sup>110</sup>

### 1. *Anti-Immigrant Rhetoric*

President Trump ran on an explicit pledge to seal the US-Mexico border, emphasizing,

When Mexico sends its people, they're not sending their best. . . . They're sending people that have lots of problems, and they're bringing those problems with us. They're bringing drugs. They're bringing crime. They're rapists. And some, I assume, are good people. . . . It's coming from more than Mexico. It's coming from all over South and Latin America.<sup>111</sup>

Throughout his presidency, Trump continually has asserted that migrants seeking entry at the border are “bad people”<sup>112</sup>—a collection of terrorists,<sup>113</sup> gang members,<sup>114</sup> and criminals.<sup>115</sup> Occasionally, he made the racial element of his animus explicit.<sup>116</sup> Additionally, President Trump has been very vocal about his disdain for the U.S. asylum system, accusing asylum-seekers of engaging in a “big fat con job,” and claiming “that U.S. laws offering protection from persecution are hampering his efforts to protect the nation from illegal immigration.”<sup>117</sup> However, statistics on grants of asylum in the United

110. While this Section focuses on the southern border, scholars also have identified that the Administration uses immigration measures as pretext for racially discriminating against asylum-seekers outside of the U.S.-Mexico border context. *See, e.g.*, Tally Kritzman-Amir & Jaya Ramji-Nogales, *Nationality Bans*, 2 U. ILL. L. REV. 563, 597–599 (2019) (discussing how Trump’s Muslim Ban “has been used as a pretext for racial and religious discrimination”).

111. *Full Text: Donald Trump Announces a Presidential Bid*, WASH. POST: POLITICS (June 16, 2015, 1:03 PM), <https://www.washingtonpost.com/news/post-politics/wp/2015/06/16/full-text-donald-trump-announces-a-presidential-bid/>.

112. *See, e.g.*, Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 29, 2018, 10:41 AM), <https://twitter.com/realDonaldTrump/status/1056919064906469376> (“Many Gang Members and some very bad people are mixed into the Caravan heading to our Southern Border.”).

113. *See, e.g.*, Exec. Order No. 13,769 (Jan. 27, 2017), [https://trumpwhitehouse.archives.gov/presidential-actions/executive-order-protecting-nation-foreign-terrorist-entry-united-states/\(suspending-refugee-entry-into-the-United-States-for-120-days\)](https://trumpwhitehouse.archives.gov/presidential-actions/executive-order-protecting-nation-foreign-terrorist-entry-united-states/(suspending-refugee-entry-into-the-United-States-for-120-days)).

114. *See, e.g.*, *President Trump on Border Security and Government Funding*, C-SPAN (Feb. 15, 2019), <https://www.c-span.org/video/?457952-1/president-trump-delivers-remarks-border-security-government-funding> (“We’re talking about an invasion of our country with drugs, with human traffickers, with all types of criminals and gangs.”).

115. *See, e.g.*, Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 22, 2018, 8:37 AM), <https://twitter.com/realDonaldTrump/status/1054351078328885248> [[https://web.archive.org/web/20181022123747if\\_/https://twitter.com/realDonaldTrump/status/1054351078328885248](https://web.archive.org/web/20181022123747if_/https://twitter.com/realDonaldTrump/status/1054351078328885248)] (“Criminals and unknown Middle Easterners are mixed in.”); Molly McKitterick, *Number of Criminals in Migrant Caravan – Does It Matter?*, VOA (Dec. 5, 2018, 7:23 AM), <https://www.voanews.com/usa/number-criminals-migrant-caravan-does-it-matter>.

116. Donald J. Trump (@realDonaldTrump), TWITTER (May 17, 2019, 6:44 AM), <https://twitter.com/realDonaldTrump/status/1129336982319050752> [<https://web.archive.org/web/20210107042400/https://twitter.com/realDonaldTrump/status/1129336982319050752>] (“Border Patrol is apprehending record numbers of people at the Southern Border. The bad ‘hombres,’ of which there are many, are being detained & will be sent home.”).

117. Maria Sacchetti, *U.S. Asylum Process Is at the Center of Trump’s Immigration Ire*, WASH. POST (Apr. 9, 2019, 6:21 PM), [https://www.washingtonpost.com/immigration/us-asylum-process-is-at-the-center-of-trumps-immigration-ire/2019/04/09/7f8259b8-5aec-11e9-842d-7d3ed7eb3957\\_story.html](https://www.washingtonpost.com/immigration/us-asylum-process-is-at-the-center-of-trumps-immigration-ire/2019/04/09/7f8259b8-5aec-11e9-842d-7d3ed7eb3957_story.html) [<https://perma.cc/SL6H-9NQZ>].

States unequivocally demonstrate that there are numerous asylum-seekers fleeing Mexico and the Northern Triangle with valid protection claims.<sup>118</sup>

President Trump has repeatedly warned that “[w]e have to close up the borders.”<sup>119</sup> In an effort to combat an imaginary “invasion,”<sup>120</sup> Trump promised to construct “a great, great wall on our southern border,”<sup>121</sup> and suggested fortifying the wall with electric fencing, “spikes . . . that could pierce human flesh,” “a water-filled trench, stocked with snakes or alligators,” and border guards who would shoot migrants in the legs “to slow them down.”<sup>122</sup> He also has derided “illegal immigrants” as an “infest[ation],”<sup>123</sup> evoking something in need of extermination, and has referred to asylee-producing nations including El Salvador, Haiti, and states in Africa as “shithole countries.”<sup>124</sup> Further dehumanizing those seeking to enter the U.S. at the southern border, Trump has warned, “You wouldn’t believe how bad these people are. These aren’t people. These are animals,”<sup>125</sup> comparing them with snakes.<sup>126</sup> The President has made these statements and promises without regard for the

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118. For example, the United States granted asylum to 4,892 Guatemalan nationals, 2,870 Mexican nationals, 4,689 Honduran nationals, and 6,923 Salvadoran nationals in FY2015–2019. See TRAC IMMIGR., *supra* note 67 (figures represent the sum of grants of asylum across “Fiscal Year of Decision” by “Nationality” and “Decision”). TRAC uses data from the Executive Office of Immigration Review (EOIR). *Id.*

119. See, e.g., Remarks Prior to a Meeting with President Abdelfattah Said Al-Sisi of Egypt and an Exchange with Reporters, 2019 DAILY COMP. PRES. DOC. 214 (Apr. 9, 2019), <https://www.govinfo.gov/content/pkg/DCPD-201900214/pdf/DCPD-201900214.pdf>.

120. Thomas Kaplan, *How the Trump Campaign Used Facebook Ads to Amplify His ‘Invasion’ Claim*, N.Y. TIMES (Aug. 5, 2019), <https://www.nytimes.com/2019/08/05/us/politics/trump-campaign-facebook-ads-invasion.html>. Trump has used “invasion” to describe immigration at the border in a myriad of other contexts. In his re-election advertisements on Facebook, President Trump published over 2,000 posts describing an “invasion” on the border with Mexico. See, e.g., Alexia Fernández Campbell, *Trump Described an Imaginary ‘Invasion’ at the Border 2 Dozen Times in the Past Year*, VOX (Aug. 7, 2019, 1:50 PM), <https://www.vox.com/identities/2019/8/7/20756775/el-paso-shooting-trump-hispanic-invasion> [<https://perma.cc/G7N7-WUUQ>].

121. *Donald Trump Announces a Presidential Bid*, *supra* note 111.

122. Michael D. Shear & Julie Hirschfeld Davis, *Shoot Migrants’ Legs, Build Alligator Moat: Behind Trump’s Ideas for Border*, N.Y. TIMES (Oct. 1, 2019), [www.nytimes.com/2019/10/01/us/politics/trump-border-wars.html](http://www.nytimes.com/2019/10/01/us/politics/trump-border-wars.html). Trump has denied advocating for a border moat. Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 2, 2019, 11:02 AM), <https://www.thetrumparchive.com/> (click “Date filters”; then set date range from “2019-10-02” to “2019-10-03”).

123. See, e.g., Donald J. Trump (@realDonaldTrump), TWITTER (June 19, 2018, 9:52 AM), <https://www.thetrumparchive.com/> (click “Date filters”; then set date range from “2018-06-19” to “2018-06-20”).

124. Josh Dawsey, *Trump Derides Protections for Immigrants from ‘Shithole’ Countries*, WASH. POST (Jan. 12, 2018, 7:52 AM), [https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94\\_story.html](https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94_story.html) (Trump also stated a preference for immigrants from Norway at this meeting.).

125. Remarks at a Roundtable Discussion on California’s Immigration Enforcement Policies, 2018 DAILY COMP. PRES. DOC. 338 (May 16, 2018), <https://www.govinfo.gov/content/pkg/DCPD-201800338/pdf/DCPD-201800338.pdf>. Trump later said he was referring only to MS-13 gang members. Donald J. Trump (@realDonaldTrump), TWITTER (May 18, 2018, 6:51 AM), <https://www.thetrumparchive.com/> (click “Date filters”; then set date range from “2018-05-18” to “2018-05-19”).

126. See, e.g., CBS News, *Trump Reads ‘The Snake’ Poem*, YOUTUBE (Apr. 29, 2017), <https://www.youtube.com/watch?v=qSrOXvoNLwg>; Dara Lind, “The Snake”: Donald Trump *Brings Back His Favorite Anti-Immigrant Fable* at CPAC, VOX (Feb. 23, 2018, 1:46 PM), <https://www.vox.com/policy-and-politics/2018/2/23/17044744/trump-snake-speech-cpac>.

United States' legal obligation to protect persons fleeing persecution and torture under domestic and international law.

In his unfaltering rhetoric, President Trump has made clear his hostility to migrants and his racially-animating views on migration.<sup>127</sup> This vitriol has been mirrored and advanced through the Administration's immigration policy.

## 2. *Law and Policy Measures*

While the Trump administration's transparent political agenda has vocally focused on constructing a *physical* wall to cage asylum-seekers in Mexico,<sup>128</sup> it is the laws and policies the Administration has implemented that have been extremely effective in closing the southern border. These "legal" walls are intended to prevent asylum-seekers from accessing effective protection in the United States, and to dissuade them from making the journey in the first place.

