



May 13, 2021

Senator Gary C. Peters, Chair
U.S. Senate Committee on Homeland Security & Government Affairs

Senator Rob Portman, Ranking Member
U.S. Senate Committee on Homeland Security & Government Affairs

Re: Amnesty International USA Statement for Full Committee Hearing: DHS Actions to Address Unaccompanied Minors at the Southern Border

Dear Chairperson Peters, Ranking Member Portman, and Members of the Committee:

On behalf of Amnesty International USA and our members and supporters in the United States, we submit this statement for the record on the treatment of unaccompanied children at the U.S. southern border.¹

As the Biden administration continues to welcome children seeking safety at the U.S. southern border, we call on the government to take bold action to transform how it welcomes children – and all people – into this country and ensure their human rights.

The Biden administration inherited a chaotic, punitive system that does not prioritize the well-being of people seeking safety in the United States – including unaccompanied children. Gross negligence from the previous administration, including a lack of planning and resources invested to welcome children seeking safety with dignity, created challenges we saw play out on the U.S. southern border. COVID-19 precautions have also constrained capacity.

In 2018 and 2019, Amnesty International USA visited the temporary influx facilities for unaccompanied children at Tornillo and Carrizo Springs in Texas, and the notorious [Homestead](#) facility in Florida, as well as permanent facilities for children in Florida and Texas. Advocacy groups such as ours sounded the alarm, calling for accountability for human rights violations at Homestead in particular. We demanded an end to the cruel policies that had necessitated the use of these facilities at all – forcibly separating families and using [children as bait](#) to deport their

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.

potential sponsors through the Department of Homeland Security (“DHS”) and the Office of Refugee Resettlement (“ORR”).

While the immediate context necessitating the use of temporary influx facilities and emergency intake sites is different, the Biden administration is still obligated to hold children in conditions that meet international human right standards and U.S. standards that support their best interests. No matter the situation or who is heading the administration, the government must uphold its human rights obligations.

The government has taken responsive steps and a holistic approach to transfer children more quickly from Customs and Border Protection (“CBP”) facilities to ORR facilities. For example, mobilizing emergency intake sites helped to address children’s welfare swiftly by moving them out of CBP facilities. The government must ensure it releases children as quickly as possible from these stopgap emergency intake sites and swiftly addresses concerns about their conditions and services. The government must act similarly for temporary influx facilities. Children must be held in conditions that meet their best interests and safely and quickly reunified with families and sponsors.

Now is the time for transformation. As the administration adapts to current challenges, it must concurrently set in motion the systemic changes needed for reforming the border reception and ORR systems for unaccompanied children, so children are held in CBP facilities for minimal time; the need for influx facilities and emergency intake sites in the future is eliminated; the use of detention is not assumed; and children’s safe and speedy release and reunification with parents, caregivers, and other sponsors is prioritized, as both U.S. and international human rights law require.

Human Rights Standards Governing the Detention of Immigrant Children

Under international human rights standards, all actions concerning children should be guided by the best interests of the child.² Under that “best interests” principle, the UN Committee on the Rights of the Child has underscored that “protection and care” should be provided that ensures “the child’s ‘well-being’ and development. Children’s well-being, in a broad sense includes their basic material, physical, educational, and emotional needs, as well as needs for affection and

² UN Convention on the Rights of the Child (“CRC”), Art. 3(1) (November 20, 1989), available at www2.ohchr.org/english/law/pdf/crc.pdf. The U.S. signed the CRC in 1995, though it is the only country that has yet to ratify it. As a signatory to the CRC, the U.S. is prohibited under customary international law from acts that would defeat its object and purpose.

safety.”³ The U.S. has incorporated this principle at the federal and state levels, including multiple immigration law provisions and decision about a child’s custody.⁴

