



April 20, 2021

The Honorable Alejandro Mayorkas

Secretary of Homeland Security

Washington, D.C. 20528

**Re: Amnesty International USA comments on February 2021 Interim Guidance:
Civil Immigration Enforcement and Removal Priorities**

Dear Secretary Mayorkas:

On behalf of Amnesty International USA,¹ we write to urge you to revise the February 2021 Interim Guidance: Civil Immigration Enforcement and Removal Priorities (“Interim Guidance Memorandum”) to comport with human rights standards and President Biden’s stated commitment to a fair, orderly, and humane immigration system.² An administration pledged to uphold human rights and racial equity should seize this opportunity to reshape the immigration enforcement system to reflect that commitment.

The Interim Guidance Memorandum uses broad categorizations to reduce people to security risks and deprive them of protection, and fails to address critical immigration enforcement issues undermining the U.S.’s human rights obligations. The Interim Guidance Memorandum does not protect people fleeing to the United States in search of safety nor does it redress the cruelty suffered by those locked up in immigration detention. The Interim Guidance Memorandum is also silent on privatized immigration detention and the continuing use of Title 42 at the U.S. southern border to expel families and adults seeking safety.

During this 90-day interim period, before you issue new enforcement guidelines, we urge you to revise the Interim Guidance Memorandum to do the following:

¹ Amnesty International is an independent, Nobel Peace Prize-winning, global human rights movement of more than ten million people. Amnesty International USA is the movement’s U.S.-based section.

² U.S. Department of Homeland Security, *Immigration and Customs Enforcement, Interim Guidance: Civil Immigration Enforcement and Removal Priorities* (February 18, 2021), available at www.ice.gov/doclib/news/releases/2021/021821_civil-immigration-enforcement_interim-guidance.pdf.

(1) Eliminate the language conflating asylum seekers as “border security” priorities

The Interim Guidance Memorandum specifies that all people who entered the United States on or after November 1, 2020, are considered a “border security” priority and therefore will be considered priorities for detention and removal. This includes adults and families seeking humanitarian protection.

People seeking safety are not “border security” risks. They need protection and humane treatment, not detention and deportation. Casting asylum-seekers as security risks undermines the United States’ obligations under domestic and international laws to provide safe haven for asylum-seekers.

The right to seek asylum is enshrined in both international and domestic law. Under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, the latter of which the United States has signed and incorporated into domestic law through the 1980 Refugee Act, governments must uphold the right to seek asylum.³ The U.S. government has codified in domestic law the right to seek asylum both at and between ports of entry along the U.S. border.⁴

Detaining an entire class of people as security threats solely on account of their immigration constitutes arbitrary detention, a violation of international law. Both refugee and international human rights law require the U.S. government to respect and ensure personal liberty and security as all individuals’ default condition.⁵ Arbitrary detention is prohibited.⁶ Immigrants and asylum-seekers, as anyone else, must benefit from a legal presumption of liberty and not be subjected to arbitrary detention.

The U.S. government has an obligation to ensure that the human rights of immigrants and asylum-seekers are respected, protected, and fulfilled. Detention should be the exception

³ 1980 Refugee Act, available at www.govinfo.gov/content/pkg/STATUTE-94/pdf/STATUTE-94-Pg102.pdf.

⁴ 8 U.S.C. §§ 1158, 1225.

⁵ *Universal Declaration of Human Rights*, Arts. 9, 14 [UDHR]; *International Covenant on Civil and Political Rights*, Art. 9(1) [ICCPR]; UN Human Rights Committee (HRC), *General Comment 35: Article 9 (Right to Liberty and Security of Persons)* [HRC General Comment 35]; General Assembly (GA), *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, A/RES/43/173, Principle 2 [GA Body of Principles]; UN Human Rights Council, *Report of the Special Rapporteur on the human rights of migrants on a 2035 agenda for facilitating human mobility*, UN Doc A/HRC/35/25 (April 28, 2017) at para 58 [Special Rapporteur on Migrants 2017]; *Convention Relating to the Status of Refugees*, Art. 31 [Refugee Convention].