The Trump administration has imposed hurdles at every step in the process for protection-seekers: metering who may enter at the southern border to lodge an asylum claim,<sup>129</sup> requiring asylees who have submitted claims to wait in Mexico for the duration of their immigration proceedings under the Migration Protection Protocols (MPP) (also known as the "Remain in Mexico Policy"),<sup>130</sup> the "third country transit ban" that renders the vast majority of asylees ineligible for protection if they do not first apply for asylum in another country on their journey to the U.S.,<sup>131</sup> and asylum cooperative agreements with Mexico and the Northern Triangle countries to facilitate the expeditious return of individuals to these States.<sup>132</sup> Each of these laws and

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127. See Jayashri Srikantiah & Shirin Sinnar, *White Nationalism as Immigration Policy*, 71 STAN. L. REV. ONLINE 197, 198 (2019) ("The President's statements and policies suggest that he views U.S. national identity in racial terms and seeks to preserve the nation's predominantly white identity."); see also Fatma Marouf, *Immigration Challenges of the Past Decade and Future Reforms*, 73 SMU L. REV. F. 87, 100 (2020) ("Under the Trump Administration, explicit discrimination and xenophobic fearmongering have been a central part of the President's rhetoric.").

128. Donald J. Trump (@realDonaldTrump), TWITTER (Apr. 7, 2019, 9:03 PM), <https://twitter.com/realDonaldTrump/status/1115057524770844672> ("Mexico must apprehend all illegals and not let them make the long march up to the United States, or we will have no other choice than to Close the Border and/or institute Tariffs. Our Country is FULL!").

129. See, e.g., HILLEL R. SMITH, CONG. RESEARCH SERV., LSB10295, THE DEPARTMENT OF HOMELAND SECURITY'S REPORTED "METERING" POLICY: LEGAL ISSUES 2 (2019) [hereinafter DHS Metering Policy].

130. Press Release, Kirstjen M. Nielsen, Dep't of Homeland Sec., Sec'y Kirstjen M. Nielsen Announces Historic Action to Confront Illegal Immigration, Announces Migration Protection Protocols (Dec. 20, 2018), <https://www.dhs.gov/news/2018/12/20/secretary-nielsen-announces-historic-action-confront-illegal-immigration>.

131. Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829, 33,830 (July 16, 2019) ("[A]n alien who enters or attempts to enter the United States across the southern border after failing to apply for protection in a third country outside the alien's country of citizenship, nationality, or last lawful habitual residence through which the alien transited en route to the United States is ineligible for asylum.").

132. Joint Declaration and Supplementary Agreement Between the United States of America and Mexico, TIAS No. 19-607/2019, <https://www.state.gov/wp-content/uploads/2019/09/19-607-Mexico-Migration-and-Refugees.pdf>; Agreement Between the United States of America and Guatemala on Cooperation Regarding the

policies—MPP, metering, the third country transit ban—are the subject of ongoing litigation.<sup>133</sup> While this is not an exhaustive account of the law and policy measures the Trump administration has instituted to curtail protections for asylum-seekers, it demonstrates of the Administration’s intentions vis-à-vis this population of vulnerable migrants.

Over 69,000 individuals have been subjected to the MPP program,<sup>134</sup> forced to wait in Mexican border towns with well-documented security concerns while their asylum claims are adjudicated.<sup>135</sup> Many returnees have been subjected to violent attacks—there are over 1,300 “reported cases of murder, rape, torture, kidnapping [and] other violent assaults,”<sup>136</sup> although experts believe the actual number of such cases is much larger.<sup>137</sup> Even if asylees

Examination of Protection Claims, TIAS No. 19-1115/2019, <https://www.state.gov/wp-content/uploads/2020/01/19-1115-Migration-and-Refugees-Guatemala-ACA.pdf>; Agreement Between the Government of the United States of America and the Government of the Republic of El Salvador for Cooperation in the Examination of Protection Claims, TIAS No. 20-1210/2019, [https://www.state.gov/e1\\_salvador-20-1210](https://www.state.gov/e1_salvador-20-1210); Agreement on Asylum Cooperation, TIAS No. 20-325/2019 (Hond.), <https://2017-2021.state.gov/honduras-20-325/index.html>; see also Implementing Bilateral and Multilateral Asylum Cooperative Agreements under the Immigration and Nationality Act, 84 Fed. Reg. 63,994 (Nov. 19, 2019).

133. See, e.g., Press Release, The White House, Statement Regarding Migrant Protection Protocols Litigation (Apr. 9, 2019), <https://trumpwhitehouse.archiveswww.whitehouse.gov/briefings-statements/statement-regarding-migrant-protection-protocols-litigation> (MPP); *Washington v. United States*, 18-cv-939 (W.D. Wash. 2018) (metering); *Al Otro Lado, Inc. v. Nielsen*, 327 F.Supp.3d 1284 (S.D. Cal. 2017) (metering); *Barr v. E. Bay Sanctuary Covenant*, No. 19A230 (U.S. Sept. 11, 2019) (third country transit ban); DHS Metering Policy, *supra* note 129 (discussing 2017 class action lawsuit where plaintiffs claim that asylum seekers face “dangerous conditions of rampant crime and violence by gangs and cartels on the Mexican side of the border,” and that metering “creates unreasonable and life-threatening delays in processing asylum seekers.”); Miriam Jordan, *Appeals Court Allows ‘Remain in Mexico’ Policy to Continue Blocking Migrants at the Border*, N.Y. TIMES (Mar. 4, 2020), <https://www.nytimes.com/2020/03/04/us/migrants-border-remain-in-mexico-mpp-court.html>.

134. Syracuse Univ., *Details on MPP (Remain in Mexico) Deportation Proceedings*, TRAC IMMIGRATION, <https://trac.syr.edu/phptools/immigration/mpp/> [<https://perma.cc/WMT7-94DQ>] (last accessed Jan 9, 2021).

135. See, e.g., Overseas Advisory Council, Bureau of Diplomatic Sec., U.S. DEP’T OF STATE, MEXICO 2019 CRIME & SAFETY REPORT: CIUDAD JUAREZ (2019), <https://www.osac.gov/Content/Report/767346f9-d5f4-40e0-bc0e-15f4aeb82c35> [<https://perma.cc/S4A8-UEZT>] (“Kidnappings are a constant threat throughout the state of Chihuahua.”); Overseas Advisory Council, Bureau of Diplomatic Sec., U.S. DEP’T OF STATE, U.S. DEP’T OF STATE, MEXICO 2019 CRIME & SAFETY REPORT: MATAMOROS (2019), <https://www.osac.gov/Content/Report/03b73ba8-0cd3-4772-bc97-15f4aebfc985> [<https://perma.cc/524W-ZX7J>] (“The random nature of violence, combined with one of the highest kidnapping rates in Mexico, exposes everyone to a high risk of being subject to dangerous situations.”); Overseas Advisory Council, Bureau of Diplomatic Sec., U.S. DEP’T OF STATE, MEXICO 2019 CRIME & SAFETY REPORT: NUEVO LAREDO (2019), <https://www.osac.gov/Content/Report/4811d231-eea0-4a49-b25c-15f4aec0eb64> [<https://perma.cc/8C3N-Q7MW>] (“Violent crime, such as murder, armed robbery, carjacking, kidnapping, extortion, and sexual assault, is common.”); Overseas Advisory Council, Bureau of Diplomatic Sec., U.S. DEP’T OF STATE, MEXICO 2019 CRIME & SAFETY REPORT: TIJUANA (2019), <https://www.osac.gov/Country/Mexico/Content/Detail/Report/72d11598-3cfa-4ff4-a9bc-15f4aec22ce4> [<https://perma.cc/JLN2-ESNE>] (“Kidnapping-for-ransom is an established criminal activity”).

136. DELIVERED TO DANGER, <https://deliveredtodanger.org/> (last accessed Jan. 9, 2021) (current as of Dec. 15, 2020).

137. See, e.g., Maria Hinojosa, *The Moving Border: Part One, The North*, NPR: LATINO USA (May 20, 2020), <https://www.latinousa.org/2020/05/20/themovingborder/> (Maureen Meyer, WOLA Director for Mexico and Migrant Rights, emphasizes that these are just the reported cases and that the actual number of violent attacks is likely much higher); see also Kennji Kizuka, Eleanor Acer, & Rebecca Gendelman, *Pandemic as Pretext: Trump Administration Exploits COVID-19, Expels Asylum Seekers and Children to Escalating Danger*, HUMAN RTS. FIRST 9 (2020), <https://www.humanrightsfirst.org/resource/pandemic-pretext-trump-administration-exploits-covid-19-expels-asylum-seekers-and-children> (The 1,114 reported cases are likely an underestimate given that “COVID-19-realized traveler restrictions” have curtailed access to these populations.).

escape the reach of violent crime, they are still forced to live in crowded, unsanitary, makeshift camps at the border.<sup>138</sup> They also have limited access to legal representation,<sup>139</sup> which is a significant factor in successfully establishing asylum in the U.S.<sup>140</sup> While policies like MPP and metering have been paused in the wake of the coronavirus pandemic,<sup>141</sup> they have created a situation of extreme vulnerability for those now waiting in limbo on the Mexican side of the border as new measures to seal the United States have taken root.<sup>142</sup>

### C. *Justifying the Asylum Ban*

The Trump administration's clear and enduring racist rhetoric and myriad attempts to close the border demonstrate how pandemic-related restrictions on asylum-seekers are a continuation (and expansion) of these efforts. Beyond the rhetoric and policies discussed above, President Trump's chief adviser on immigration previously tried to leverage Title 42, Section 265 to seal the border.<sup>143</sup> Presidential adviser Stephen Miller attempted to employ this law to keep migrants from entering the U.S. on several occasions, including in response to a mumps outbreak in several U.S. detention facilities and

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138. Miriam Jordan, *Appeals Court Allows 'Remain in Mexico' Policy to Continue Blocking Migrants at the Border*, N.Y. TIMES, (Mar. 4, 2020), <https://www.nytimes.com/2020/03/04/us/migrants-border-remain-in-mexico-mpp-court.html>.

139. *Access to Attorneys Difficult for Those Required to Remain in Mexico*, TRAC IMMIGR. (July 29, 2019), <https://trac.syr.edu/immigration/reports/568/>.

140. See Jaya Ramji-Nogales, Andrew I. Schoenholtz, & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 340 (2007). In FY 2019, asylum applicants with an attorney were twice as likely to receive asylum or some other form of relief than those without. *Record Number of Asylum Cases in FY 2019*, TRAC IMMIGR. (Jan. 8, 2020), <https://trac.syr.edu/immigration/reports/588/>.