Children should not be detained, whether unaccompanied or accompanied, as it is not in their best interests.⁵ If children are detained, they must only be detained as a last resort for the shortest possible time and in the least restrictive setting possible, in a facility that is appropriate to the child’s needs and complies with both international and U.S. standards.⁶ Whenever a child is detained, they should be treated “in a manner that takes into account the needs of persons of his or her age.”⁷

The *Flores* Settlement Agreement lays out standards for the detention, release, and treatment of all immigrant children, whether unaccompanied or accompanied.⁸ It requires the government to release immigrant children as quickly as possible, and to hold them in the least restrictive setting possible – generally, in a non-secure facility licensed by a state child welfare entity. It also provides for exemptions to the care and oversight of children “in the event of an emergency or influx of minors into the United States.”⁹ The Trafficking Victims Protection Reauthorization Act of 2008 (“TVPRA”) similarly requires that children be placed in the “least restrictive setting that is in the best interest of the child.”¹⁰

Response at the Border and a Way Forward

The administration continues to take a whole-of-government approach to welcome children more in line with its obligations. It has [revoked](#) the dangerous agreement between DHS and ORR that endangered children and their sponsors – which advocacy groups like ours fought.

³ Committee on the Rights of the Children, *General Comment No. 14*, ¶ 71 (2013), available at www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf.

⁴ See, e.g., 8 U.S.C. § 1101(a)(27)(J); Immigration and Naturalization Service, *Guidelines for Children’s Asylum Claims* (December 10, 1998); 8 U.S.C. § 1232(c)(2); Child Welfare Information Gateway, *Determining the Best Interests of the Child* (2012), available at www.childwelfare.gov/pubPDFs/best_interest.pdf.

⁵ See International Covenant on Civil and Political Rights (“ICCPR”), Art. 9(3); UN High Commissioner for Refugees (“UNHCR”), *UNHCR’s Position Regarding the Detention of Refugee and Migrant Children in the Migration Context*, January 2017, at 2, available at <http://www.refworld.org/docid/5885c2434.html>.

⁶ See CRC, Art. 37; General Comment from UNHCR on ICCPR Art. 9; Joint General Comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration, Art. 32(f) (November 16, 2017).

⁷ CRC, Art. 37(c)129.

⁸ *Flores v. Lynch*, No. CV 85-04544 DMG (Ex), Central District of California (August 21, 2015), available at www.aila.org/File/Related/14111359p.pdf [hereinafter *Flores* Agreement].

⁹ *Flores* Agreement.

¹⁰ William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA) § 235(c)(2); 8 U.S.C. §1232(c)(2), Pub. L. No. 110–457, 122 Stat. 5044 (2008).

Mobilizing emergency intake sites helped to address children's welfare swiftly by moving them out of CBP facilities. A CBP facility is no place for families or children to stay a moment longer than absolutely necessary. The government's emergency response significantly reduced the amount of time children were held in CBP facilities and now the government must ensure it releases children as quickly and safely as possible from these stopgap emergency intake sites, where conditions and services have raised concerns, and quickly winds down their use.

Similarly, putting creative processes into place to get children out of ORR facilities faster right now – from reducing quarantine time to paying for the transportation of children and sponsors to facilitate reunification to case managers filling out paperwork for Category 1 and 2 sponsors – has enabled the speedier release of children to sponsors and charts a path for permanent reform.

Nonetheless, the administration can take immediate steps that will lead to long-term reforms, so the government is not here in the same situation in another year. At the border, ORR should start the sponsor-vetting process rather than at a later stage. This would potentially allow for release of children to their parents, families, and other sponsors from the border. Additionally, ORR and CBP should test not only children but also their sponsors for COVID-19 to enable quicker release and even potentially allow children to quarantine with their sponsors, who are often parents and family members.

Beyond the border, the administration must start right now to expand its network of ORR facilities. The facilities should be permanent, licensed, and small scale. Children should not be warehoused in facilities with 500 beds as if they are in a processing plant. Detention should not be assumed as the model, and foster care options must be expanded.