⁶ UDHR, Arts. 9, 14; ICCPR, Arts 2, 9(1); Refugee Convention, Art. 31; *Convention on the Protection of the Rights of Migrant Workers and Members of their Families*, Art. 16 [Migrant Worker Convention]; UN Committee on the Elimination of Racial Discrimination, *General Recommendation 30 on Discrimination against Non-Citizens*; HRC General Comment 35; UN High Commissioner for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012), Guidelines 1, 2, 3 [UNHCR Detention Guidelines]; Working Group on Arbitrary Detention, *Revised Deliberation No. 5 on deprivation of liberty of migrants* (February 7, 2018) at para 8 [WGAD 2018].

and can only be permitted in very narrow circumstances.⁷ It must be justified in each individual case, subject to judicial review, necessary and proportionate to a legitimate purpose, and non-discriminatory.⁸ When detention occurs, it must be the least restrictive as possible for the shortest period of time. In order to show that detention is necessary and proportionate, a government must demonstrate that alternatives to detention would not be effective before resorting to detention.⁹ The blanket use of detention for the “border security” priority constitutes arbitrary detention and is unlawful – it is not based on an individualized assessment of its necessity and proportionality and is used as a default measure instead of an exception.¹⁰

The arbitrary detention of people seeking safety also deprives them of a fair opportunity to ask for asylum and consequently jeopardizes lives with the threat of *refoulement*. The United States government is under an obligation not to return individuals to a situation in which they would be at risk of torture or other serious human rights abuses: the principle of non-*refoulement*.¹¹ This includes not only their countries of origin, but any other place where they would face risk of serious harm.¹² The blanket use of detention for border enforcement undermines the U.S.’s obligation to provide a fair opportunity to seek asylum, given the well documented issues with meaningful access to legal counsel for people in detention.¹³ Without a meaningful opportunity to ask of protection, people seeking safety could be returned to the very danger they fled, in violation of the U.S.’s obligation of non-*refoulement*

The use of arbitrary detention for border enforcement further undermines the right to seek asylum because it seeks to deter people from seeking safety in the United States. Refugee

⁷ See, e.g., UN Human Rights Council, *Report of the Special Rapporteur on the human rights of migrants on a 2035 agenda for facilitating human mobility*, UN Doc A/HRC/35/25 (April 28, 2017) at para 62.

⁸ See Refugee Convention, Art. 31(2); HRC General Comment 35 at para 12; UNHCR Detention Guidelines, Guideline 4.2, para 34; *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, I(A)(10) [Siracusa Principles]; Special Rapporteur on Migrants 2017 at para 58.

⁹ UNHCR Detention Guidelines, Guideline 4.2, para 34; see also Siracusa Principles I(A)(11).

¹⁰ UNHCR Detention Guidelines, Guideline 4.1.4 at para. 32; *Concluding observations of the Committee on the Elimination of Racial Discrimination: Bahamas* (April 28, 2004) CERD/C/64/CO/1 at para 17; WGAD 2018 at para 19; Special Rapporteur on Migrants 2017 at para 58.

¹¹ Refugee Convention, Art. 33; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1984), Art. 3, G.A. Res. 39/46.

¹² 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*, at para. 7.

¹³ For the right to legal assistance, see ICCPR, Art. 14(3); UN Human Rights Committee, *General Comment No. 13, Article 14 (Administration of Justice) Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law*; UNHCR Detention Guidelines, Guideline 7; GA Body of Principles, Principles 17, 18; see, e.g., Ingrid Eagly and Steven Shafer, *Access to Counsel in Immigration Court*, American Immigration Council (September 2016), available at www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf; Kyle Kim, “Immigrants held in remote ICE facilities struggle to find legal aid before they’re deported,” *Los Angeles Times* (September 28, 2017), available at www.latimes.com/projects/la-na-access-to-counsel-deportation/.

and international law establish the right to seek asylum without penalty regardless of how a person enters a country, and the right to liberty and security, free from arbitrary detention.¹⁴ The Refugee Convention recognizes the humanity behind flight: people fleeing violence and persecution often have little choice about how they cross borders in their search for safety and compassion demands they not be penalized for the manner of entry. In fact, as noted above, U.S. law permits people to apply for asylum regardless of how they enter -- whether at or between ports of entry. The blanket use of detention to deter people from crossing a border to ask for asylum is not only wholly inconsistent with refugee protection and human rights standards, it is also at odds with U.S. law guaranteeing the right to seek asylum regardless of how they entered the country.