141. Border officials are not currently implementing metering at the border, since the CDC order has restricted all asylum-seekers from lodging protection claims. See *supra* Part I. MPP and asylum cooperative agreements have also been halted during the pandemic. See, e.g., EOIR Operational Status During Coronavirus Pandemic: Information Regarding Migrant Protection Protocols (MPP) Hearings, U.S. DEP'T OF JUSTICE (June 11, 2020), <https://www.justice.gov/eoir/eoir-operational-status-during-coronavirus-pandemic> [<https://perma.cc/E2S9-WTSK>] (temporarily suspending MPP hearings); Camila DeChalus, *Guatemala Suspends US Flights Carrying Asylum-seekers*, ROLL CALL (Mar. 17, 2020, 7:16 PM), <https://www.rollcall.com/2020/03/17/guatemala-suspends-u-s-flights-carrying-asylum-seekers/> (Guatemala temporarily suspended the Asylum Cooperative Agreement).

142. Press Release, Human Rights First, *Responding to the COVID-19 Crisis While Protecting Asylum Seekers* (Mar. 25, 2020), <https://www.humanrightsfirst.org/press-release/responding-covid-19-crisis-while-protecting-asylum-seekers-update> [<https://perma.cc/2ZD8-HA2U>] ("Through the Remain in Mexico policy, the [A]dministration has already sent tens of thousands of people seeking refuge to some of the most dangerous parts of Mexico, where they are currently forced to live in unsafe, unsanitary, and inhumane conditions in open-air encampments and shelters that endanger their health and safety. An even broader ban on asylum will endanger the lives of even more refugees and further jeopardize our collective public health."); see also *id.* ("Amnesty International USA, Doctors Without Borders/Médecins Sans Frontières USA, Human Rights First, Physicians for Human Rights, Refugees International, and Women's Refugee Commission call on the Trump [a]dministration to immediately rescind its policy of shutting the border to people seeking asylum in the United States.").

143. Caitlin Dickerson & Michael D. Shear, *Before Covid-19, Trump Aide Sought to Use Disease to Close Borders*, N.Y. TIMES (May 3, 2020), <https://www.nytimes.com/2020/05/03/us/coronavirus-immigration-stephen-miller-public-health.html> ("From the early days of the Trump administration, Stephen Miller, the president's chief adviser on immigration, has repeatedly tried to use an obscure law designed to protect the nation from diseases overseas as a way to tighten the borders.").

when flu infections struck a number of border patrol stations.<sup>144</sup> The text of these draft executive orders actually were “in large part repurposed . . . as an urgent response to the coronavirus pandemic.”<sup>145</sup>

The Trump administration’s track record makes it hard to accept that the CDC order was intended to protect the nation’s health. In addition to the backdrop of this critical context, which raises its own questions about the Asylum Ban’s sincerity and legitimacy, the health justifications that the Administration has proffered to support the Order are not compelling. In response to a congressional request for information on the CDC order’s compliance with domestic and international legal obligations, the State Department claimed that the Asylum Ban was necessary: 1) to prevent the introduction of COVID-19 in the United States; and 2) because border facilities are unable to accommodate social distancing or quarantine practices.<sup>146</sup> While there are valid concerns about the spread of coronavirus among individuals who are held in congregate settings where social distancing is not possible,<sup>147</sup> public health experts have asserted that there are less austere interventions that can prevent the spread of the virus and protect public health, while also allowing asylum-seekers to access protection in the United States. This Section explores why the Administration’s arguments supporting the Ban ultimately fail, as well as the opinion of public health experts who claim that closing the U.S. border to asylees and unaccompanied minors is not necessary to prevent the scourge of COVID-19.

### 1. *Introduction from Risky Locations?*

When the CDC issued the Rule that formed the basis for its Asylum Ban order, COVID-19 already had a firm stronghold in the United States. At that

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144. *Id.*

145. *Id.* (“But what has been billed by the White House as an urgent response to the coronavirus pandemic was in large part repurposed from old draft executive orders and policy discussions that have taken place repeatedly since Mr. Trump took office and have now gained new legitimacy, three former officials who were involved in the earlier deliberations said.”).

146. Email from [Redacted], Senior Cong. Advisor, Bureau of Legislative Affairs, U.S. DEP’T OF STATE, to [Redacted] (Apr. 24, 2020, 6:23 PM), [https://foreignaffairs.house.gov/\\_cache/files/1/5/15b9fb59-24f7-44e1-a8dd-b438072a8cc7/40C6CAE6BA2441181901371E291682E4.april-24-opinion.pdf](https://foreignaffairs.house.gov/_cache/files/1/5/15b9fb59-24f7-44e1-a8dd-b438072a8cc7/40C6CAE6BA2441181901371E291682E4.april-24-opinion.pdf) [hereinafter April 24 E-mail from Dept. of State].

147. To this end, the ACLU and others have filed lawsuits calling for a reduction of persons held in immigration detention to allow for proper social distancing and the release of particularly vulnerable individuals in those settings. *See, e.g.*, ACLU, *What It’s Like in ICE Detention During a Pandemic* (ep. 95), ACLU (Apr. 15, 2020), <https://www.aclu.org/podcast/what-its-ice-detention-during-pandemic-ep-95> (“ACLU and [its] affiliates have filed more than a dozen lawsuits across the country” calling for the release of “high-risk detainees.”); Kate Morrissey, *ACLU Sues for ‘Drastic Reduction’ of Immigrant Detainees Along California Border Due to Coronavirus*, L.A. TIMES (Apr. 21, 2020), <https://www.latimes.com/california/story/2020-04-21/aclu-sues-for-drastic-reduction-of-immigrant-detainees-along-california-border-due-to-coronavirus> (The lawsuit called for the release “of enough detainees to reduce the population to a point that those left inside can practice proper social distancing and hygiene recommendations.”).

time, the U.S. had over 4,225 confirmed cases of coronavirus.<sup>148</sup> When the CDC renewed the Order, the United States boasted the largest number of infections in the world with 1.69 million confirmed cases.<sup>149</sup> Recall that the Rule's cited authority (42 U.S.C. § 265) was intended to combat the "introduction" of disease into the country,<sup>150</sup> but the disease was already very much present in the United States.

In addition to the impossibility of preventing the "introduction" of a disease that had already gripped the nation, the U.S. government incorrectly claimed the Asylum Ban prohibited the entry of people from "COVID-19-risky locations."<sup>151</sup> The disparate treatment in both the application of the Order itself and other travel restrictions, as well as the numbers on the ground, unhinge this claim. For example, the original CDC order only applied to land borders—excluding coastal POEs where, presumably, the same entry concerns would exist.<sup>152</sup> Furthermore, neither Mexico nor any Central American countries have been subject to country-specific travel restrictions in the United States.<sup>153</sup> Individuals from these countries are still allowed to travel by plane to the United States, despite the fact that HHS has "explicitly listed" this form of transportation as a congregate setting "with higher risk of disease transmission than land travel."<sup>154</sup> Researchers also have identified that "there are far fewer cases of COVID-19 in Guatemala, Honduras and El Salvador—the countries providing the largest number of migrants to the U.S. southern border—than in the United States."<sup>155</sup> Relatedly, at the time of the initial Order's publication, Mexico had "only 53 confirmed cases of COVID-19."<sup>156</sup> The Order itself also acknowledged that the largest POE, El Paso PDN, which receives roughly 12,000 pedestrians each day, had not yet encountered a single individual suspected of having COVID-19.<sup>157</sup>

Considering that the disease was already present in the United States, the conflicting government travel restriction policies, and the incidence of

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148. CDC Rule, *supra* note 46, at 16,561 ("As of March 17, 2020 . . . more than 4,225 cases have been identified in the United States, with new cases being reported daily. . .").

149. Lucas Jackson, *U.S. Death Toll Nears 100,000*, NBC NEWS (May 27, 2020, 3:00 AM), <https://www.nbcnews.com/health/health-news/live-blog/2020-05-26-coronavirus-news-n1214521> [<https://perma.cc/4DFA-ESHPI>].

150. *See supra* notes 50–56 and accompanying text.

151. May 12 Letter from Congress, *supra* note 18, at 3.

152. *See* CDC Order Amendment and Extension, *supra* note 63, at 31,507.

153. Presidential proclamations have restricted travel from China, Iran, Schengen Countries, the UK, Ireland, and Brazil. *See supra* notes 78–82 and accompanying text.

154. Letter from Joe Amon et al. to Alex Azar, Sec'y, Dep't of Health and Human Serv. & Robert R. Redfield, Dir., Ctr. for Disease Control and Prevention (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> [<https://perma.cc/2T6J-KQQ5>] [hereinafter Letter from Public Health Experts to HHS and CDC].

155. Tanvi Misra, *DHS Indefinitely Extends, Expands Border Asylum Ban*, ROLL CALL (May 20, 2020, 4:35 PM), <https://www.rollcall.com/2020/05/20/dhs-indefinitely-extends-expands-border-asylum-ban/>.

156. CDC order, *supra* note 4, at 17,064.

157. *Id.* at 17,066.

infection in Mexico and the Northern Triangle at the time of the Order's implementation, it is dubious that this Ban was intended to prevent the introduction of COVID-19 into the United States or the entry of persons from "risky" locations.

## 2. *The Impossibility of Social Distancing?*

The CDC also attempted to rationalize the Order's laser focus on persons without valid travel documents because processing them requires that they "be held in the common areas of the facilities, in close proximity to one another, for hours or days."<sup>158</sup> It further stated that the current infrastructure at POEs cannot accommodate "even small numbers" of persons without valid travel documents—without any clarification of what "small" means.<sup>159</sup> However, given the number and size of various POEs and border patrol stations, there *is* some capacity for reviewing individuals at the border while still respecting social distancing best practices. Actually, the initial Order detailed that El Paso PDN "has several small waiting rooms that are used to isolate individuals suspected of exposure to or infection with a contagious disease. Each room can fit approximately 6-7 people."<sup>160</sup>

In addition to inherent capacity for supporting some number of individuals in compliance with social distancing protocols, the CDC further acknowledged that, "at least in theory," POEs and Border Patrol stations could be structurally modified and personnel could be trained "to more safely interact with covered aliens."<sup>161</sup> However, it advised against these efforts, claiming that they would divert resources needed domestically and would take too long to implement.<sup>162</sup> Yet, there is time to implement precautions to safely process protection-seekers because, as the CDC itself stated, "[t]he public health risks that are the basis for [the Order] are unlikely to abate in the coming months."<sup>163</sup>

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158. CDC Order Amendment and Extension, *supra* note 63, at 31,504.