This expansion process will take time, and that is why the administration must act urgently. The U.S. must not continue using temporary influx facilities or emergency intake sites because of a lack of planning or investment in the infrastructure to care for unaccompanied children. In emergency situations, influx facilities and emergency intake sites are an imperfect stopgap measure. The government must move away from reflexively using them.

While these facilities are in use, the Biden administration must ensure stringent safeguards are in place to care for children. Unlike before, the use of influx facilities should have the same services and standards of care as permanent ones. Children's rights should not be shortchanged because of where they are held; the government is obligated to uphold their rights equally. Children should be released as quickly as possible from them to parents and other sponsors. The government must also ensure regular access to these facilities for independent monitors, child welfare experts, and attorneys to ensure children's welfare and oversight and accountability.

Influx facilities are not appropriate for prolonged use, and they should be de-activated as quickly as possible.

Similarly, the Biden administration must ensure stringent safeguards are in place to care for children at emergency intake sites. Guidance outlining standards for emergency intake sites seeks to establish a framework for creating child-appropriate care, but reports of inadequate conditions and services show [oversight is urgently needed](#). The acute phase of challenge in moving children from CBP to ORR custody appears to have passed, and recognizing the stopgap nature of emergency intake sites, the administration must move to implement a best interests of the child standard at these facilities, including urgently addressing inadequate conditions; providing more services and with more appropriate staffing ratios; and ensuring access to trauma-informed care. The administration must prioritize intensive case management to release children in these facilities faster to vetted sponsors or transfer them to licensed facilities or foster care in the ORR network, and move to demobilize the facilities as quickly as possible.

In addition to expanding system capacity, the sponsor-vetting process must continue to be streamlined and case management services immediately and heavily invested in so children can have a place to call home. Efficiencies do not mean compromising thoroughness; the well-being of the child is always paramount. There must need immediate investment in processing sponsorship applications much more quickly as well as increasing post-release services to ensure children's welfare. Most unaccompanied children have families and sponsors waiting to welcome them, and that is where they belong – the government is not a parent.

Challenges bring opportunities for change, and systemic reform must begin now to stop this cycle of urgent response at the border for the reception of unaccompanied children and release to their parents, caregivers, and other sponsors. The U.S. has the capacity, and must marshal the political will, to act.

Stop the Misuse of Title 42

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. Disregarding the objections of its own experts, the Centers for Disease Control and Prevention (“CDC”) issued an [order](#) under Title 42, allegedly as a public health measure responding to COVID-19, which DHS has used to close U.S. borders to people seeking safety. The administration must immediately halt this unlawful use of Title 42.

The exemption of unaccompanied children from Title 42 is welcome and was long overdue, as it conflicts with the TVPRA and human rights obligations. However, the welcoming of children at

the border, while the U.S. continues to expel families with children as well as adults, demonstrates that the use of Title 42 is arbitrary and serves as a cruel and unlawful form of border management.

This selective use of Title 42 [creates family separation](#) and endangers children, when parents expelled under Title 42 and placed in a desperate situation, allow their children to travel to the U.S. alone to ask for protection. Since President Biden took office, CBP agents have reportedly encountered more than [2,100 unaccompanied children](#) who traveled alone to the U.S. to seek safety, after they had been expelled with their families under Title 42.

The government's misuse of Title 42 has resulted in the summary expulsion of [more than 500,000](#) immigrants and asylum-seekers. 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. Over the course of Black History Month in February 2021 and then in March 2021, the Biden administration expelled [more than 1,200 Haitians](#) to danger in Haiti, including children, infants, and families.

The misuse of Title 42 violates 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 be at risk of serious human rights harm – the principle of *non-refoulement*.¹¹

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 (“UNHCR”) 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](#). 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.”](#) 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

¹¹ *Convention Relating to the Status of Refugees*, Art. 33 [Refugee Convention]; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1984), Art. 3, G.A. Res. 39/46; UN High Commissioner for Refugees (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; 1980 Refugee Act; 8 U.S.C. §§ 1158, 1225.

assessed and confirmed that there is no public health rationale for denying people their right to claim asylum at the U.S. border. 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.