The inclusion of families in the “border security” priority violates the U.S.’s obligations toward the treatment of immigrant children. The detention of immigrant children, whether accompanied or unaccompanied, is prohibited in international law as it is not in their best interests.¹⁵ Additionally, detaining children because of their parents’ immigration status will never be in their best interests, nor will separating them from their parents.¹⁶ Children should not be detained and families should be released as a unit.¹⁷ The detention of families must end altogether.

Amnesty International has documented the grievous harm of detention and a punitive immigration enforcement system, and campaigned to free families and individuals detained simply because they were seeking safety at the U.S. southern border. Under the Interim Guidance Memorandum, these families and individuals would be detained simply because they came to the U.S. southern border asking for safety:

Families, with children as young as infants and toddlers, who were detained from multiple months to nearly two years after they asked for asylum at the U.S. southern border. Some children grew up in detention, such as Josué*, who learned to walk and talk while detained at the Berks County Family Residential Center. Other families such as Britany* and her son Gerry* and daughter Angela*, Andrea* and her son Mario, and Monica* and her son

¹⁴ Refugee Convention, Art. 31(2); ICCPR, Arts 2, 9(1); Special Rapporteur on Migrants, 2017 at para 58; *Report of the Working Group on Arbitrary Detention on its visit to the United States of America* (July 17, 2017), UN Doc. A/HRC/36/37/Add.2, at paras. 26-28, 32.

¹⁵ See WGAD 2018 at para 11; Special Rapporteur on Migrants 2017 at para 61; UNHCR, *UNHCR’s position regarding the detention of refugee and migrant children in the migration context* (January 2017); UN Special Rapporteur on torture, *Thematic Report on Torture and III-Treatment of Children Deprived of their Liberty* (March 5, 2015) UN Doc. A/HRC/28/68 at para. 80; UN Committee on the Rights of the Child, *General Comment No. 22 and General Comment No. 6*, UN Doc. CRC/GC/2006/6 at para. 18.

¹⁶ UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, *Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return* (November 16, 2017) CMW/C/GC/4-CRC/C/GC/23.

¹⁷ WGAD 2018 at para. 40.

Jafeth* were forcibly separated in the spring of 2018, only to be reunified and then detained at the South Texas Family Residential Center in Texas for months. The government chose to detain even infants such as Jose*, even after he developed breathing problems after days held in a Customs and Border Protection facility and was sent to a hospital for five days and put on a machine to help him breathe. Instead of releasing him during the pandemic, the government sent him and his mother to detention at the South Texas Family Residential Center in Texas. The detention of all of these families was solely predicated on their coming to the U.S. southern border asking for asylum. It was arbitrary, unnecessary, and harmful.

Pastor Steven Tendo, who was detained at the Port Isabel detention facility in Texas for nearly 26 months after he fled to the U.S. seeking asylum. He had been tortured by Ugandan government forces who amputated two of his fingers, detained him more than a dozen times and subjected him to further abuse, and killed several of his family members shortly before he escaped. While detained at Port Isabel, his health rapidly deteriorated due to inadequate care: his diabetes was left untreated, he lost vision in one eye and was losing vision in the other, and suffered numbness and tingling in his extremities; he also had recurring boils on his body. Due to public outrage, he finally received medical care that restored vision in one eye, managed his diabetes and other health conditions, but his immune system remained compromised and ICE continued to detain him. Working with his lawyers and other advocacy organizations, Amnesty International campaigned to free him and he was finally freed in February 2021. While Pastor Steven's treatment in detention reflected the punitive nature of a system toward people seeking safety, his direct experience also speaks to the systemic racism that Black immigrants endure in ICE detention.

Alejandra Barrera, who was detained for more than two years at the trans pod at the Cibola County Correctional Center in New Mexico after asking for asylum at the U.S. southern border. While in detention, she did not receive adequate health care. Despite requiring specialized medical care, and having a sponsor waiting to welcome her, she was denied parole five times. While Alejandra was detained, a transgender asylum-seeker named Roxana Hernandez died at a local hospital in ICE custody after she was transferred from Cibola. Alejandra was depressed and scared she would face a similar fate. Alejandra's situation is not unique; there are many more trans women seeking asylum in the United States who are detained after asking for safety.

at the southern border, and at risk of ill-treatment while in detention because of their gender identity, medical needs, or the trauma they have endured.

Categorizing people as security risks simply because of how they enter the United States feeds a harmful narrative that has dehumanized immigrants and people seeking safety. Such broad brushstrokes bolster discriminatory treatment of people simply because they come from another country.

