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Hon. Alejandro Mayorkas
Secretary
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CC: Hon. Antony Blinken
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September 1, 2021

Dear Secretary Becerra, Director Walensky and Secretary Mayorkas:

We are public health experts at leading public health schools, medical schools, hospitals, and other institutions across the United States who are working at the forefront of the response to COVID-19. We are gravely concerned that the Centers for Disease Control and Prevention (CDC) has recently endorsed and extended the implementation of the scientifically baseless and politically motivated Title 42 order which enables the mass expulsion of asylum seekers and is being used to circumvent laws and treaty protections designed to save lives. From its original implementation in March 2020, we have led a national group of public health and medical experts who objected to the specious public health grounds that underpin the order; developed recommendations for safely processing asylum-seekers in May 2020,[1] and provided the Biden transition team and the CDC with updated recommendations in December 2020[2] and January 2021[3] that responded to the evolving COVID-19 situation, including testing availability and vaccines. We have requested meetings with the CDC and the Administration on numerous occasions to discuss our concerns and recommendations as recently as July, but to no avail. Today, we write again to insist the Centers for Disease Control and Prevention (CDC) rescind, in its entirety, the Title 42 order that continues to unethically and illegally[4] exploit the COVID-19 pandemic to expel, block, and return to danger, asylum seekers and individuals seeking protection at the border.

With every day that goes by, the application of Title 42 exacts a terrible toll on the lives and well-being of asylum seekers turned away from the U.S. border and denied their right to seek asylum – a right that is enshrined in both domestic and international law. In its most recent endorsement and extension of the Title 42 order,[5] issued on August 2, 2021, the CDC notes the emergence of the more infectious Delta variant of SARS-CoV-2 (B.1.617.2), combined with the enhanced risks of transmission in congregate settings, as key reasons for the continued expulsion of asylum-seekers at the Southern border. Critically, the CDC acknowledges that mitigation

measures, such as masking and social distancing, work to prevent the spread of disease and cites the laudable example of the program to process unaccompanied minors as evidence of what can be achieved with the implementation of appropriate public health measures.[6] However, it claims that U.S. Customs and Border Protection (CBP) lacks the capacity to implement such measures at the present time. Eight months into the Biden/Harris administration, such arguments are no longer tenable and the public health basis for the revised August 2nd order remains baseless.

First and foremost, the revised order ignores the scientific consensus that the risks posed by the Delta variant can be mitigated through public health measures. It also rests on several flawed assumptions, including: that there is a fundamental difference in viral risk and transmission between unaccompanied minors and single adults and family units (when in reality any increased risk derives from the less safe procedures and practices DHS uses to process certain groups); that asylum seekers must be kept in congregate settings; that migrants serve as vectors of disease transmission; and that expelling asylum seekers to harm is an effective, legally and morally acceptable option to protect public health.

1. **The Delta variant demonstrates the need for public health vigilance, not the denial of asylum.**

The prevalence of the more infectious Delta variant[7] and the likely emergence of future variants of concern serve as a reminder that a pandemic response cannot rest on a single intervention. While vaccination remains the most effective method for decreasing severe illness and death from COVID-19, a multi-layered response integrating other public health and social measures is crucial to protect the public and safely process migrants.[8] Increased transmission of the virus, particularly among unvaccinated individuals, reinforces the need to adhere to evidence-based mitigation measures. By consistently implementing these measures – enabling social distancing, providing appropriate personal protective equipment (PPE), ensuring frequent testing, and offering vaccination – risks to the public and asylum seekers arriving in the United States can be substantially reduced.

As the August 2 order acknowledges, the use of mitigation measures such as avoiding congregate settings, social distancing, testing, quarantine, and isolation can effectively limit transmission of COVID-19 among unaccompanied minors arriving at U.S. ports of entry.[9] There is no public health rationale preventing these same measures from being safely applied to adults and family units, including during CBP processing. Indeed, in many cases, it may be easier to isolate adults due to their limited need for supervision. Additionally, adults and children 12 years of age and above are able to be vaccinated, further decreasing the risk of COVID-19 transmission. By citing a “lack of capacity" to implement these measures in CBP settings (for single adults and family units), the CDC has drawn an arbitrary distinction based on what is politically expedient, rather than scientifically based or ethically just.