159. *Id.* at 31,507.

160. CDC order, *supra* note 4, at 17,066.

161. CDC Order Amendment and Extension, *supra* note 63, at 31,506.

162. *Id.*

163. *Id.* at 31,508. These cited concerns will remain until there is a widely available vaccine and/or treatment for COVID-19. Even at the time of finalizing this Article's text in early January, although there are now ten vaccines in use worldwide logistical hurdles and access concerns for lower-income countries have made it challenging to rapidly achieve widespread vaccination. See Carl Zimmer, Jonathan Corum & Sui-Lee Wee, *Coronavirus Vaccine Tracker*, N.Y. TIMES (Jan. 14, 2021), <https://www.nytimes.com/interactive/2020/science/coronavirus-vaccine-tracker.html>; Rebecca Robbins, Frances Robles & Tim Arango, *Here's Why Distribution of the Vaccine is Taking Longer Than Expected*, N.Y. TIMES (Dec. 31, 2020), <https://www.nytimes.com/2020/12/31/health/vaccine-distribution-delays.html> ("[L]ogistical problems in clinics across the country have put the campaign to vaccinate the United States against Covid-19 far behind schedule . . ."); *COVID-19 Vaccinations in the United States*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://covid.cdc.gov/covid-data-tracker/#vaccinations> (last accessed Jan. 8, 2021) (indicating that, of over twenty-two million distributed COVID-19 vaccine doses, only approximately 6.6 million had been administered); Maria Cheng & Aniruddha Ghosal, *Poor Countries Face Long Wait for Vaccines Despite Promises*, ASSOCIATED PRESS (Dec. 15, 2020), <https://apnews.com/article/poorer-countries-coronavirus-vaccine-0980fa905b6e1ce2f14a149cd2c438cd> ("Of the approximately 12 billion doses the pharmaceutical industry is expected to produce next year, about 9 billion shots have already been reserved by rich countries.").



Furthermore, the government has the discretion to temporarily parole arrivals into the United States for deferred inspection,<sup>164</sup> or while waiting for their credible fear interviews or for their hearings before an immigration judge.<sup>165</sup> They could be released to family or friends living in the United States, which would obviate concerns about holding them at POEs—or in similar settings—altogether.

The possibility of leveraging existing space at POEs to promote social distancing, the ability to modify spaces for appropriately-distanced interactions, as well as the power to temporarily parole individuals into the United States negates the assertion that the pandemic justifies a wholesale ban on processing asylum-seekers at the border because of concerns associated with congregate settings.

### 3. *The Absence of a Public Health Rationale*

Acknowledging the lack of sincere health-based justifications, experts have admonished the Asylum Ban as discriminatory and racist. In particular, public health experts have affirmed that there is no genuine health reason to single out asylees while allowing many other exempted groups cross-border access.<sup>166</sup>

In public health . . . any time there is a category about who you apply your measure to or who you don't—is highly suspect. . . . There is no scientific evidence for it. And it's discriminatory.<sup>167</sup>

Significantly, forty public health experts “working at the forefront of the response to the novel coronavirus” urged the U.S. government to withdraw the Asylum Ban.<sup>168</sup> The experts claim that the CDC order commandeers public health laws “as a pretext for overriding humanitarian laws and treaties that provide life-saving protections to refugees seeking asylum and unaccompanied children.”<sup>169</sup>

These experts have proposed several measures, “grounded in the best available public health guidance,” for safely processing individuals at the border, including using outdoor areas to enable social distancing, requiring use of face masks for officers and arrivals, using “plexiglass barriers and/or face shields” to facilitate interviews, and providing hand sanitizer and

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164. 8 C.F.R. § 235.2(c) (2020).

165. 8 U.S.C. § 1182(d)(5)(A) (2018); 8 C.F.R. § 212.5(b)(4) (2020).

166. See, e.g., Joanna Naples-Mitchell, *There is No Public Health Rationale for a Categorical Ban on Asylum Seekers*, JUST SECURITY (Apr. 17, 2020), <https://www.justsecurity.org/69747/there-is-no-public-health-rationale-for-a-categorical-ban-on-asylum-seekers/>.

167. *Id.* (statement by Professor Lawrence Gostin, director of the O'Neill Institute for National and Global Health Law at Georgetown University). Dr. Monik Jiménez, Assistant Professor at Harvard Medical School and Harvard T.H. Chan School of Public Health, also has noted that the CDC order is politically motivated, calling it “a racist policy against the Latinx community.” *Id.*

168. Letter from Public Health Experts to HHS and CDC, *supra* note 154.

169. *Id.*

handwashing stations.<sup>170</sup> The experts also have suggested that the government mitigate concerns about congregate settings at POEs by using their discretion to temporarily parole protection-seekers into the United States, where they can stay with family or friends—noting that ninety-two percent of asylees arriving at the southern border have contacts in the United States.<sup>171</sup>

Some border control practices in other countries during this time have demonstrated that these interventions can both protect public health while honoring international obligations to protect vulnerable asylum-seekers. For example, a large number of European states have instituted protective measures like medical screenings and use of quarantine as opposed to blanket bans on entry,<sup>172</sup> and the European Union Commission explicitly exempted asylum-seekers from its restriction on nonessential travel.<sup>173</sup>

In its indefinite expansion of the Order, the CDC underscored, “[e]pidemiologically speaking, the United States as a whole remains in the acceleration phase of the pandemic . . . . At this critical juncture, it would be counterproductive to undermine ongoing public health efforts by relaxing restrictions.”<sup>174</sup> However, the din of the double standard given the U.S. government’s other coronavirus-related policies is deafening: Businesses are safe to reopen but borders must remain closed;<sup>175</sup> proximity is a health concern at POEs but not in immigration detention centers<sup>176</sup> or at the

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170. *Id.*

171. *Id.* (citing Tom K. Wong, SEEKING ASYLUM: PART 2, U.S. IMMIGRATION POLICY CENTER AT UC SAN DIEGO 13 (2019), <https://usipc.ucsd.edu/publications/usipc-seeking-asylum-part-2-final.pdf>); see also *supra* notes 164-65 and accompanying text.

172. See UNHCR REGIONAL BUREAU FOR EUROPE, *Practical Recommendations and Good Practice to Address Protection Concerns in the Context of the COVID-19 Pandemic 2* (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> [<https://perma.cc/33GY-AV6S>] (Discussing European countries that have implemented these measures and exempted asylum-seekers from entry bans and border closures. These protective measures reflect the UNHCR’s guidance on leveraging medical screening and testing and quarantine measures to protect public health and protection-seekers simultaneously.).

173. European Comm’n, *Communication from the Commission to the European Parliament, the European Council, and the Council, COVID-19: Temporary Restriction on Non-Essential Travel to the EU*, COM 2 (2020) 115 (Mar. 16, 2020), <https://ec.europa.eu/transparency/regdoc/rep/1/2020/EN/COM-2020-115-F1-EN-MAIN-PART-1.PDF> (exempting “[p]ersons in need of international protection or for other humanitarian reasons.”).

174. CDC Order Amendment and Extension, *supra* note 63, at 31,505.

175. Press Release, Lutheran Immigration and Refugee Serv., LIRS Opposes the Extension of Severe Immigration Restrictions at the U.S. Southern Border (May 19, 2020), <https://www.lirs.org/extension-border-restrictions> (“In the same breath that the administration tells Americans that our country is safe enough to begin re-opening, it cuts off every conceivable path to protection for the most vulnerable asylum seekers.”); see also Camilo Montoya-Galvez, *As Trump Pushes To Reopen, U.S. Continues Expelling Migrants at Border, Citing Pandemic*, CBS NEWS (June 1, 2020), <https://www.cbsnews.com/news/as-trump-pushes-to-reopen-u-s-officials-continue-border-expulsion-policy-citing-pandemic/>.

176. See, e.g., *Immigration Detention and Covid-19*, BRENNAN CTR. FOR JUST. (Mar. 27, 2020), <https://www.brennancenter.org/our-work/research-reports/immigration-detention-and-covid-19> (last updated June 3, 2020); Alan Gomez, Maria Clark & Rebecca Plevin, *‘Terrified of Dying’: Immigrants Beg To Be Released from Immigration Detention as Coronavirus Spreads*, USA TODAY (Apr. 7, 2020, 7:28 PM), <https://www.usatoday.com/story/news/nation/2020/04/07/covid-19-hits-ice-detention-migrants-say-they-cant-clean-stay-safe/2953170001/>.

polls;<sup>177</sup> social distancing is possible at grocery stores but not at border patrol stations.<sup>178</sup> The Trump administration's prior attacks on asylum and past attempts to leverage Section 265, the Ban's unsupported health-based justifications, and public health experts' emphatic recognition of the absence of any "public health rationale for denying admission to individuals based on legal status,"<sup>179</sup> all underscore that the CDC order is thinly veiled pretext. The Order is intended to "target certain classes of noncitizens rather than to protect public health."<sup>180</sup>

### III. BEYOND PANDEMIC PRETEXT

The justifications for the Asylum Ban are unconvincing, but what if the CDC order was reasonably well-justified? Under international refugee and human rights law, is it permissible for countries to use national laws—as the United States has leveraged Title 42, Section 265—to completely seal their borders to asylees? The Trump administration has often justified its sweeping and illegal immigration law and policy measures in the name of state sovereignty, asserting an "absolute power to shut down the border."<sup>181</sup> However, this is not how international law works; the sovereign right of a state to control its borders is circumscribed by its international legal obligations—stemming from treaties, customary law, and *ius cogens*.<sup>182</sup> Sovereignty might be the rule, but refugees are the exception.<sup>183</sup>

This Part scrutinizes the Asylum Ban under the United States' international legal obligations to persons seeking protection from persecution.<sup>184</sup>

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177. See, e.g., Sam Levine, *Trump Urges Republicans To 'Fight Very Hard' Against Voting by Mail*, THE GUARDIAN (Apr. 8, 2020, 10:30 AM), <https://www.theguardian.com/us-news/2020/apr/08/trump-mail-in-voting-2020-election>.

178. Lucas Guttentag & Stefano M. Bertozzi, *Trump is Using the Pandemic to Flout Immigration Laws*, N.Y. TIMES (May 11, 2020), <https://www.nytimes.com/2020/05/11/opinion/trump-coronavirus-immigration.html>.

