CENTER FOR IMMIGRATION STUDIES

December 4, 2023

Toby Biswas, Director of Policy
Unaccompanied Children Program
Office of Refugee Resettlement
Administration for Children and Families
Department of Health and Human Services
Washington, D.C.

RE: *Unaccompanied Children Program Foundational Rule*, RIN 0970-AC93, Document Number: 2023-21168.

Dear Director Biswas,

The Center for Immigration Studies (CIS) submits the following public comment to the U.S. Department of Health and Human Services (HHS), Office of Refugee Resettlement (ORR) in response to the request for comments on the Notice of Proposed Rulemaking (NPRM) titled ***Unaccompanied Children Program Foundational Rule***, as published in the Federal Register on October 4, 2023.[1]

CIS is an independent, non-partisan, non-profit, research organization. Founded in 1985, CIS has pursued a single mission – providing immigration policymakers, the academic community, news media, and concerned citizens with reliable information about the social, economic, environmental, security, and fiscal consequences of legal and illegal immigration into the United States. CIS is the nation's only think tank devoted exclusively to the research of U.S. immigration policy to inform policymakers and the public about immigration's far-reaching impact. CIS is animated by a unique **pro-immigrant, lower-immigration** vision which seeks fewer annual admissions but a warmer welcome for those admitted.

I. Background

The term "unaccompanied alien child" (UAC)[2] is defined in statute as a child who—(A) has no lawful immigration status in the United States; (B) has not attained 18 years of age; and (C) with respect to whom — (i) there is no parent or legal guardian in the United States; or (ii) no parent or legal guardian in the United States is available to provide care and physical custody.[3] Most UACs

[1] 88 Fed. Reg. 68908 (Oct. 4, 2023).
[2] CIS uses the term used in statute, "unaccompanied alien child," rather than the term used in this rule, "unaccompanied child," for legal accuracy, precision, and clarity. 6 U.S.C. § 279(g)(2). Additionally, CIS believes it is necessary to distinguish between unaccompanied alien children, over which this rulemaking impacts, and U.S. citizen minor in need of government custody, given the distinct needs and protections provided to both groups. As explained in this comment, CIS believes that ORR is, through this rulemaking, widening the disparity of care and protections afforded to U.S. citizen minors in need of government custody and UACs in the United States. Accordingly, it is necessary to continue to use the legal term when discussing this issue.
[3] 6 U.S.C. §279(g)(2).

are apprehended between U.S. ports of entry (POEs) along the southwestern border with Mexico, while a minority of UACs are deemed inadmissible at POEs along the border or encountered in the interior of the United States.[4]

The number of UACs arriving across the Southern border has skyrocketed since 2012. According to the Congressional Research Service, the number of UACs apprehended by DHS and referred to ORR in the early 2000s "averaged 6,700 annually and ranged from a low of about 4,800 in Fiscal Year (FY) 2003 to a peak of about 8,200 in FY 2007".[5] By 2014, U.S. Customs and Border Protection (CBP) reported the number of UAC apprehensions to hit a then-record of 68,541.[6] Annual figures have more than doubled since President Biden took office in January 2021. CBP reported 146,925 UAC encounters in the Southwest land border region in FY 2021, 152,057 UAC encounters in FY 2022, and 137,275 encounters in FY 2023.[7]

Section 462(b) of the Homeland Security Act (HSA) and Section 235(c) of the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) define UAC and describe conditions for the care and placement of UACs in federal custody. Additionally, a 1997 court decree (commonly referred to as the *Flores* Settlement Agreement) established a nationwide policy for the detention, treatment, and release of UACs.[8] The *Flores* Settlement Agreement notably requires U.S. government officials to provide food, water, medical care, education, adequate supervision to protect minors from others, and separation from unrelated adults whenever possible, among other requirements.[9]

Section 235 of the TVPRA, however, also distinguished UACs into two separate groups: (1) children from "contiguous" countries (Canada and Mexico); and (2) minors who were nationals of "non-contiguous" countries. Under that provision, a UAC from a contiguous country can be returned home if the child has not been trafficked and does not have a credible fear of return. UACs from non-contiguous countries must be transferred to the care and custody of ORR within 72 hours and placed into formal removal proceedings, even if they have not been trafficked and have no fear of return.[10] ORR is then directed to place most of those children with "sponsors" in the United States.