It should be noted that the actions of CBP neglect recommended public health measures such as masking, social distancing,[10] and routine COVID-19 testing,[11] as well as vaccination,[12] in favor of complicated and high-risk deportation strategies. For example, the administration continues to detain some individuals in congregate settings for days to weeks prior to transporting them to other border locations,[13] often across state lines,[14] and then expelling them to Mexico[15] or

deporting them to Guatemala, Honduras, or El Salvador.[16] In recent weeks, the Biden administration has initiated expulsion flights that send Central Americans to southern Mexico,[17] where they are then refouled to rural regions of Guatemala. The UN Refugee Agency (UNHCR) recognizes that these practices "heighten the risk of COVID-19 transmission across national borders", amplifying risks to public health.[18] Furthermore, while individuals who are accepted into the United States to seek asylum may be offered vaccination, those who are deported under Title 42 are not,[19] despite an abundance of available vaccines in the region.[20] Despite its stated concern for public health and the risk of COVID-19 among migrant populations, the U.S. government does not consistently offer vaccines to this population, including those migrants expelled under Title 42.

2. **The United States has the ability to both avoid congregate settings and to protect those in congregate settings.**

Underpinning the Title 42 order is the spurious claim that asylum seekers must be held in congregate detention – a practice that has long been denounced by public health, medical and legal experts as unnecessary, inhumane and detrimental to public health. Community-based alternatives to detention,[21] such as the Family Case Management Program,[22] are associated with high compliance, including court appearance rates of 96-97%, at a fraction of the cost (3-7%) of individual detention. In the context of COVID-19, a senior CBP official in the Rio Grande Valley Sector testified that "releasing migrants in coordination with NGOs significantly reduces COVID-19 risk to both CBP employees and migrants in custody because it reduces the number of individuals in enclosed facilities."[23] A 2019 study found, of migrants sampled, over 90% of had close ties to communities in the U.S., making alternatives to detention an accessible, safe, and humane approach to processing migrants.[24]

Where holding asylum-seekers in congregate settings cannot be avoided, the implementation of proactive and effective public health measures can mitigate disease transmission risks substantially. Homeless shelters have successfully avoided COVID-19 outbreaks through the use of mitigation measures, even when cases did enter the facilities.[25] Researchers identified mitigation measures that led to this success, including enabling social distancing through the use of surge shelters to expand capacity, access to rapid assessment and testing on site, restructuring physical spaces to accommodate isolation, and rapid turnaround of test results through collaboration with local laboratories.

Given an annual budget of nearly 5 billion per annum for U.S. Border Patrol alone,[26] as well as the resources of the Department of Homeland Security as a whole, and recognizing the successful implementation of such measures by agencies in other U.S. settings,[27] it strains credulity to claim that U.S. agencies "lack the capacity" to safely process asylum seekers, and lends credence to administration statements indicating that Title 42 is instead being used to advance political objectives relating to migration control and deterrence rather than public health.[28]

3. **The CDC should be working to dismantle racially-based tropes presenting migrants as vectors of disease, rather than perpetuating them.**

The United States has a long, regrettable history of stoking fears of disease to galvanize support for anti-immigration policies. As early as the nineteenth century, public health was falsely invoked through the Immigration Act of 1891 and subsequent legislation, allowing immigration authorities to indefinitely detain and deport arriving migrants on the basis of prevailing racial stereotypes.[29] Even as our understanding of infectious disease transmission and public health measures have made great strides, the dual threats of xenophobia and racism continue to loom during outbreaks,[30] as we saw in the 1980s with HIV among Haitian Americans,[31] with the 2009 H1N1 Influenza outbreak associated with Mexican Americans,[32] and COVID-19 initially being associated with Chinese Americans.[33] Political rhetoric in the U.S. is already making the link between asylum-seekers and disease. For example, Texas Governor Greg Abbott's recent executive order directing state troopers to reroute vehicles containing migrants replicates this narrative and further burdens shelters and NGOs which are working to decongest CBP facilities.[34] Similarly, Senator Ted Cruz of Texas[35] and Florida Governor Ron DeSantis[36] have blamed migrants for the increased rates of COVID-19 in their states - a false narrative that epidemiologists and public health experts in Texas have debunked.[37] The Title 42 order stokes this rhetoric, putting current and future asylum seekers at risk.