Not only does the “border security” priority create harm by subjecting immigrants and people seeking safety – including families with children – to arbitrary enforcement solely based on their identity, it is also inconsistent with the administration’s other proposed reforms at the border. Notably the U.S. Citizenship Act (HR 1177 / S 348) proposes the establishment of a path to citizenship for those who entered on or before January 1, 2021, while the Interim Guidance Memorandum classifies anyone who enters the U.S. after November 1, 2020, as a “border security” priority.

We urge you to eliminate the arbitrary and harmful “border security” priority and chart a new course grounded in human rights and the recognition that people entering the United States are not threats because of their immigration status. Rather, the Department of Homeland Security (DHS) should prioritize humane and respectful reception for asylum-seekers at the southern border recognizing their right to seek protection and upholding their humanity and dignity.

(2) End the Use of Arbitrary Immigration Detention

The Interim Guidance Memorandum does not address the thousands of people currently detained by Immigration and Customs enforcement (“ICE”).

All people in ICE detention should have a review of their case with the presumption of liberty, in line with the U.S.’s human rights obligations to respect and ensure personal liberty and security as all individuals’ default condition and not subject people to arbitrary detention – including immigrants and asylum-seekers.¹⁸ As discussed above, the blanket use of detention in the U.S., not uncommonly for prolonged and even indefinite periods, violates those obligations.

In February 2021, one hundred groups, including Amnesty International USA, urged DHS to establish an affirmative file review process to consider release for all persons in ICE custody.¹⁹ This process should prioritize people who are most vulnerable to harm in

¹⁸ UDHR, Arts. 9, 14; ICCPR, Arts. 2, 9(1); HRC General Comment 35; GA Body of Principles, Principle 2; Refugee Convention, Art. 31; Migrant Worker Convention, Art. 16; HRC General Comment 35; WGAD 2018 at para 8; UNHCR Detention Guidelines, Guidelines 1, 2, 3; UN Committee on the Elimination of Racial Discrimination, *General Recommendation 30 on Discrimination against Non-Citizens*.

¹⁹ www.amnestyusa.org/wp-content/uploads/2021/02/Coalition-Letter-to-Secretary-Mayorkas-on-ICE-File-Review.pdf.

custody including families and children, transgender individuals, HIV+ individuals, pregnant people, and those at heightened risk of COVID-19. All persons should be considered eligible for release pursuant to this process, including those subject to statutory mandatory custody under 8 U.S.C. § 1226(c). This is in line with ICE officials exercising their discretion to release people detained under 8 U.S.C. § 1226(c) for urgent humanitarian reasons, including the COVID-19 pandemic.²⁰

ICE's case review process must be replaced with this affirmative review process. ICE's current process puts the burden on the detained person – or their counsel, if the person is fortunate to have counsel – to ask for a case review, instead of the government assuming the responsibility to free people unjustly detained. Advocates report that ICE's case review process is implemented inconsistently, without transparency, and with limited benefit for people currently detained. It does not reflect meaningful engagement to create a fair and humane immigration system.

Creating an affirmative case review process upholds a presumption of liberty for people in detention. Instead of putting the burden on detained people, the vast majority of whom do not have counsel and/or fall outside ICE's own enforcement priorities, the burden should be on the government to demonstrate why someone should be detained. The population under consideration is just over 14,000, making the process contemplated even more feasible.

Amnesty International has campaigned to release people who are not a priority enforcement under the Interim Guidance Memorandum, and yet remained detained:

Originally from Guatemala, Alida* sought safety in the U.S. with her daughter after years of severe physical, psychological, and sexual abuse at the hands of her partner. In February 2021, a U.S. immigration judge found that this heinous treatment amounted to torture, and granted Alida protection under the Convention Against Torture. Despite this, ICE continued to detain in York County Prison in Pennsylvania. Only after Amnesty International intervened, shining a light on the continued detention of a survivor of torture, was Alida released.