179. Letter from Public Health Experts to HHS and CDC, *supra* note 154.

180. *Id.*

181. Michael D. Shear & Julie Hirschfeld Davis, *Shoot Migrants' Legs, Build Alligator Moat: Behind Trump's Ideas for Border: Decision Points*, N.Y. TIMES (Oct. 1, 2019), <https://www.nytimes.com/2019/10/01/us/politics/trump-border-wars.html>.

182. See Ashley B. Armstrong, *Chutes and Ladders: Nonrefoulement and the Sisyphean Challenge of Seeking Asylum in Hungary*, 50 COLUM. HUM. RTS. L. REV. 46, 81-82 (2019); see also JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE 212 (3d ed. 2013) ("[I]nternational law . . . [is] the body of restrictions on sovereignty that have been accepted by states through the mechanisms of custom and treaty."); see also *id.* at 261-62 (noting that sovereignty "never has been unconditional").

183. Armstrong, *supra* note 182, at 82 (quoting Guy S. Goodwin-Gill); see also Motomura, *The New Migration Law*, *supra* note 20, at 481 ("[R]efugee protection emerged as an exception, not a challenge, to sovereign control of national borders.").

184. While the CDC order violates both U.S. domestic and international legal obligations, this Part focuses on international legal obligations. For analysis of how the Order violates U.S. immigration and anti-trafficking laws intended to protect asylum seekers and unaccompanied minors (including the INA) as amended by the 1980 Refugee Act, and Trafficking Victims Protection Reauthorization Act (TVPRA) and procedural due process issues, among other concerns, see Guttentag, *Coronavirus Border Expulsions*, *supra* note 13. The CDC order is also the subject of litigation in the United States. See *J.B.B.C. v. Wolf*, ACLU (June 24, 2020), <https://www.aclu.org/cases/jbbc-v-wolf> ("[T]he nation's first legal challenge to the Trump administration's order restricting immigration at the border based on an unprecedented and unlawful invocation of the Public Health Service Act, located in Title 42 of the U.S. Code."); see also *Groups Challenge Trump*

While other scholars have criticized the Ban for violating U.S. law,<sup>185</sup> this Part focuses on international law given the Administration's emphasis on sovereignty in justifying its actions at the border and, especially, because a state "may not invoke the provisions of its internal law as justification for its failure to perform [its] treaty [obligations]."<sup>186</sup> Section A examines two essential rights under international refugee law: the rights to apply for asylum and not to be refouled to danger or harm. Next, Section B illustrates how the Asylum Ban violates these paramount rights by preventing asylum-seekers from submitting protection claims. Lastly, Section C assesses the Trump administration's response regarding the Order's compliance with international legal obligations, and concludes that a wholesale ban on processing asylum-seekers is not only a violation of the U.S.'s *non-refoulement* obligation—it completely unhinges the international refugee protection regime.

#### A. *The Right to Apply for Asylum and the Non-refoulement Obligation*

The United States is party to a number of treaties that detail the duties it owes to asylum-seekers. These instruments include the Convention Against Torture,<sup>187</sup> International Covenant on Civil and Political Rights (ICCPR),<sup>188</sup> and the 1967 Protocol Relating to the Status of Refugees—which also subjects the United States to provisions of the 1951 Refugee Convention.<sup>189</sup>

Beyond assertions that "protecting public health and protecting individuals from persecution or torture are not mutually exclusive,"<sup>190</sup> what does international law require of states vis-à-vis asylum-seekers? Asylum-seekers are entitled to two paramount rights under international law: 1) the right to apply for asylum and 2) the right not to be returned to a place where they would face danger (*non-refoulement*).

Regarding the right to apply for asylum, the 1948 Universal Declaration of Human Rights (UDHR) provides that all persons fleeing persecution have the right to "*seek and enjoy asylum*."<sup>191</sup> The UDHR, while not a binding

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Administration's Illegal Border Expulsions, ACLU (June 10, 2020), <https://www.aclu.org/press-releases/groups-file-challenge-trump-administrations-illegal-border-expulsions> (discussing *G.Y.J.P. v. Wolf*—another case challenging the CDC order.).

185. See Guttentag, *Coronavirus Border Expulsions*, *supra* note 13.

186. Vienna Convention on the Law of Treaties, art. 27, May 23, 1969, 1155 U.N.T.S. 331.

187. The United States ratified the Convention Against Torture on Oct. 21, 1994. United Nations, MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY GENERAL 302 (2009).

188. International Covenant on Civil and Political Rights, May 23, 1976, U.N.T.S. 999-171/1978 [hereinafter ICCPR]. The United States ratified the International Convention on Civil and Political Rights on June 8, 1992. MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY GENERAL, *supra* note 187, at 179.

189. The United States acceded to the Protocol Relating to the Status of Refugees on Nov. 1, 1968. *Id.* at 418. In joining the 1967 Protocol, states agree to comply with arts. 2-34 of the 1951 Refugee Convention. 1967 Protocol, *supra* note 1, at art. I(1).

190. May 12 Letter from Congress, *supra* note 18, at 1; see also Press Release, Human Rights First, Responding to the COVID-19 Crisis While Protecting Asylum Seekers (Mar. 25, 2020), <https://www.humanrightsfirst.org/press-release/responding-covid-19-crisis-while-protecting-asylum-seekers-update> [<https://perma.cc/2ZD8-HA2U>]; UNHCR REGIONAL BUREAU FOR EUROPE, *supra* note 172.

191. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 14 (Dec. 10, 1948) [hereinafter UDHR].

instrument of international law *per se*, contains provisions that have arguably acquired the binding authority of customary international law<sup>192</sup> if not, at least, strong moral authority prescribing state action.<sup>193</sup> The modern foundations of the international refugee law regime, the 1951 Refugee Convention<sup>194</sup> and its 1967 Protocol,<sup>195</sup> which are binding international legal instruments, also champion this right to apply for asylum.<sup>196</sup> These treaties outline the rights of refugees (and asylum-seekers hoping to establish refugee status). In the 1951 Convention preamble, states reaffirmed their “profound concern for refugees” and referenced the UDHR when affirming that refugees must be able to enjoy “the widest possible exercise of . . . fundamental rights and freedoms.”<sup>197</sup> While the preamble is not a binding part of the Convention, it affects how states interpret the Convention’s operative clauses.<sup>198</sup> Furthermore, a blanket ban on allowing asylum-seekers to lodge protection claims would render the Convention meaningless; it would be the antithesis of a state’s binding obligation to honor its treaty duties *in good faith* under the Vienna Convention on the Law of Treaties.<sup>199</sup>

States are also obligated to respect the principle of *non-refoulement*, which is fundamental to the international refugee protection regime. The 1951 Refugee Convention and its 1967 Protocol prohibit states from sending individuals to countries “in any manner whatsoever” where they would face persecution on one of the five Convention grounds.<sup>200</sup> The Convention Against Torture (CAT) prohibits states from sending individuals to countries where they would be subjected to torture and/or inhuman or degrading treatment for

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192. See, e.g., Donnelly, *supra* note 182, at 26.

193. Stephen Legomsky, *Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection*, 15 INT’L J. OF REFUGEE L., 567, 612 n.195 (2003) (“The UDHR . . . has acquired special moral status in the international community, but debate persists over how much of the Declaration, if any, has become binding international law.”); GUY GOODWIN-GILL, JANE MCADAM, *THE REFUGEE IN INTERNATIONAL LAW* 371 (3d ed. 2007) (noting that scholars debate the UDHR’s status as customary international law, particularly as it applies to a “duty on the State to *grant asylum*” given state practice) (emphasis added). However, it may be argued that state law and practice support a procedural right to *apply* for asylum. See, e.g., 8 U.S.C. § 1158(a)(1) (2020) (right to apply for asylum under U.S. law); Charter of the Fundamental Rights of the European Union, art. 18, 2012 O.J. (C 326/391) (“right to asylum” under EU law).

194. 1951 Convention, *supra* note 1.

195. 1967 Protocol, *supra* note 1.

196. See Alice Edwards, *Human Rights, Refugees, and the Right to Enjoy Asylum*, 17 INT’L J. REFUGEE L. 293, 301 (2005) (“Article 14 is implicit within the 1951 Convention and its 1967 Protocol . . . [supporting its status as] ‘an important emerging norm of customary international law.’”).

197. 1951 Convention, *supra* note 1, at pmbl.

198. See Vienna Convention, *supra* note 186, at art. 31(2) (“The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes.”).

199. *Id.* at art. 26 (The principle of *pacta sunt servanda*: “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”). The United States is party to the Vienna Convention on the Law of Treaties. See U.N., MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY GENERAL, *supra* note 187, at 526.

200. 1951 Convention, *supra* note 1, at art. 33(1) (“No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”); 1967 Protocol, *supra* note 1, at art. I(1) (States agree to comply with 1951 Convention arts. 2-34).

any reason.<sup>201</sup> The UDHR<sup>202</sup> and ICCPR<sup>203</sup> also require that states not *refoule* individuals to places where they would face harm. This *non-refoulement* duty prohibits not only direct return, but also onward, or chain, *refoulement*, preventing states from sending refugees to countries “from where he or she risks being sent to such a risk.”<sup>204</sup>

The only limited exception to the 1951 Convention’s prohibition on *non-refoulement* concerns national security—withholding the benefit of *non-refoulement* is permitted where someone presents “a danger to the security of the country.”<sup>205</sup> Other than this explicit exclusion, which is only employed on an individual basis, the 1951 Convention does not permit states to make any reservations or otherwise derogate from their *non-refoulement* obligation.<sup>206</sup> Additionally, this obligation is of such importance to the refugee law regime that even states who are not party to the Convention and/or its Protocol (except, perhaps, for “persistent objectors”) must abide by the prohibition on *refoulement* as it is considered customary international law.<sup>207</sup> Under the human rights conception of *non-refoulement*, captured in the CAT and the ICCPR, the obligation is also non-derogable; however, absolutely no exceptions are allowed—including by states not party to these Conventions—

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201. United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Convention Against Torture] (this *non-refoulement* obligation is not limited to the 1951 Convention’s five protection grounds).

202. UDHR, *supra* note 191, at art. 5 (“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”).

203. ICCPR, *supra* note 188, at arts. 6–7 (Article 6 concerns deprivation of life and the inherent right to life; Article 7 prohibits subjecting individuals to “torture and cruel, inhuman, or degrading treatment or punishment.”); *see also* U.N. Human Rights Comm., International Covenant on Civil and Political Rights, General Comment No. 31[80], The Nature of the General Legal Obligation Imposed on State Parties to the Covenant, para. 12, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004), <http://www.refworld.org/docid/478b26ae2.html478b2478b26ae2.html> [<https://perma.cc/734B-2XUW>] (States have “an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.”).