After Congress enacted the TVPRA, the number of UACs from non-contiguous countries soared, as parents and smugglers realized that section 235 of the TVPRA all but guaranteed that any child who could make it illegally into the United States would be released into this country to rejoin their family. Nonenforcement policies implemented by the U.S. government (i.e., the Deferred

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[4] Congressional Research Service, Unaccompanied Alien Children: An Overview (R43599) (Sept. 1, 2021).
[5] *Id*.
[6] *Id*.
[7] U.S. Customs and Border Protection, Southwest Land Border Encounters (updated Nov. 14, 2023).
[8] *Flores v. Meese*—Stipulated Settlement Agreement (U.S. District Court, Central District of California, 1997).
[9] As modified in 2001, the *Flores* Settlement Agreement provides that it will terminate forty-five days after publication of final regulations implementing the agreement. ORR anticipates that "any termination of the settlement based on the adoption of this proposal as a final rule would only be effective for those provisions that affect ORR and would not terminate provisions of the FSA for other Federal Government agencies." 88 Fed. Reg. 68908 (Oct. 4, 2023).
[10] UACs are not amenable to expedited removal. *See* 8 U.S.C. § 1232(a)(5)(D).

Action for Childhood Arrivals (DACA) program) were also successful in sending the message to prospective migrants that the U.S. government was not interested in enforcing U.S. immigration law with regard to these populations.

ORR has demonstrated both an unwillingness and an inability to manage the care and placement of UACs in the United States. Exploitation, abuse, and neglect of UACs after arriving in the United States has been well documented, despite ORR's responsibilities.

For example, a bipartisan Homeland Security Advisory Council made alarming findings in 2019 that many migrant adults revealed during CBP processing that they were encouraged to bring a child with them by criminal smuggling organizations that are paid to transport the migrant and child to the U.S. border from Central America.[11] The Council also found that children are being "exploited and placed in danger in many ways,"[12] emphasizing that **migrant adults frequently fraudulently claim parentage to a child to gain entry to the United States, some children are being "re-cycled by criminal smuggling organizations, i.e. returned to Central America to accompany a separate, unrelated adult on another treacherous journey through Mexico to the U.S. border," and that human traffickers extract additional fees as a form of indentured servitude from family units who were released with notices to appear and made their way into the interior of the United States.**[13] Additionally, the Council stated that "the risk for commercial sexual exploitation of these children and teens is predictably high and will be very difficult to prevent after transport or release into the interior of the U.S."[14]

Moreover, in February 2019, internal documents received by Congress that showed HHS and the Department of Justice (DOJ) received thousands of allegations of sexual abuse, including almost two hundred staff-on-child allegations.[15] From October 2014 to July 2018, the HHS' Office of Refugee Resettlement received 4,556 complaints, and the Department of Justice received 1,303 complaints. This includes 178 allegations of sexual abuse by adult staff. The HHS Office of Inspect General reported that ORR failed in determining whether facilities responded appropriately to such incidents.

