AMNESTY INTERNATIONAL

Debbie Seguin, Assistant Director, Office of Policy
U.S. Immigration and Customs Enforcement
Department of Homeland Security
500 12th Street SW
Washington, DC 20536

5 November 2018

RE: DHS Docket No. ICEB-2018-0002

Dear Assistant Director Seguin,

On behalf of Amnesty International USA, an international human rights organization with more than two million members and supporters across the U.S., I respectfully submit this comment strongly opposing the proposed regulations from the U.S. Department of Homeland Security ("DHS") and the U.S. Department of Health and Human Services ("HHS") on the Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, Docket No. ICEB-2018-0002.

The proposed regulations, which seek to end the critical protections mandated in the 1997 Flores Settlement Agreement ("FSA"), violate U.S. obligations under both international human rights law and the treaties and principles protecting the rights of refugees. If adopted, the proposed regulations would result in children kept in prolonged detention with their parents, in conditions that have been proven to be harmful to their health and well-being, with little chance of release. Instead of institutionalizing child welfare protections and rights, and seeking to do what is in the best interest of the child, these proposed regulations would effectively terminate the FSA's substantive protections for children in immigration detention.

On behalf of our members across the country and across the world, including the tens of thousands of Amnesty International members who have submitted their own unique comments, we urge DHS and HHS to withdraw the proposed regulations, and instead advance policies that conform with the FSA and human rights and refugee rights law. DHS should end, rather than expand, the detention of children with their parents.[1]

The proposed regulations violate both the FSA and the U.S.'s obligations under human rights and refugee rights law.

[1] Amnesty International calls for ending the detention of migrant children, whether accompanied or unaccompanied, separated or held together with their family, as it is never in their best interest. The detention of asylum-seeking families for immigration purposes should be stopped, and children and parents jailed in family detention centers should be immediately released together. Amnesty International calls for the reinstatement of the alternative-to-detention program, the Family Case Management Program, which was discontinued under the current Administration.

Under the FSA, the release of a child from immigration detention should occur within three to five days, and the government must generally release a minor "without unnecessary delay." Children are to be released to a family member, legal guardian, or other appropriate adult and transferred to a non-secure, licensed facility.[2] In certain specified situations, children may be held up to 20 days.[3]

The proposed regulations explicitly seek to eliminate the FSA's limits on the length of time that children may be detained.[4] They would allow children to be detained with their parents through the entirety of their immigration proceedings, based solely on their immigration status,[5] which could mean children are held for months or even years in family immigration detention facilities.

Should these regulations go into effect, they would institutionalize prolonged detention as the norm, completely contravening the FSA and resulting in children being denied their human rights. As a first matter, children should not be held in family immigration detention.[6] Detention is never in the best interests of a child. It should only ever be used as a last resort and for the shortest period of time where necessary to protect the best interests of a child, only following an individualized assessment and judicial review.[7] The United Nations High Commissioner for Refugees ("UNHCR") has stated

[2] *Flores v. Lynch*, No. CV 85-04544 DMG (Ex) (C.D. Cal. Aug. 21, 2015) at 9, https://www.aila.org/File/Related/14111359p.pdf.

[3] *Id.* at 10.

[4] 83 FR 45512 ("[T]he proposed rule may result in extending detention of some minors and their accompanying parent or legal guardian in [family detention centers, or 'family residential centers'] beyond 20 days.")

[5] *See* E.O. 13767 sec. 6, 82 FR 8793 (Jan. 30, 2017) (calling on Secretary of Homeland Security to "take all appropriate actions to ensure the detention of aliens apprehended for violations of immigration law" until their immigration cases are resolved); E.O. 13841 sec. 3, 83 FR 29435 (Jan. 20, 2018) (directing Secretary of Homeland Security to "maintain custody of alien families during the pendency of any […] immigration proceedings").

[6] Although the FSA does not end family detention, it is essential to ensuring that children receive care predicated on the principles of the best interest of the child and family unity. When children are detained, it should be in the least restrictive environment and for the shortest period of time necessary, pursuant to an individualized assessment and judicial review, and in accordance with appropriate standards. They should be released to their parents, legal guardian, or family members. The FSA is a necessary protection for children's human rights.

[7] U.N. Convention on the Rights of the Child ("CRC") Art. 3(1) (Sept. 2, 1990) ("[I]n all actions concerning children...the best interests of the child shall be a primary consideration."), https://www.ohchr.org/en/professionalinterest/pages/crc.aspx). While the U.S. is the only country in the world to have signed but not ratified the CRC, the Convention's principles are considered international customary law and are also contained in other international instruments. As a signatory, the U.S. is bound, as a signatory, to avoid actions that would "defeat the object and purpose" of the CRC. Vienna Convention on the Law of Treaties (May 23, 1969), 1155 U.N.T.S. 331, Art. 18; *see Roper v. Simmons*, 543 U.S. 551 (2005) (acknowledging "the overwhelming weight of international opinion against the juvenile death penalty," including the direct prohibition in Article 37 of the United Nations Convention on the Rights of the Child).