204. UNHCR, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations Under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, para. 7 (Jan. 26, 2007), <https://www.refworld.org/docid/45f17a1a4.html> (prohibiting expulsion to any country where there is such a threat, “or from where he or she risks being sent to such a risk.”).

205. 1951 Convention, *supra* note 1, at art. 33(2); *see also* Hathaway, *supra* note 14 (the “[security] exclusion is narrow and not applicable to public health threats like COVID-19.”). The Convention also excludes from its definition of “refugee” persons who have committed war crimes, crimes against peace, crimes against humanity, “serious non-political crimes,” or “acts contrary to the purposes and principles of the United Nations.” 1951 Convention, *supra* note 1, at art. 1(F) (indicating several categories of persons to whom the “provisions of this Convention” do not apply).

206. 1951 Convention, *supra* note 1, at art. 42(1) (States may not make reservations to art. 33.).

207. *See* UNHCR, Advisory Opinion, *supra* note 204, at paras. 14-16, (stating that *non-refoulement* is a rule of customary international law and, as such, is binding on all states regardless of whether they are party to the 1951 Convention or 1967 Protocol). However, under customary international law it is possible for states to “persistently object” to the formation of a rule, which may have the effect of excluding the objecting party from the underlying legal obligation. *See* Tullio Treves, Max Planck Encyclopedias of International Law, CUSTOMARY INTERNATIONAL LAW § 2(d)(39) (last updated Nov. 2006), <https://opil-ouplaw-com.proxygt-law.wrlc.org/view/10.1093/law:epil/9780199231690/law-9780199231690-e1393?rskey=5o7fCP&result=1&prd=MPIL>.

because the obligation to prevent torture is more than customary international law—it is considered *jus cogens*.<sup>208</sup> Thus, even where a “public health emergency which threatens the life of the nation” exists, states are not permitted to derogate from their duty to honor individuals’ right to life and protection from torture and cruel, inhuman, or degrading treatment or punishment.<sup>209</sup> Furthermore, in the context of the coronavirus pandemic, the UNHCR has unequivocally asserted that “denial of access to territory without safeguards to protect against *refoulement* cannot be justified on the grounds of any health risk.”<sup>210</sup>

The rights to apply for asylum and not to be refouled are interrelated. Even if scholars debate the binding nature of the UDHR, and thus the “right to seek asylum,” the *non-refoulement* obligation’s absolute, binding nature mandates that states assess asylees’ claims. In order to ensure that asylum-seekers are not sent back to a place where they would face harm, evaluating their specific protection claims is imperative.<sup>211</sup> A state may not knowingly send an individual to danger,<sup>212</sup> and an individualized inquiry, predicated on fair and efficient procedures, is essential for determining whether a country is sending someone to a place where his or her safety is ensured.<sup>213</sup> Furthermore, the

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208. See U.N. Comm. Against Torture, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, General Gen. Comment No. 2, The Implementation of Article 2 by States Parties, para. 1, Jan. 24, 2008, U.N. Doc CAT/C/GC/2, <http://www.refworld.org/docid/47ac78ce2.html> [<https://perma.cc/QN8U-L5AK>] (prohibition on torture as a peremptory *jus cogens* norm); see also Vienna Convention on the Law of Treaties, *supra* note 186, at art. 53 (defining *jus cogens* as a “peremptory norm of general international law . . . accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted.”).

209. ICCPR, *supra* note 188, at art. 4.1 (derogations permitted), 4.2 (no derogation is permitted from Articles 6 and 7, among others).

210. UNHCR, *Key Legal Considerations on Access to Territory for Persons in Need of International Protection in the Context of the COVID-19 Response*, at para. 6 (Mar. 16, 2020), <https://www.refworld.org/docid/5e7132834.html> (“[I]mposing a blanket measure to preclude the admission of refugees or asylum-seekers, or of those of a particular nationality or nationalities, without evidence of a health risk and without measures to protect against refoulement, would be discriminatory and would not meet international standards, in particular as linked to the principle of non-refoulement . . . . Denial of access to territory without safeguards to protect against refoulement cannot be justified on the grounds of any health risk.”). Instead, states may utilize screening, testing, and quarantine to mitigate the spread of disease—provided that those measures are not used to “deny [asylees] an effective opportunity to seek asylum or result in refoulement.” *Id.* at para. 8.

211. See, e.g., Edwards, *supra* note 196, at 301 (“[W]ithout appropriate asylum procedures, obligations of non-refoulement, including rejection at the frontier, could be infringed.”); Guy S. Goodwin-Gill, *Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement*, 23 INT’L J. REFUGEE L. 443, 445 (2011) (“[States must not] frustrate the exercise of the right to seek asylum in such a way as to leave individuals at risk of persecution or other relevant harm.”).

212. See Legomsky, *supra* note 193, at 568 (Legomsky discusses the “complicity principle,” whereby “no country may send any person to another country, knowing the latter will violate rights which the sending country is itself obligated to respect.”); see also *id.* at 612–626.

213. See generally UNHCR, Div. of Int’l Prot. Servs., *Conclusions Adopted by the Executive Committee on the International Protection of Refugees, 1975-2009* (2009) (Conc. No. 71 (XLIV), para. i (1993), “Reiterates the importance of establishing and ensuring access consistent with the 1951 Convention and the 1967 Protocol for all asylum-seekers to fair and efficient procedures for the determination of refugee status in order to ensure that refugees and other persons eligible for protection under international or national law are identified and granted protection.”; Conc. No. 71 (XLV), para. i (1994) also requires “fair and efficient” procedures); Conc. No. 82 (XLVIII), para. d(ii) (1997), notes that “the institution of asylum” requires “access, consistent with the 1951 Convention and the 1967 Protocol, of asylum-seekers to fair and effective procedures for determining status and protection needs.”); see also

UNHCR Executive Committee<sup>214</sup> explicitly affirms that respect for *non-refoulement* requires that states ensure “non-rejection at frontiers without access to fair and effective procedures for determining status and protection needs.”<sup>215</sup>

### B. *The Asylum Ban Violates International Law*

The CDC order conflicts with both of these paramount refugee rights: 1) it closes the border to undocumented persons, preventing asylum-seekers from submitting protection claims; and 2) it does not require government officials to properly assess individual cases before expelling persons, in violation of the *non-refoulement* obligation. As discussed above, there is no “asylum-seeker visa”; realistically, undocumented asylees must launch protection claims at a land border.<sup>216</sup> The CDC order makes this impossible, violating these essential refugee rights and the spirit and intent of the 1951 Convention and its 1967 Protocol:

If the only way to apply for international protection is to appear physically at the frontier of the requested state, and if that requested state either blocks physical access to the frontier or erects procedural barriers to those who gain physical access, then those in need of protection lose all meaningful opportunities to have their claims decided in substance.<sup>217</sup>

Legomsky, *supra* note 193, at 672 (“[I]nternational law requires an individualized, case-by-case determination of whether to return the applicant to a third country . . . . Only then can there be adequate assurance that the person’s Convention rights, including the right of non-refoulement, will be observed.”).

214. UNHCR’s Executive Committee (ExCom) Conclusions on International Protection, while not binding, “are a rich source of soft law and have interpretive significance, both in analyzing and clarifying the meaning of international refugee law.” Ashley B. Armstrong, *You Shall Not Pass! How the Dublin System Fueled Fortress Europe*, 20.2 CHI J. INT’L L. 332, 344 (2020); *see also* UNHCR, Div. of Int’l Prot. Servs., *Conclusions on International Protection Adopted by the Executive Committee of UNHCR Programme, 1975-2017 (Conclusion No. 1-114)* (2017), <https://www.refworld.org/type,EXCONC,UNHCR,,5a2ead6b4,0.html>.

215. UNHCR, *supra* note 213, at No. 99 (LV), para. (l) (2004); *see also* UNHCR, *supra* note 213, at No. 6 (XXVIII), para. c (1977) (“Reaffirms the fundamental importance of the observance of the principle of non-refoulement—both at the border and within the territory of a State.”); UNHCR, *supra* note 213, at No. 22 (XXXII), para. II(A)(2) (1981) (“In all cases the fundamental principle of non-refoulement including non-rejection at the frontier-must be scrupulously observed.”); UNHCR, *supra* note 213, at No. 81 (XLVII), para. h (1997) (Reaffirming “the principle of non-refoulement” and that states must provide “access, consistent with the 1951 Convention and the 1967 Protocol, of all asylum-seekers to fair and effective procedures for determining status and protection needs; no rejection at frontiers without the application of these procedures”); UNHCR, *supra* note 213, at No. 85 (XLIX), para. q (1998) (reiterating, in the context of *non-refoulement*, “the need to admit refugees to the territory of States, which includes no rejection at frontiers without access to fair and effective procedures for determining their status and protection needs.”); UNHCR, *supra* note 213, at No. 108 (LIX), *pmbl.* (2008) (“Deeply preoccupied by current and persistent protection problems of persons of concern, including the rejection of refugees and asylum-seekers at frontiers without examination of claims for asylum or safeguards to prevent refoulement.”).

216. *See supra* note 86 and accompanying text (explaining how visa requirements and carrier sanctions make it challenging to board a plane to the U.S. to claim asylum, often meaning that lodging a protection claim at the U.S. land border is an asylee’s only option).