In September 2021, Axios reported that ORR "has **lost contact with thousands of migrant children** released from its custody," with nearly a third of calls to these minors or their sponsors going unanswered. In October 2021, Arizona Rep. Andy Biggs wrote a letter to the Department of Health and Human Services, demanding to know how HHS was "unable to contact 19,726 sponsors of unaccompanied alien children since January 2021." ORR lost contact with nearly 20,000 UAC in less than a year. Even more alarming, the New York Times reported that ORR lost

[11] See Homeland Security Advisory Council, *Final Emergency Interim Report, CBP Families and Children Care Panel* (Apr. 2019).
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] Owens, Caitlin, Kight, Stef, Stevens, Harry, Axios, *Thousands of migrant youth allegedly suffered sexual abuse in U.S. custody* (Feb. 26, 2019).

contact with and could not reach more than 85,000 UACs it had placed with sponsors, stating that "[o]verall, the agency lost immediate contact with a third of migrant children."[16]

On October 29, 2021, the United States Senate Committee on Finance issued a report, titled *Exposing the Risks of Deliberate Ignorance, Years of Mismanagement and Lack of Oversight by the Office of Refugee Resettlement, Leading to Abuses and Substandard Care of Unaccompanied Alien Children*, which investigated the UAC program following the numerous allegations of sexual abuse of UACs and criticisms of ORR grantee facilities' efforts to protect children in their care, as well as serious questions about the financial accountability of ORR grantees. The Senate Committee concluded that ORR endangers UAC safety and welfare because it does not have adequate systems in place to track the performance of UAC grantees or assess grantee performance. The Committee also highlighted that ORR's Prevention of Sexual Abuse Team is neither able to properly track incoming allegations, nor to ensure that appropriate actions have been taken after receiving them.

ORR has also demonstrated an unwillingness to share necessary information or otherwise be transparent about its operations regarding UAC care. In its October 2021 report, the United States Senate Committee on Finance also reported that ORR engaged in "obstruction tactics" to interfere with Congress's Constitutional duty to conduct oversight over the federal agencies.[17] Moreover, the Committee found that ORR does not consistently coordinate with federal, state, and local agencies. In many cases, the Committee found that ORR relies on voluntary reporting by facility operators to inform ORR of their own failures.

This year, a Florida statewide grand jury convened, in part, to examine the smuggling and release UACs specifically in its state. The grand jury reported that:

> "Like many of our fellow Floridians, we had no pre-existing knowledge about how UAC are processed, how their sponsors are selected, how they arrive in Florida, and how they are cared for upon arrival. The public is led to believe that the process described by our federal government in documents and popular media accounts at least resembled the truth. ORR asserts that children fleeing from danger are adequately identified, properly cared for, and reunited with their family here in this country.
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> **In reality, ORR is facilitating the forced migration, sale, and abuse of foreign children, and some of our fellow Florida residents are (in some cases unwittingly) funding and incentivizing it for primarily economic reasons.** These entities encourage UAC to undertake and/or be subjected to a harrowing trek to our border, ultimately abandoning significant numbers of those who survive the journey to an uncertain fate with persons who are largely unvetted. **This process exposes children to horrifying health conditions, constant criminal threat, labor and sex trafficking, robbery, rape, and other experiences not done justice by mere words.** We will never be able to forget or un-see some of the heart-wrenching testimony,

[16] Dreier, Hannah, The New York Times, *Alone and Exploited, Migrant Children Work Brutal Jobs Across the U.S., Arriving in record numbers, they're ending up in dangerous jobs that violate child labor laws — including in factories that make products for well-known brands like Cheetos and Fruit of the Loom* (Feb. 28, 2023).
[17] U.S. Senate, Senate Committee on Finance, *Exposing the Risks of Deliberate Ignorance, Years of Mismanagement and Lack of Oversight by the Office of Refugee Resettlement, Leading to Abuses and Substandard Care of Unaccompanied Alien Children* (Oct. 29, 2021).