Similarly, the [reported U.S. policy memo](#) urging Mexico to implement measures to decrease the number of migrants and asylum-seekers trying to cross the U.S.-Mexico, including by facilitating the U.S.'s expulsions of families and individuals under Title 42, further exposes that the U.S. is using Title 42 for border control – not public health – purposes. It should be fully repudiated.

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. Continuing to apply Title 42 to adults and families is unlawful, not based on science, and perpetuates the systemic racism permeating the U.S.'s punitive immigration enforcement system.

The welcoming of children at the border – while continuing the expulsion of families with children as well as adults – demonstrates that the use of Title 42 is arbitrary and serves as a cruel and unlawful form of border management. UNHCR has warned that “[\[m\]easures restricting access to asylum must not be allowed to become entrenched under the guise of public health.](#)” We urge the administration to heed that warning and stop the misuse of Title 42 and the practice of summarily expelling immigrants and people seeking safety – including families with children.

Conclusion and Recommendations

In the midst of national debates urging the Biden administration to close the border and framing children as a threat to national security and the immigration system, the focus must remain on our collective humanity. These are children who are seeking safety. Their well-being, safety, and security must be the north star. The U.S. has taken urgent steps to improve conditions at the border and ensure the safe, expedited release of children to their families and other sponsors. It must urgently continue to implement both short and long-term reforms to address children's welfare comprehensively and effectively.

The alternative to welcoming children is unacceptable and unlawful: children must not be expelled under Title 42. Children – and all people – seeking safety can and must be welcomed. It is the U.S.'s legal and moral obligation, and it is their human right to ask for safety. The Biden Administration must act swiftly and decisively to reach its stated goal of creating a fair and humane immigration system for all people by immediately halting the misuse of Title 42.

Amnesty International USA recommends:

Reception, Detention, and Release of Unaccompanied Children

To the Administration:

- Unaccompanied children should not be detained. However, if detention is necessary, children should be placed for the shortest period of time possible in foster care facilities or small-size, state-licensed, permanent facilities while they are reunified with their families or matched with other appropriate sponsors.
 - ORR should fully utilize existing transitional foster care (TFC) beds and long-term foster care (LTFC) beds and immediately begin efforts to expand TFC and LTFC placement capacity so that more children can be placed in foster care rather than congregate care facilities.
 - ORR should immediately begin efforts to expand placement capacity for permanent, licensed, small-scale facilities containing under 25 beds.

- Decisions regarding the release of unaccompanied children to sponsors must always be made in a child's best interests, supported by adequate staffing and resources to ensure that children are placed with appropriate sponsors as quickly as possible, and not based on the sponsor's immigration status or used for immigration enforcement. Whenever possible, all effort should be made to place unaccompanied children in ORR facilities as close to their potential sponsors as possible.
 - HHS should fully adopt co-location of HHS personnel at CBP facilities to initiate the release of children arriving with trusted caregivers at the border to facilitate expedited, safe release of children.
 - For children arriving with trusted caregivers who are not their parents or legal guardian, HHS personnel should be provided with a separate space to initiate an evaluation of these caregivers as potential sponsors while they are in CBP custody and, if approved, release the child and caregiver together when possible. This would avoid the need to separate children from their caregivers, transfer them to ORR custody, and only then begin the sponsorship process. Children who arrive and are released with trusted caregivers meet the legal definition of unaccompanied child and should be afforded all protections for unaccompanied children provided by the TVPRA.
 - For children arriving alone, HHS personnel should interview these children to identify any special needs the child may have as well as any potential sponsor(s), which should be shared immediately with the child's case manager to speed up the sponsor vetting process. All unaccompanied children whose family

reunifications are expedited, whether through direct release at co-located CBP facilities or other means, should be ensured legal counsel and post-release services.