Maura fled to the U.S. from Mexico to escape relentless, transgender-based violence and abuse. Originally from Nicaragua, she spent half her life in the U.S. as a lawful permanent resident, attending high school in San Diego, holding numerous jobs in the hospitality industry, and building a community that accepts her as a trans woman. Maura is seeking humanitarian

²⁰ See www.americanimmigrationcouncil.org/sites/default/files/amicus_briefs/hope_et_al_v_doll_et_al_amicus_brief.pdf.

protection; she faces significant risk if returned to a country which is not safe for lesbian, gay, bisexual, transgender and intersex (LGBTI) individuals, particularly trans women. Yet, for nearly two years, she's been detained at the Otay Mesa Detention Center in California where she has suffered abuse and lacks adequate medical care, making her particularly vulnerable for COVID-19 complications. Maura is not a priority under the Interim Guidance Memorandum, and ICE has the legal and discretionary authority to release her. Maura should be released.

To uphold its human rights obligations, DHS should issue guidance based on the presumption of liberty for people in the immigration system. The new guidance should commit to individualized consideration of release for all people in ICE custody. No one should be detained for seeking safety or detained solely because of their immigration status. Moreover, Black and brown communities again and again bear the brunt of harsh, punitive enforcement policies and practices anchored in detention. Failure to address these systemic harms undermines President Biden's commitment to racial equity and human rights.

(3) Phase out privatized immigration detention and contracts with county jails

The Interim Guidance Memorandum is silent on privatized immigration detention. As a presidential candidate, Joe Biden promised to “[e]nd for-profit detention centers” as “[[n\]o business should profit from the suffering of desperate people fleeing violence.”²¹](#)

The vast majority of people in ICE custody – from 70 to 80 percent – are detained in immigration detention facilities owned or managed by private prison corporations.²² Many of these facilities have a well documented record of harsh conditions and negligent care, and lack of accountability.²³

²¹ “The Biden Plan for Securing Our Values as a Nation of Immigrants,” available at <https://joebiden.com/immigration/>.

²² See ACLU, Human Rights Watch, National Immigrant Justice Center, *Justice-Free Zones: U.S. Immigration Detention Under the Trump Administration* (2020), available at https://immigrantjustice.org/sites/default/files/content-type/research-item/documents/2020-04/Justice-Free%20Zones_Immigrant_Detention_Report_ACLU-HRW-NIJC_April-2020.pdf; Freedom for Immigrants, available at www.freedomforimmigrants.org/detention-statistics; Migration Policy Institute, *Profiting from Enforcement: The Role of Private Prisons in U.S. Immigration Detention* (2018), available at www.migrationpolicy.org/article/profitting-enforcement-role-private-prisons-us-immigration-detention.

²³ See ACLU, Human Rights Watch, National Immigrant Justice Center, *Justice-Free Zones: U.S. Immigration Detention Under the Trump Administration* (2020), available at https://immigrantjustice.org/sites/default/files/content-type/research-item/documents/2020-04/Justice-Free%20Zones_Immigrant_Detention_Report_ACLU-HRW-NIJC_April-2020.pdf; Migration Policy Institute, *Profiting from Enforcement: The Role of Private Prisons in U.S. Immigration Detention* (2018), available at www.migrationpolicy.org/article/profitting-enforcement-role-private-prisons-us-immigration-detention; ACLU, *Shutting Down Profiteers* (2016), available at www.aclu.org/sites/default/files/field_document/white_paper_09-30-16_released_for_web-v1-opt.pdf.

Amnesty International has exposed the horrifying conditions in immigration detention, including facilities operated by private prison companies – a lack of physical distancing, overcrowding, inadequate hygiene, and negligent medical care.²⁴ These rights violations have made ICE detention facilities tinderboxes for the spread of COVID-19.

We commend President Biden’s January 2021 executive order eliminating the use of privately operated criminal detention facilities: “To decrease incarceration levels, we must reduce profit-based incentives to incarcerate by phasing out the Federal Government’s reliance on privately operated criminal detention facilities.”²⁵ The Department of Justice is phasing out of private prison companies for use by the Bureau of Prisons because the U.S. government has found private prison companies to provide substandard and unsafe conditions for criminal detention facilities and incentivize mass incarceration.

In December 2016, the Homeland Security Advisory Council, an expert panel of law enforcement, national security, military, and other experts who advise the DHS Secretary, voted to recommend that DHS shift away from using private prisons to detain immigrants and asylum-seekers.²⁶

The reliance on privately operated and owned detention facilities has fueled arbitrary, mass detention and provision of care and conditions that are negligent and dangerous for people in ICE custody. Yet, private prison companies continue to operate in the context of immigration detention.