> disturbing videos, and infuriating abuse we have observed in the course of our five-month investigation." (Emphasis added).[18]

The grand jury further explained that conditions for UACs have worsened in recent years. Specifically, these investigators explained that:

> "**In addition, the process of identifying UAC and their sponsors creates multiple perverse incentives and tragic outcomes. Some "children" are not children at all, but full-grown predatory adults; some are already gang members or criminal actors; others are coerced into prostitution or sexual slavery; some are recycled to be used as human visas by criminal organizations; some are consigned to relatives who funnel them into sweatshops to pay off the debt accumulated by their trek to this country; some flee their sponsors and return to their country of origin; some are abandoned by their so-called families and become wards of the dependency system, the criminal justice system, or disappear altogether Meanwhile, ORR's efforts and resources are less-directed at preventing or remedying any of these maladies, and instead appear fully focused on maximizing the number of children they can process, heedless of the downstream consequences to either the children or the communities into which they are jettisoned**." (Emphasis added).[19]

The grand jury also reported talking to UACs, who communicated details of being:

> "…'**pimped out' by their 'aunt' (whom they did not know prior to arriving in the United States**); some who had run away from their sponsor because **they were being sold for sex**; being teenaged **females living in a house full of unknown adult males with no private bedroom**; being children aged seven left with an unknown male while their sponsor was working; UAC relating that they had to drop out of school and work to pay debts for their passage, as well as pay their family's debt to coyotes in their home country; UAC disclosing how they call friends of their sponsor to obtain fraudulent documents to enable them to work; UAC displaying the fake documents; **UAC disclosing that they and their families overseas actually paid their "sponsor" to apply for their custody**, **and that they never actually went to live with that sponsor**; UAC relating that they and other UAC rode together to work sites arranged by their sponsors 'wherever they take me'; and UAC relating that their sponsor had been sent to prison in Florida, **for Felony Battery upon a child**" (Emphasis added).[20]

These findings are corroborated by recent OIG reports that likewise determined that ORR has failed to conduct standard security protocols and has failed to transfer UAC children in its custody.[21] Specifically, OIG reported that ORR failed to conduct or document background, fingerprint, Sex Offender Registry and Child Abuse/Neglect checks for hundreds of its own employees. ORR also did not require a transportation services contractor to conduct such background and security checks and issued waivers for background checks that were not necessary.[22]

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[18] Supreme Court of Florida, Third Presentment of the Twenty-First Statewide Grand Jury, Case No.: SC22-796 (Mar. 29, 2023).
[19] *Id.*
[20] *Id.*
[21] U.S. Department of Health and Human Services, Office of Inspector General, *The Office of Refugee Resettlement Needs Improve Its Practices for Background Checks During Influxes* (May 2, 2023); U.S. Department of Health and Human Services, Office of Inspector General, *The Office of Refugee Resettlement Needs to Improve Its Oversight Related to the Placement and Transfer of Unaccompanied Children* (May 23, 2023).
[22] U.S. Department of Health and Human Services, Office of Inspector General, *The Office of Refugee Resettlement Needs Improve Its Practices for Background Checks During Influxes* (May 2, 2023).

ORR also failed to adequately document placement decisions or placement designations for UACs and that ORR faced challenges transferring children with both behavioral and mental health needs.[23] OIG summarized that, "These errors occurred because ORR has limited quality control procedures, lacked oversight to ensure documentation was retained by care providers, and did not have a process in place to track denied transfers."[24]

Additionally, OIG found in 2020 that ORR did not award contracts regarding the third-party operation of influx care facilities for temporary emergency shelter and services for UACs in accordance with federal regulations and did not effectively manage its contracts for services provided in accordance with federal statutes, regulations, and HHS policies.[25] As a result, ORR risked paying for services that were not performed or incorrect and, in one case, paid approximately $67 million in taxpayer money to operate a facility for nearly three months with no UACs present.[26]

These reports detail just a fraction of the harms that have been documented and failures ORR has committed in exercising its duties regarding the care and placement of UACs. Despite these reports, ORR submitted this NPRM, titled *Unaccompanied Children Program Foundational Rule*, to codify standards of care and placement protocols for UACs into regulation.[27] CIS is disappointed to understand that many of the provisions in the rule are aimed at insulating ORR from liability, further reducing transparency in the program, and restricting communication between federal agencies and state and local law enforcement.