In considering and weighing risk, it should be noted that community transmission of COVID-19 is high – indeed the U.S. is leading the world in cases.[38] While it is impossible to know the exact number of asylum seekers arriving given the administration's failure to identify them, provide access to asylum, and track their cases, we estimate that asylum seekers constitute only a small fraction[39] of people crossing[40] the U.S.-Mexico border on a daily basis, and the implementation of public health measures such as masking, social distancing, and frequent testing, has the potential to reduce transmission risk substantially.

4. **The Title 42 order fails to address the United States' legal and moral obligations to protect human rights, nor does it account for the documented harm and suffering of asylum seekers who have been returned under the order.**

The application of Title 42 has exacted a terrible toll on the lives and well-being of asylum seekers in the more than 500 days since it was initially enacted. Over 3,250 kidnappings, rapes, and other attacks on people expelled or blocked at the U.S.-Mexico border have been recorded since President Biden took office in January,[41] and these numbers continue to increase daily. With the official ports of entry effectively closed to asylum seekers,[42] individuals attempting to exercise their right to seek asylum are driven to ever more dangerous routes, and face substantially increased risk. The remains of 140 migrants have been found along the border this year to date,[43] a tragic increase in deaths that experts attribute in part to repeated crossing attempts stemming from Title 42.[44] In response to the Biden administration's failure to end this egregious abuse of public health authority, two prominent advocacy organizations – HIAS and the IRC[45] – are ceasing their work processing humanitarian exceptions to Title 42, stating that exceptions to the order are not a long-term solution.

The United States has a legal and moral obligation to provide asylum seekers due process. The COVID-19 pandemic does not negate but rather reinforces this responsibility, as asylum seekers navigate an increasingly perilous world, where shuttered borders have been prioritized over proven public health measures. Multiple countries have managed to balance these obligations

even during times of pandemic. Of the 125 countries that implement COVID-19 related restrictions on access to territory, 76 apply exceptions for asylum seekers.[46]

Finally, Title 42 runs counter to the government's own commitment to address COVID-19 globally.[47] The absence of effective COVID-19 mitigation services at the border and the expulsion of people to situations in which they may be exposed to COVID-19 and unable to practice prevention are contrary to the U.S. government commitment to address COVID-19 globally, with a particular focus on the world's most vulnerable communities. As UNHCR noted recently, "at a time of significantly increased movement of asylum-seekers and migrants in the region, the Title 42 expulsion flights will also further strain the overburdened humanitarian response capacity in southern Mexico, heighten the risk of COVID-19 transmission across national borders and run counter to steps being taken to share responsibility among countries of the region in addressing the root causes of forced displacement and migration." [48]

Rather than continuing to rely on a discriminatory and unjustifiable order, U.S. authorities should adopt measures that are based on sound science and public health practice, and that comply with U.S. law and treaty obligations towards refugees and asylum-seekers. As noted above, our group of epidemiologists and public health experts have repeatedly outlined such measures[2] and shared them with the CDC, DHS, and U.S. government officials. Asylum seekers can and must be protected through the implementation of evidence-based public health measures such as avoiding congregate detention settings, enabling routine testing, providing access to vaccinations, maximizing ventilation, and enabling use of masks and social distancing. We call on the CDC and HHS to fully rescind the Title 42 asylum expulsion order and implement appropriate protective measures in line with robust public health guidance. As the UN High Commissioner for Refugees confirmed in a rare public statement directed at the United States, "protecting public health and protecting access to asylum, a fundamental human right, are fully compatible."[49] We demand a clear timeline for the revocation of this order, robust data systems with public results, and a strong, external monitoring component to ensure the protection of the rights of asylum seekers moving forward.

Respectfully,*

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