217. Legomsky, *supra* note 193, at 600–01.



The danger is not attenuated by the Order's exception for persons who make "affirmative, spontaneous" claims fearing torture, with assessments requiring additional clearance from CBP supervisors. Failing to interview persons who fear persecution, and requiring officers to receive approval from supervisors for those who fear torture, almost certainly means that the United States is refouling *bona fide* protection-seekers in violation of international law.<sup>218</sup> The numbers are telling: again, of the roughly 400,000-plus asylum-seekers expelled and sent back across the border under the CDC order, very few have been granted humanitarian protection.<sup>219</sup>

The Order contravenes international legal obligations and exposes asylees to risk since they are expelled without any evaluation of their individual protection claims. In addition to these procedural concerns, substantively, the countries where the United States is sending individuals are not safe for asylum-seekers. As noted above, individuals sent over the border are subjected to violence in Mexican border towns—where there have been documented cases of rape, torture, murder, and other widely known security concerns.<sup>220</sup> The rate of violent crime, including kidnappings, armed robberies, and homicide, has only increased in Mexico during the pandemic.<sup>221</sup> Additionally, policies like MPP and metering have overwhelmed Mexico's fragile asylum system, and the country does not have the capacity to safely host large number of asylees in shelters.<sup>222</sup> The result is that many individuals are living in makeshift camps without proper

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218. In *Sale v. Haitian Centers Council*, the Supreme Court held that interdiction on the high seas did not violate the prohibition on *non-refoulement* under the INA or Art. 33 of the 1951 Convention. *Sale v. Haitian Ctrs. Council*, 509 U.S. 155 (1993). However, this case dealt with the extraterritorial application of the *non-refoulement* obligation, as opposed to the CDC order, which applies to migrants arriving at the U.S. border (land and coastal POEs). As such, *Sale* does not control the analysis of the U.S.'s *non-refoulement* obligation, here. The decision has also been widely criticized. See, e.g., Nicholas R. Koberstein, *Without Justification: Reliance on the Presumption Against Extraterritoriality in Sale v. Haitian Centers Council, Inc.*, 7 GEO. IMMIGR. L.J. 569 (1993); Harold Hongju Koh, *Reflections on Refoulement and Haitian Centers Council*, 35 HARV. L.J. 569 (1993); *Haitian Centers Council: The Return of Haitian Refugees*, 17 FORDHAM INT'L L.J. 1062 (1994); Maria Luisa Sepulveda, *Barring Extraterritorial Protection for Haitian Refugees Interdicted on the High Seas: Sale v. Haitian Centers Council, Inc.*, 44 CATH. U. L. REV. 321 (1994); Andrew G. Pizor, *Sale v. Haitian Centers Council: The Return of Haitian Refugees*, 17 FORDHAM INT'L L.J. 1062 (1994); Harold Hongju Koh, *Reflections on Refoulement and Haitian Centers Council*, 35 HARV. INT'L L.J. 1321 (1994). The European Court of Human Rights also has criticized the Supreme Court's decision in *Sale*, holding that the *non-refoulement* obligation does extend to state action on the high seas and wherever the state exhibits "effective control and authority." *Hirsi Jamaa and Others v. Italy*, App. No. 27765/09, 55 EUR. CT. H.R. 21, para. 69 (2012); *id.* at para. 67 (J. Albuquerque, concurring) (asserting that the United States Supreme Court in *Sale* failed to interpret Art. 33 in good faith); see also Michael B. Wise, *Intercepting Migrants at Sea: Differing Views of the U.S. Supreme Court and the European Court of Human Rights*, 21 WILLAMETTE J. INT'L L. & DISP. RESOL. 19, 33 (2013) (*Hirsi Jamaa* offers "guidance" for reversing *Sale*).

219. Miroff, *supra* note 67 (From March 21, 2020 to May 14, 2020, border agents provided relief to only two protection-seekers under CAT, "according to unpublished U.S. Citizenship and Immigration Services data obtained by *The Washington Post*."). At the time of writing, this was the most recently reported figure available.

220. See *supra* notes 134–141 and accompanying text.

221. KIZUKA ET AL., *supra* note 137, at 8.

222. *Id.*

sanitation or access to food and other necessities—which also exacerbates their susceptibility to contracting coronavirus.<sup>223</sup>

Furthermore, the CDC order itself acknowledged concerns about Mexico’s “current capabilities” to combat COVID-19, including its limited healthcare resources.<sup>224</sup> It is even more egregious then, that the United States is sending vulnerable<sup>225</sup> migrants to a country ill-equipped to handle potential outbreak, in conditions that would readily foster the spread of disease. Sending a person to a country where they would have inadequate healthcare itself may violate the *non-refoulement* obligation.<sup>226</sup>

Additionally, while the Mexican government agreed to receive undocumented individuals denied entry by the United States,<sup>227</sup> it stopped processing asylum applications in the wake of the coronavirus pandemic.<sup>228</sup> While protection-seekers are technically still allowed to submit applications,<sup>229</sup> there

223. Joint Statement, Washington Office on Latin America et al., U.S. Expulsion Policy Leaves Migrants in Situations of Extreme Vulnerability Amidst Border Closings (May 20, 2020), <https://www.wola.org/2020/05/united-states-migrant-expulsion-policy/>; see also KIZUKA ET AL., *supra* note 137, at 18 (Individuals are “without safe and secure housing, adequate medical care, or sufficient food. Shelters are cutting capacity, not accepting new residents, and in some cases closing all together.”).

224. CDC order, *supra* note 4, at 17,065.

225. While apprehended individuals are vulnerable in a number of contexts, the Order acknowledges that many are at particular risk for contracting COVID-19: “At this time, the majority tend to be adults between 25 and 40 years old, and include those with chronic health problems such as diabetes and high blood pressure (which are comorbidities known to increase the health risks associated with COVID-19 infections and, thus, the likelihood of requiring medical intervention after infection).” CDC order, *supra* note 4, at 17,065. Furthermore, human rights fact-finding reports have detailed profiles of extremely vulnerable asylees that the U.S. has turned away under the CDC order—including pregnant women, newborns, and victims of violent crime in Mexico. KIZUKA ET AL., *supra* note 137, at 5–6.

226. See, e.g., UNHCR, THE PRINCIPLE OF NON-REFOULEMENT UNDER INTERNATIONAL HUMAN RIGHTS LAW 1 (2020), <https://www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf> [<https://perma.cc/F83R-WPY8>] (“[L]ack of medical treatment . . . [has] been found to prevent return of persons.”) (last accessed June 17, 2020); United Nations Comm. on the Rights of the Child, General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, para. 27, U.N. Doc. CRC/GC/2005/6 (2005), <https://www.refworld.org/docid/42dd174b4.html> [<https://perma.cc/86S6-LJ38>] (To respect the principle of *non-refoulement*, states must “take into account the particularly serious consequences for children of the insufficient provision of . . . health services.”).

227. Presidencia de la República, *Versión estenográfica de la conferencia de prensa matutina*, GOBIERNO DE MÉXICO (Mar. 20, 2020), <https://www.gob.mx/presidencia/es/articulos/version-estenografica-de-la-conferencia-de-prensa-matutina-viernes-20-de-marzo-de-2020?idiom=es> (announcing the restriction on non-essential travel across the U.S.-Mexican border, and affirming that Mexico will continue to accept undocumented individuals who are refused entry to the United States and allow them to wait in Mexico).

228. Comisión Mexicana de Ayuda a Refugiados, *Comunicado COMAR: Se suspenden a nivel nacional los plazos para resolver todos los procedimientos iniciados al día de hoy ante la Comar*, GOBIERNO DE MÉXICO (Mar. 24, 2020), <https://www.gob.mx/comar/articulos/comunicado-comar> (announcing that refugee processing is suspended until April 20, 2020).

229. See, e.g., Comisión Mexicana de Ayuda a Refugiados, *Comunicado No. 40/2020 Extiende Comisión Mexicana de Ayuda a Refugiados suspensión de plazos e implementa mecanismo de contingencia por COVID-19*, GOBIERNO DE MÉXICO (Apr. 3, 2020), <https://www.gob.mx/comar/articulos/comunicado-no-40-2020?idiom=es> (extending the suspension on processing refugee applications to May 1, 2020, but affirming that applications for protection may still be submitted: “For the reception of documents and requests to start the procedure, COMAR remains open.”); Comisión Mexicana de Ayuda a Refugiados, *Comunicado No. 61/2020: Extiende Comisión Mexicana de Ayuda a Refugiados suspensión de plazos de manera indefinida*, GOBIERNO DE MÉXICO (May 27, 2020), <https://www.gob.mx/comar/es/articulos/comunicado-no-61-2020?idiom=es> (announcing that COMAR’s suspension will continue “until the health authority determines that there is no epidemiological risk related to the reopening of activities,” but also reaffirming that COMAR will continue receiving applications for protection.);

have been reports of chain *refoulement*—where Mexico has repatriated thousands of individuals against their will to the places they have fled.<sup>230</sup> For those who are not refouled, Mexican law obligates applicants to wait in the state where they applied pending the resolution of their claim—requiring them to remain in conditions of insecurity and danger.<sup>231</sup> Those who are sent to Northern Triangle countries do not fare much better; El Salvador,<sup>232</sup> Guatemala,<sup>233</sup> and Honduras<sup>234</sup> all have inadequate asylum systems that are unable to protect refugees fleeing persecution. Furthermore, the Northern Triangle is “one of the most dangerous places on earth,” producing large numbers of refugees who themselves are “fleeing for their lives.”<sup>235</sup>

### C. *The Trump Administration’s Response*

The Trump administration failed to demonstrate that it had the authority to invoke the Asylum Ban in conformity with the U.S.’s international legal obligations. When Congress asked the Administration to provide a “detailed explanation” of how the CDC order comports with domestic and international law, the State Department responded with a brief email that dedicated one sentence to the U.S.’s international legal obligations:

[T]he Supreme Court has noted that neither the United States nor any State or municipality has any legal obligation to conform its conduct to

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Comisión Mexicana de Ayuda a Refugiados, *Comunicado No. 63/2020: Informa Comar acciones realizadas en el marco de la Jornada Nacional de Salud de Sana Distancia*, GOBIERNO DE MÉXICO (May 29, 2020), <https://www.gob.mx/comar/es/articulos/comunicado-no-63-2020?idiom=es> (explaining that COMAR will continue to receive refugee applications during the pandemic because “[t]he registration of applications for refugee status was declared an essential activity.”).

230. See, e.g., Wash. Office on Latin America et al., *supra* note 223; KIZUKA ET AL., *supra* note 137, at 17; see also Adam Isacson, *The U.S. Government’s 2018 Border Data Clearly Shows Why the Trump Administration is on the Wrong Track*, WASH. OFFICE ON LATIN AMERICA (Nov. 9, 2018), <https://www.wola.org/analysis/us-government-2018-border-data-trump-immigration-asylum-policy/> (<https://www.wola.org/analysis/us-government-2018-border-data-trump-immigration-asylum-policy/>) (“Mexico routinely apprehends 100,000 or more Central American citizens on its own soil, and deports most.”).

231. ASYLUM ACCESS MEXICO, ASYLUM IN MEXICO BY THE NUMBERS 1 (2020), <https://asylumaccess.org/wp-content/uploads/2020/01/Asylum-in-Mexico-by-the-Numbers.pdf>.