II. *Unaccompanied Children Program Foundational Rule*

CIS strongly recommends that ORR amend or withdraw its NPRM to provide stronger protections to UACs while discouraging the smuggling of minors into the United States. CIS believes that this proposal codifies many of ORR's existing, misguided policies that have allowed the agency to lose track of nearly 100,000 UACs it has placed with sponsors. This NPRM does little to address ORR's failures; prevent the placement of UACs with strangers, including criminals or traffickers; or discourage the smuggling of UACs into the United States, generally.

In place of this proposal, CIS strongly recommends that ORR issue a rulemaking that:

- Requires use of DNS tests to confirm familial relationships between UACs and sponsors, when one is claimed;
- Requires stronger, mandatory vetting procedures for sponsors and children alike;
- Prohibits sponsors from taking custody of multiple UACs that do not have a familial relationship to the sponsor;

[23] U.S. Department of Health and Human Services, Office of Inspector General, *The Office of Refugee Resettlement Did Not Award and Manage the Homestead Influx Care Facility Contracts in Accordance With Federal Requirements* (Dec. 2020).
[24] *Id*.
[25] *Id*.
[26] *Id*.
[27] *See* 88 Fed. Reg. 68908 (Oct. 4, 2023).

- Priotizings the reunion and repatriation of UACs with their families in their home countries;
- Requires any facility that housing UACs to be licenses in the state or locality it is located in;
- Facilitates sharing of information between ORR and federal government agencies and state and local law enforcement agencies.

Finally, ORR must rescind proposed 8 C.F.R. § 410.1309(a). The provision has not been authorized by Congress and, therefore, exceeds HHS's rulemaking authority.

A. ORR Should Require Use of DNA Tests to Confirm Familial Relationships.

HHS must amend its proposal to require ORR to use DNA testing to confirm familial relationships between UACs and alleged family members. ORR must also use DNA testing as evidence of age when determining whether an alien meets the definition of UAC under 6 U.S.C. § 279(g)(2). Additionally, CIS urges ORR to amend proposed 45 C.F.R. § 410.1201 and § 410.1202 to make any adult who claims a familial relationship with a UAC but fails a DNA test or provides false identity documentation barred from sponsoring an UAC.

Specifically, this NPRM under proposed 45 C.F.R.§ 410.1702 and § 410.1703 provides that ORR may consider information or documentation to make an age determination as a "totality of the circumstances and evidence" analysis. Under proposed § 410.1703(b), ORR may consider information or documentation, including but not limited to: (1) birth certificate, including a certified copy, photocopy, or facsimile copy if there is no acceptable original birth certificate and proposes that ORR may consult with the consulate or embassy of the individual's country of birth to verify the validity of the birth certificate presented; (2) authentic government-issued documents issued to the bearer; (3) other documentation, such as baptismal certificates, school records, and medical records, which indicate an individual's date of birth; (4) sworn affidavits from parents or other relatives as to the individual's age or birth date; (5) statements provided by the individual regarding the individual's age or birth date; (6) statements from parents or legal guardians; (7) statements from other persons apprehended with the individual; and (8) medical age assessments, which should not be used as a sole determining factor but only in concert with other factors.

ORR, however, proposed no provisions to establish minimum requirements for determining whether a sponsor possesses a *bona fide* parent or relative relationship with a UAC. Equally concerning, this NPRM provides no protocols or information sharing requirements when ORR does determine that an adult has fraudulently claimed to be a parent or relative of a UAC.

Use of DNA testing is essential given the high rate of immigration- and identity-related fraud that has been uncovered in the UAC program.[28] For example, during a three-day Rapid DNA pilot program in 2019, ICE's Homeland Security Investigations (HIS) conducted consensual

[28] *See, e.g.*, Homeland Security Advisory Council, *Final Emergency Interim Report, CBP Families and Children Care Panel* (Apr. 2019); U.S. Customs and Border Protection, *Unaccompanied Child Imposters Identified in El Paso* (Aug. 19, 2023).