Equity and racial justice demand that DHS develop and implement a plan to phase out ICE contracts with private prison companies, as is being done by the Department of Justice. People in ICE custody detained in facilities owned or managed by private prisons companies should be afforded equal protection and consideration of their rights and well being.

DHS should also phase out contracts with state and local prisons and jails and other criminal detention facilities, including those privately owned and operated, for immigration

²⁴ Amnesty International, *Update to Amnesty International report on COVID-19 in US immigration detention*, Index: AMR 51/2958/2020 (August 2020), available at www.amnesty.org/download/Documents/AMR5129582020ENGLISH.PDF; Amnesty International USA, *Family Separation 2.0: “You aren’t going to separate me from my only child”* (May 2020), available at www.amnestyusa.org/wp-content/uploads/2020/04/Amnesty-International-USA-Family-Separation-2.0_May-21-2020-.pdf; Amnesty International, *‘We are adrift, about to sink’: The looming COVID-19 disaster in US immigration detention facilities*, Index: AMR 51/2095/2020 (April 2020), available at www.amnesty.org/download/Documents/AMR5120952020ENGLISH.PDF; Amnesty International, *‘You Don’t Have Any Rights Here’: Illegal Pushbacks, Arbitrary Detention and Ill-treatment of Asylum-seekers in the United States*, Index: AMR 51/9101/2018 (October 2018), available at www.amnestyusa.org/wp-content/uploads/2018/10/You-Dont-Have-Any-Rights-Here.pdf.

²⁵ Executive Order 14006, *Reforming Our Incarceration System to Eliminate the Use of Privately Operated Criminal Detention Facilities* (January 26, 2021), available at www.govinfo.gov/app/details/DCPD-202100088.

²⁶ Homeland Security Advisory Council, *Report of the Subcommittee On Privatized Immigration Detention Facilities* (December 1, 2016), available at www.dhs.gov/sites/default/files/publications/DHS%20HSAC%20PIDF%20Final%20Report.pdf.

detention. Facilities with the worst records for negligent and abusive care and conditions and lack of accountability should be prioritized in phasing out contracts.

Finally, in order to facilitate a broader shift away from immigration detention, DHS should expand community-based alternatives to detention. It must also halt the detention of asylum-seekers. These detention reforms will move the U.S. toward compliance with its human rights obligations, drastically reduce the number of people detained by ICE, and save hundreds of millions of dollars.

As with criminal detention, Black and brown communities comprise the majority of people in immigration detention, both a reflection and perpetuation of systemic racism. Upholding President Biden's commitment to racial equity and human rights unequivocally rests on resetting the racialized and punitive assumptions of the U.S.'s current immigration enforcement system. Private prison companies are a principal driver of this abusive system, and their unchecked and unexamined presence must end.

(4) Stop Misuse of Title 42

The Interim Guidance Memorandum is silent on the use of the Title 42 of the Public Health Services Act, which the government continues to use to expel families and people seeking safety at the U.S. southern border.

In March 2020, the previous administration began misusing Title 42 of U.S. Code Section 265 to effectively shut down access to the asylum system. The unlawful use of Title 42 has resulted in the summary expulsion of over 500,000 immigrants and asylum-seekers.²⁷ Title 42 has particularly affected Black immigrants and asylum-seekers, who have been summarily returned to the countries they fled because the Mexican government is largely only receiving immigrants and asylum-seekers from the northern countries of Central America who are expelled under Title 42.²⁸ Over the course of Black History Month in February 2021 and then in March 2021, the Biden administration expelled over 1,200 Haitians to danger in Haiti, including children, infants, and families.²⁹

All of this was entirely preventable, endangered lives, and is in violation of the U.S.'s obligations under international and domestic law to uphold the right to seek asylum and not forcibly return individuals to a place where they would face persecution.

²⁷ U.S. Department of Homeland Security, Customs and Border Protection, *Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions* (April 7, 2021), available at www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics.

²⁸ www.dhs.gov/news/2021/03/16/statement-homeland-security-secretary-alejandro-n-mayorkas-regarding-situation.

²⁹ Haitian Bridge Alliance, The UndocuBlack Network, and The Quixote Center, *The Invisible Wall: Title 42 and its Impact on Haitian Migrants* (March 2020), available at www.quixote.org/wp-content/uploads/2021/03/The-Invisible-Wall.pdf.