"that all action taken on behalf of refugee children must be guided by the principle of the best interests of the child as well as by the principle of family unity."[8]

Further, detaining children on the basis of their immigration status violates U.S. obligations under human rights and refugee rights law.[9] The Refugee Convention and the 1967 Protocol, of which the U.S. is a signatory, forbids the punitive detention of asylum-seekers.[10] Article 31 of the Convention states, in relevant part:

> The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened . . . enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

The U.S. codified the Convention's provisions in the bipartisan 1980 Refugee Act.[11]

Further, UNHCR is opposed to the immigration detention of children and categorically calls on all states to end this practice.[12] UNHCR recently reiterated that:

The "best interest of the child" principle is a fundamental basis for child protection standards in the U.S., including asylum processing. *See* United States Citizenship and Immigration Services, RAIO [Asylum] Officer Training, Children's Claims at 13 (Nov. 30, 2015) (applying "the internationally recognized 'best interests of the child' principle" to interview procedures for child asylum-seekers), https://www.uscis.gov/sites/default/files/files/nativedocuments/Legal_standards_governing_Asylum_claims_and_issues_related_to_the_adjudication_of_children.pdf. All 50 U.S. states, the District of Columbia, and U.S. territories require consideration of a child's best interests in decisions about the child's custody. See Child Welfare Information Gateway, Determining the Best Interests of the Child (2012), https://www.childwelfare.gov/pubPDFs/best_interest.pdf.

[8] UNHCR Executive Committee Conclusions on Refugee Children No. 47 (1987).

[9] *See, e.g.*, International Covenant on Civil and Political Rights ("ICCPR"), Art. 9, https://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx; CRC, Art. 37; Refugee Convention, Art. 31; U.N. High Commissioner for Refugees, Detention Guidelines: Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention (2012), citing CRC, http://www.unhcr.org/505b10ee9.html.

[10] July 28, 1951, 189 U.N.T.S. 137. The United States never ratified the Convention itself, but it acceded to the 1967 Protocol, by which it became bound by articles 2 through 34 of the 1951 Convention. Protocol relating to the Status of Refugees (Jan. 31, 1967), 606 U.N.T.S. 267.

[11] United States Refugee Act of 1980, Pub. L. 96-212 (Mar. 17, 1980), 94 Stat. 102, codified as amended at 8 U.S.C. ch. 12.

[12] *See, e.g.*, UNHCR, "UN Refugee Agency calls on States to end the immigration detention of children on the 25th anniversary of the Convention on the Rights of the Child" (Nov. 20, 2014),

> children should not be detained for immigration related purposes, irrespective of their legal/migratory status or that of their parents, and detention is never in their best interests. Appropriate care arrangements and community-based programmes need to be in place to ensure adequate reception of children and their families.[13]

The detention of children for immigration purposes is a clear violation of the U.N. Convention on the Rights of the Child ("CRC"). Children may not be detained "solely for reasons of illegal entry or presence in the country."[14] In 2012, the Committee on the Rights of the Child stated that "regardless of the situation, detention of children on the sole basis of their migration status or that of their parents is a violation of children's rights, is never in their best interests and is not justifiable."[15] The Committee further stressed the child's right to family unity and emphasized that "family unity was not a justification for detaining children and alternative measures should be found for the whole family."

Similarly, the United Nations High Commissioner for Human Rights has stated: "Children should never be detained for reasons related to their own or their parents' migration status. Detention is never in the best interests of the child and always constitutes a child rights violation."[16]

Neither should families or individuals be detained solely on account of their immigration status.[17] Detention should be used only as a measure of last resort; it must be justified in each individual case; and subject to judicial review. Detention is appropriate only when authorities can demonstrate in an individual case that it is necessary and proportionate to the objective being achieved and on grounds

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http://www.unhcr.org/news/press/2014/11/546de88d9/un-refugee-agency-calls-states-end-immigration-detention-children-25th.html.

[13] UNHCR, UNHCR's Position Regarding the Detention of Refugee and Migrant Children in the Migration Context (Jan. 2017), http://www.refworld.org/docid/5885c2434.html.

[14] CRC, General Comment No. 6: Treatment of unaccompanied and separated children outside their country of origin, 39th Session (2005), § 63.

[15] U.N. Committee on the Rights of the Child, Report of the 2012 Day of General Discussion on the Rights of All Children in the Context of International Migration (Sept. 28, 2012), http://www.refworld.org/docid/51efb6fa4.html.

[16] U.N. High Commissioner for Human Rights, Press Briefing Note on Egypt, the United States and Ethiopia (June 5, 2018).