- ORR should continue to implement intensive case management as standard practice to safely expedite children's release.
 - ORR should increase post-release services to ensure children's welfare.
 - ORR should continue the practice of paying for a child's transportation to their sponsor once the release process is approved, and where appropriate a sponsor's transportation. ORR should also pay for the care provider staff member's transportation, if necessary, to escort the child to their sponsor.
 - ORR and DHS should not re-enter into any information-sharing agreement regarding an unaccompanied child for use or reference during removal proceedings or for immigration enforcement.
- Policies and practices regarding the care of unaccompanied children conform to the best interests of the child standard as outlined in domestic and international human rights standards.
 - ORR should ensure that temporary influx facilities follow state licensing requirements as well as the *Flores* standards for permanent ORR shelters and international human rights standards.
 - ORR should ensure that temporary influx facilities have the same services and standards of care as permanent facilities. The government must also ensure regular access to these facilities for independent monitors, child welfare experts, and attorneys to ensure children's welfare and oversight and accountability.
 - ORR should ensure that emergency intake sites rapidly implement a best interests of the child standard for conditions, care, and release. It should urgently address inadequate conditions; provide more services and with more appropriate staffing ratios; and ensure access to trauma-informed care. It must prioritize intensive case management to release children in these facilities more quickly to vetted sponsors or transfer them to licensed facilities or foster care in the ORR network. It must also ensure regular access to these facilities for independent monitors, child welfare experts, and attorneys to ensure children's welfare and oversight and accountability.
 - ORR should demobilize emergency intake sites as quickly as possible and end the protracted use of influx facilities and move to the use of licensed ORR facilities and foster care.

- Access to counsel should be guaranteed.
 - Guarantee all children in government custody legal counsel to conduct “Know Your Rights” presentations, interview children, conduct legal assessments, and establish contact with representation in the community where the child will be released.
 - Establish a right to counsel for children and ensure children are guaranteed legal counsel in all immigration court proceedings.

- A farsighted planning process should be developed that has the elasticity and responsiveness necessary to accommodate variations in unaccompanied children populations while complying with domestic and international human rights standards.

To Congress:

- Allocate funds in line with advocate and service provider recommendations in support of the recommendations above.
- Conduct official visits to emergency intake sites and temporary influx facilities to assess conditions and ensure appropriate oversight.
- Co-sponsor and support passage of FAIR Proceedings Act (S.901).
- Place limitations on funding for contracts with for-profit corporations, as they will not be properly incentivized to care for children. The detention of children should not be a business.

Title 42

To the Administration:

- Immediately stop expelling individuals and families under Title 42 and withdraw the CDC order and rescind the accompanying Health and Human Services final rule.
- Do not provide financial assistance, training or equipment, or pursue bilateral diplomatic agreements or other policy measures, to effect border control measures such as under Title 42, which undermine the right to seek asylum or result in *refoulement*.
- Ensure a fair and meaningful opportunity to ask for safety, and reject any form of expedited processing of claims for asylum and the blanket use of detention.
- Establish a right to counsel for people in immigration proceedings and ensure people are guaranteed legal counsel in all immigration court proceedings.

To Congress:

- Withhold appropriations used to carry out expulsions under Title 42.

- Hold oversight hearings on violations of U.S. refugee and human rights law and treaty obligations, including on Title 42.
- Conduct official visits to CBP facilities and other sites detaining families, children, and individuals, such as hotels and “reception” sites, to assess conditions and ensure appropriate oversight.

We urge the Biden administration to take critically needed steps to uphold its human rights obligations to meet the best interests of children through immediate and systemic change, as it works to welcome children with humanity, compassion, and care. We call on the Biden administration to immediately stop the misuse of Title 42 and ensure all people seeking safety are welcomed as part of a fair and humane immigration system. The Biden administration should approach these issues with the urgency, accountability, and transparency they deserve.

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

Sincerely,



Joanne Lin
National Director
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Denise Bell
Researcher
Refugee and Migrant Rights