The U.S.'s public health laws should not be used to evade U.S. obligations under human rights and refugee law. The UN High Commissioner for Refugees has made clear that blanket measures restricting access to asylum on health grounds, without safeguards to protect against *refoulement*, is discriminatory, does not meet international standards for protection, and cannot be justified.³⁰ As President Biden assumed office, UNHCR yet again reminded governments: “The right to seek asylum is a fundamental human right. The COVID-19 pandemic provides no exception.”³¹ Yet, the Biden administration continues to use Title 42 to expel people seeking safety under the pretext of public health, violating their right to seek asylum and protection against *refoulement* – bedrock principles of refugee protection.

Furthermore, the use of Title 42 does not advance the public health justifications on which it is purportedly based. The use of Title 42 contradicts public health experts, who have clearly assessed and confirmed that there is no public health rationale for denying people their right to claim asylum at the U.S. border.³² Despite experts at the Centers for Disease Control and Prevention (CDC) determining there was no public health rationale to close the border, the order invoking the use of Title 42 was still issued over their objections.³³

Simply put: there is no public health rationale to treat immigrants and asylum-seekers differently, but it is causing irreparable harm to them. Public health experts have published a series of recommendations on how to restart the asylum process safely by using common-sense measures.³⁴

UNHCR has warned that “[m]easures restricting access to asylum must not be allowed to become entrenched under the guise of public health.”³⁵ We urge you to heed that warning and revoke Title 42 and the practice of summarily expelling immigrants and people seeking safety – including families with children. The exemption of unaccompanied children from Title 42 is long overdue, as it conflicts with the TVPRA and human rights obligations. But continuing to apply Title 42 to adults and families is unlawful, not based on science, and

³⁰ UNHCR, *Key Legal Considerations on access to territory for persons in need of international protection in the context of the COVID-19 response* (March 16, 2020), available at www.refworld.org/docid/5e7132834.html.

³¹ UNHCR, *UNHCR warns asylum under attack at Europe's borders, urges end to pushbacks and violence against refugees* (January 28, 2021), available at www.unhcr.org/en-us/news/press/2021/1/601121344/unhcr-warns-asylum-under-attack-europes-borders-urges-end-pushbacks-violence.html.

³² See www.publichealth.columbia.edu/research/program-forced-migration-and-health/letter-acting-hhs-secretary-cochran-and-cdc-director-walensky.

³³ See www.cbsnews.com/news/trump-administration-closed-borders-migrant-children-covid-19; <https://apnews.com/article/virus-outbreak-pandemics-public-health-new-york-health-4ef0c6c5263815a26f8aa17f6ea490ae>.

³⁴ See www.publichealth.columbia.edu/public-health-now/news/public-health-experts-issue-recommendations-protect-public-health-and-lives-asylum-seekers.

³⁵ UNHCR, *Inclusion key to protecting refugees and their hosts amid COVID-19 pandemic* (November 4, 2020), available at www.unhcr.org/news/press/2020/11/5fa2f16b4/inclusion-key-protecting-refugees-hosts-amid-covid-19-pandemic.html.

perpetuates the systemic racism permeating the U.S.'s punitive immigration enforcement system. It also risks creating family separation and endangering children by creating a risk parents, seeking their children's safety, will allow them to travel to the U.S. alone to ask for protection.

The solution is to uphold the rights of immigrants and people seeking safety, without discrimination to their status, country of origin, or other characteristics, and implement a fair and humane system that ensures the timely processing of asylum-seekers and immigrants without the default use of detention. The desire to implement processes to regulate border entry can be achieved based on protecting public health and respecting human rights. The U.S. has the capacity, and must marshal the political will, to act.

We urge you to reframe the Interim Guidance Memorandum, starting from the basis of protection, racial equity, and human rights. Rather than portraying asylum-seekers and immigrants as categorical threats, the Interim Guidance Memorandum should be revised to communicate the valued place asylum-seekers and immigrants have in the United States and our communities, and whose rights should be protected as equally as all others rather than as people to be targeted. A rights-positive and equitable framework shapes not only public perception but also institutional culture.

The moment is now to build a more just, compassionate, and humane immigration enforcement system: one that does not punish and criminalize asylum-seekers and immigrants, jeopardize human rights, and perpetuate the systemic harms of racial inequity and harmful narratives. A reframed Interim Guidance Memorandum is instrumental in resetting the system, and we urge you to act.

For more information, please contact Denise Bell, 917/583-8584 or dbell@aiusa.org.

Sincerely,



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