[17] *See, e.g.*, International Covenant on Civil and Political Rights ("ICCPR"), Art. 9, https://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx; CRC, Art. 37; Refugee Convention, Art. 31; U.N. High Commissioner for Refugees, Detention Guidelines: Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention (2012), citing CRC, http://www.unhcr.org/505b10ee9.html.

prescribed by law, and that alternatives (such as reporting requirements, bail, or financial deposits) would not be effective.[18]

UNHCR has clearly outlined that detention used to deter and punish those seeking protection is not permitted under the Refugee Convention:

> Detention that is imposed in order to deter future asylum-seekers, or to dissuade those who have commenced their claims from pursuing them, is inconsistent with international norms. Furthermore, detention is not permitted as a punitive—for example, criminal—measure or a disciplinary sanction for irregular entry or presence in the country. Apart from constituting a penalty under Article 31 of the 1951 Convention, it may also amount to collective punishment in violation of international human rights law.[19]

The United Nations Special Rapporteur on torture and other cruel and inhuman or degrading treatment or punishment has concluded that "detention based solely on migration status can amount to torture, most notably where it is being intentionally imposed or perpetuated for purposes such as deterring, intimidating, or punishing irregular migrants or their families, coercing them into withdrawing their requests for asylum, subsidiary protection or other stay, agreeing to voluntary repatriation, providing information or fingerprints."[20]

The Inter-American Commission on Human Rights,[21] has also found that:

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[18] *Id.*

[19] UNHCR, Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, 2012, http://www.refworld.org/docid/503489533b8.html para. 32 ("Guidelines").

[20] Report of the U.N. Special Rapporteur on torture and other cruel and inhuman or degrading treatment or punishment to the U.N. Human Rights Council §§ 28, 29 (Feb. 26, 2018), https://www.ohchr.org/Documents/Issues/Torture/A_HRC_37_50_EN.pdf. *See* U.N. Special Rapporteur on Torture, Thematic Report on Torture and Ill-Treatment of Children Deprived of their Liberty, §§ 62, 80 (Mar. 5, 2015) (§ 62, "According to the European Court of Human Rights, even short term detention of migrant children is a violation of the prohibition on torture and other ill-treatment, holding a child's vulnerability and best interests outweigh the Government's interest in halting illegal immigration.")(§ 80, "Within the context of administrative immigration enforcement, it is now clear that the deprivation of liberty of children based on their or their parents' migration status is never in the best interests of the child, exceeds the requirement of necessity, becomes grossly disproportionate and may constitute cruel, inhuman or degrading treatment of migrant children.")

[21] The Senate gave its advice and consent to ratification of the Charter of the Organization of American States in December 1947. U.S. Cong., Senate Comm. on Foreign Relations & House Comm. on Foreign Affairs, Inter-American Relations: A Collection of Documents, Legislation, Descriptions of Inter-American Organizations, and Other Material Pertaining to Inter-American Affairs, Joint Committee Print, Prepared by the Congressional Research Service, 100th Cong., 2d sess., Dec. 1988, S.Prt. 100-168 (GPO 1989).

> the deprivation of liberty of a child for migratory motives would not be understood as a measure that responds to the child's best interests. Multiple stud[ies] have documented that detention has negative and lasting effects on children's physical and mental development, and lead to the development or worsening of conditions such as anxiety, depression, and psychological and emotional damage.[22]

Despite these strong calls to end the practice of detaining children, because they contravene the best interests of the child, obligations under human rights and refugee rights treaties and principles, and are harmful to children's psychological and physical well-being, the U.S has continued to grow this practice within its own borders.

The proposed regulations would further entrench this harmful practice that undermines U.S. obligations. Amnesty International USA calls for this practice to end, and these regulations to be rejected.

Instead, there is a proven solution that should be pursued. The U.S. can implement humane and rights-respecting policies that neither separate nor detain families seeking protection. Parents and children should be kept together and released to community-based sponsors through humane alternative-to-detention options. The Family Case Management Program ("FCMP") was 99-percent effective in ensuring that asylum-seeking parents and their children appeared at their immigration court hearings. FCMP is a proven, rights-respecting, and cost-effective solution.

Programs such as FCMP are aligned with U.S. obligations under human rights and refugee rights law requiring the least restrictive alternatives to detention be considered and the principle of family unity favored in the best interest of the child. Family unity is a fundamental right, enshrined in international human rights law, and recognized in U.S. law. Children should be released from detention with their parents, legal guardians, or family members.

Amnesty International USA calls for the practice of family detention to end, and these regulations to be rejected. Amnesty International USA encourages the Administration to instead prioritize these humane alternatives to detention and ensure that the human rights of children are protected.

Sincerely,

Denise C. Bell
Researcher, Refugee and Migrant Rights

[22] Inter-American Comm'n on Human Rts., Human Rights Situation of Refugee and Migrant Families and Unaccompanied Children in the United States of America, OAS Doc. OAS/Ser.L/V/II.155, § 80 (July 24, 2015), https://www.oas.org/en/iachr/reports/pdfs/refugees-migrants-us.docx.