232. El Salvador’s President, Nayib Bukele, has affirmed that his country currently lacks “asylum capacities.” Sharyn Alfonsi, “*Our Whole Economy is in Shatters*”: *El Salvador’s President Nayib Bukele on the Problems Facing His Country*, CBS NEWS (Dec. 15, 2019), <https://www.cbsnews.com/news/el-salvador-president-nayib-bukele-the-60-minutes-interview-2019-12-15/>.

233. The UNHCR called Guatemala’s asylum system “inadequate” and the U.S. State Department reported that “both migration and police authorities [there] lacked adequate training concerning the rules for establishing refugee status.” U.S. DEP’T OF STATE, GUATEMALA 2018 HUMAN RIGHTS REPORT 13 (2018), <https://www.state.gov/wp-content/uploads/2019/03/guatemala-2018.pdf>.

234. The U.S. State Department described Honduras’s asylum system as “nascent” and has questioned its ability to protect refugees. U.S. DEP’T OF STATE, HONDURAS 2019 HUMAN RIGHTS REPORT 12 (2019), <https://www.state.gov/wp-content/uploads/2020/02/honduras-2019-human-rights-report.pdf>.

235. *Fleeing for Our Lives: Central American Migrant Crisis*, AMNESTY INT’L (2020), <https://www.amnestyusa.org/fleeing-for-our-lives-central-american-migrant-crisis/> [<https://perma.cc/92X9-8AD3>] (last visited June 17, 2020); see also Isacson, *supra* note 230 (“El Salvador, Guatemala, and Honduras: three countries with some of the world’s highest levels of violent crime, where they face direct threats from unrestrained gangs, an utter lack of protection from their own governments, and economies that have collapsed for the poorest.”).

international treaties that are not self-executing or otherwise implemented into domestic law by an Act of Congress.<sup>236</sup>

This reply displays a distressing misunderstanding of international and U.S. law: Not only do “non-self-executing treaty obligations . . . create legal obligations,” but the United States has indeed incorporated many of its international refugee law obligations into its domestic law.<sup>237</sup> Significantly, as discussed above, U.S. domestic law provides a right to apply for asylum,<sup>238</sup> and requires that an immigration officer refer an individual to an asylum officer for an interview if the individual “indicates *either* an intention to apply for asylum . . . *or* a fear of persecution.”<sup>239</sup> U.S. law also prohibits *refoulement*.<sup>240</sup> Furthermore, even if these rights and protections were not already implemented in U.S. domestic law, the United States Constitution’s Supremacy Clause underscores the importance of “all treaties made”—which includes “non-self-executing” treaties.<sup>241</sup> Congress responded to the Administration’s “deeply flawed legal ‘justification,’” expressing concern that it was “using the COVID-19 outbreak as a pretext to expel asylum-seekers in clear violation of its obligations under domestic and international law to protect individuals fleeing persecution or torture.”<sup>242</sup>

#### CONCLUSION

President Trump and his administration have instituted hurdles at every step in the process for protection-seekers—from metering to MPP, from the “third country transit ban” to asylum cooperative agreements. The Administration has made its disdain and distrust of asylum-seekers known. However, the CDC order is the first measure that completely terminated asylum in the United States—enabling border agents to expel asylum-seekers without first allowing them to lodge protection claims. The Order itself also has fostered the spread of the pandemic it claims to abate—both by caging individuals in crowded and

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236. April 24 E-mail from Dept. of State, *supra* note 146 (citing *Medellin v. Texas*, 552 U.S. 491, 504-506 (2008); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888)).

237. Hathaway, *supra* note 14 (The “Refugee Act of 1980 implements the obligations of the United States as a party to the 1967 Protocol to the 1951 Convention. Article 3 of the CAT has been implemented through regulations promulgated under authority of the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), which provides two options to prevent *refoulement*: withholding of removal and deferral of removal, which is unconditionally available without security exceptions.”).

238. 8 U.S.C. § 1158(a)(1) (2018) (“Any alien who is physically present in the United States or who *arrives* in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien’s status, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title.”) (emphasis added).

239. 8 U.S.C. § 1225(b)(1)(A)(ii) (2020) (emphasis added).

240. 8 U.S.C. § 1231(b)(3)(2018); 8 C.F.R. §§ 208.16-.17 (2020).

241. Hathaway, *supra* note 14 (“There is no distinction made in the Constitution between self-executing and non-self-executing treaties . . . . All that it means for a treaty provision to be “non-self-executing” is that the provision is not directly judicially enforceable in U.S. courts.”).

242. May 12 Letter from Congress, *supra* note 18, at 1.

unsanitary border camps<sup>243</sup> and by carelessly expelling coronavirus-positive individuals to countries in Latin America.<sup>244</sup>

While the CDC order is technically temporary,<sup>245</sup> born of the coronavirus pandemic and the Trump administration's response to it, the concerns raised in this Article extend beyond this current political moment to the long-term implications of leveraging national laws and pretextual health concerns to close the U.S. border to asylees. Unfortunately, this fear—that the government will use health-based concerns to justify permanent changes to U.S. asylum law—graduated from tenuous speculation to reality on July 9, 2020, when U.S. Citizenship and Immigration Services, under DHS, and the Executive Office for Immigration Review, under the Department of Justice (DOJ), proposed a rule that would allow the departments to consider “emergency public health concerns based on communicable diseases due to potential international threats from the spread of pandemics” as grounds for ineligibility for persons seeking asylum or withholding of removal.<sup>246</sup> The government relied on the coronavirus pandemic to justify the proposal.<sup>247</sup> Like the CDC order, this measure flouts respect for the rule of law; it is part of a political project intended to further the Trump administration's anti-immigrant agenda.<sup>248</sup>

As the World Health Organization, UNHCR, and more than forty public health experts have asserted in the coronavirus context—it is possible, and

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243. See, e.g., CDC order, *supra* note 4, at 17,064 (“Medical experts believe that community transmission and spread of COVID-19 at asylum camps and shelters along the U.S. border is inevitable, once community transmission begins in Mexico.”).

244. See, e.g., Editorial, *Why is the United States Exporting Coronavirus?*, N.Y. TIMES, June 18, 2020, at A26; Brett Heinz, *US Deportations Are Exporting COVID-19 to Nations Unprepared for a Pandemic*, Ctr. for Econ. & Pol’y Res. (CEPR) (Apr. 28, 2020), <https://cepr.net/us-deportations-are-exporting-covid-19-to-nations-unprepared-for-a-pandemic/> (“[T]here are now multiple instances of the US deporting immigrants with active COVID-19 cases to countries with under-resourced public health care systems that are already strained by the pandemic.”).

245. As described herein, the current Order is reevaluated every 30 days. See *supra* note 63.

246. Security Bars and Processing, 85 Fed. Reg. 41,201 (July 9, 2020); see also *id.* at 41,208 (“Specifically, this rule would clarify that aliens whose entry poses a significant public health danger to the United States may constitute a “danger to the security of the United States,” and thus be ineligible for asylum or withholding of removal protections in the United States under INA 208 and 241, 8 U.S.C. 1158 and 1231, and 8 CFR 208.16 and 1208.16.”).

247. *Id.* at 41,202–06.

248. The final rule was adopted on December 23, 2020, after this Article was drafted. The Rule empowers the Attorney General, in consultation with the Secretary of Health and Human Services, to regard asylum seekers as “danger[ous] to the security of the United States”—thus ineligible for asylum and withholding of removal—if they are “coming from a country . . . where such disease is prevalent or epidemic.” U.S. Citizenship and Immigration Servs., Dep’t of Homeland Sec. and Exec. Office for Immigration Review, Dep’t of Justice, “Security Bars and Processing,” 85 Fed. Reg. 84160, 84,196–97 (Dec. 23, 2020) (to be codified at 8 C.F.R. pt. 208, 1208), <https://www.federalregister.gov/documents/2020/12/23/2020-28436/security-bars-and-processing#h-52> (final rule effective date: Jan. 21, 2021). Time will tell how the incoming Biden administration will handle the CDC order and its progeny. See, e.g., Camilo Montoya-Galvez, *Judge rules border agents can’t use COVID-19 order to expel migrant children*, CBS NEWS (Nov. 19, 2020), <https://www.cbsnews.com/news/judge-border-agents-covid-19-order-expel-migrant-kids-immigration/> (“President-elect Joe Biden’s team has pledged to direct the CDC and homeland security officials to review the expulsions order so that migrants are allowed to make asylum claims. Any changes to the policy, Mr. Biden’s advisors have said, will be guided by public health experts.”).

necessary, to simultaneously prevent the spread of disease and advance refugee protection.<sup>249</sup> While this Article focuses its analysis on the United States, UNHCR has reported that ninety states did not except asylees from their coronavirus-related border closures—in violation of their *non-refoulement* obligations.<sup>250</sup> Without an opportunity to seek asylum, protection-seekers arriving in these countries are forced into situations of orbit, trying to find a state willing to consider their protection claim. This is both traumatic for these vulnerable individuals and could promote an increase in infection rates globally by requiring additional travel.<sup>251</sup>

Indeed, if there is no opportunity to apply for asylum, and no safeguards preventing *refoulement*, the entire “object and purpose”<sup>252</sup> of the international refugee law regime—which was intended to afford *bona fide* asylum-seekers protection—is rendered meaningless. The nearly 400,000, and growing, vulnerable protection-seekers who have been expelled from the United States under the CDC order are testament to this daunting reality.

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249. Letter from Public Health Experts to HHS and CDC, *supra* note 154 (“As the World Health Organization, the U.N. Refugee Agency, and other U.N. agencies have explained, “there are ways to manage border restrictions in a manner which respects international human rights and refugee protection standards, including the principle of non-refoulement, through quarantine and health checks and that “our primary focus should be on the preservation of life, regardless of status. We can—and we must—both safeguard public health and uphold laws requiring the protection of asylum seekers and unaccompanied children.”) (internal quotations omitted).

250. Press Release, UNHCR, Forced Displacement Passes 80 Million by Mid-2020 as COVID-19 Tests Refugee Protection Globally, (Dec. 9, 2020), <https://www.unhcr.org/en-us/news/press/2020/12/5fcf94a04/forced-displacement-passes-80-million-mid-2020-covid-19-tests-refugee-protection.html> (“At the peak of the first wave of the pandemic in April, 168 countries fully or partially closed their borders, with 90 countries making no exception for people seeking asylum.”).

251. UNHCR, *Key Legal Considerations on access to territory for persons in need of international protection in the context of the COVID-19 response*, *supra* note 210, at para. 8.

252. Vienna Convention, *supra* note 186, at art. 31(1).