DNA testing of 109 purported family units in the border region. Sixteen family units were identified as fraudulent, not having a parent-child relationship that was claimed. HHS officials have even acknowledged the limitations of their screening and post-placement follow-up procedures for UAC sponsors during a Senate Homeland Security and Governmental Affairs Committee hearing. [29] Use of rapid DNA testing, however, will allow ORR to resolve questions about familial relationships and identity quickly and cheaply, while minimizing risks of fraud or human error.

B. ORR Must Require Stronger Mandatory Vetting Procedures for Sponsors and Children Alike.

ORR must amend this proposal to make all optional safeguards mandatory in order to ensure the safety and welfare of UACs placed with sponsors. CIS believes that in all cases, without exception, ORR must:

- Investigate the relationship between the sponsor and child;
- Run background checks on the adults in the sponsors' households and secondary caregivers;
- Visit sponsors' homes prior to placement;
- Determine whether sponsors have already received custody of an unrelated child or children; and
- Conduct post-placement follow-up to ensure the child is safe.

Accordingly, ORR must amend proposed 45 C.F.R. § 410.1202(a) to *require*, rather than merely permit, ORR to consult with the issuing agency (e.g., consulate or embassy) of the sponsor's identity documentation to verify the validity of the sponsor identity document presented and be required to conduct a background check on the proposed sponsor.

ORR must also amend proposed § 410.1202(c) to require ORR to investigate the living conditions in which the UAC would be placed and the standard of care the UAC would receive. ORR must also amend proposed 45 C.F.R. § 410.1204 to require ORR to conduct home studies for all potential sponsor placements, beyond the set of mandatory investigations set out in proposed 45 C.F.R. § 410.1204(b). ORR must also be required, in all cases, to verify the employment, income, and other relevant information provided by a potential sponsor as evidence of the ability to support the child. As written, these vetting protocols are optional.[30] Given the extent of exploitation and abuse that has been uncovered, CIS believes this is unacceptable and strongly recommends ORR make these protocols mandatory.

CIS further emphasizes that it, in addition to providing stronger background checks protocols for potential sponsors, ORR must also amend 45 C.F.R. § 410.1202(c) to require ORR to vet other adults that may be present in the household of a sponsor in every case. These individuals reside in close contact and obtain access to UACs. Therefore, it is necessary to ensure that these

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[29] U.S. Congress, Senate Committee on Homeland Security and Governmental Affairs, Permanent Subcommittee on Investigations, *Adequacy of the Department of Health and Human Services' Efforts to Protect Unaccompanied Alien Children From Human Trafficking*, 114th Cong., 2nd sess., January 28, 2016.
[30] Proposed 45 C.F.R. § 410.1202(c).

individuals do not present risks to the safety and well-being of UACs. Conducting background checks on these individuals may also be crucial to uncovering illegal schemes regarding the unlawful employment or trafficking of UACs in the United States. ORR cannot in good faith claim to making a decision that is in the best interest of the UAC if ORR has no idea who they will be living with.

ORR must also amend 45 C.F.R. § 410.1202 to bar potential non-relative sponsors who have already acquired custody of a UAC from receiving custody of other non-relative UACs. CIS believes that ORR is accepting an unreasonable risk of placing UACs with human traffickers and abusive or exploitative adults when it permits an individual who is not a relative of a UAC to sponsor multiple UACs who do not, themselves, have a familial relationship.

Moreover, ORR must amend 45 C.F.R. § 410.1202 to bar potential sponsors who refuse to submit to security and background checks from receiving custody of a UAC.

Finally, ORR must amend this NPRM to require ORR to terminate custody agreements in cases where it is determined the UAC's safety or wellbeing is at risk or a sponsor has committed fraud as a means to acquire custody of the UAC.

C. ORR Must Amend Its Proposal to Prioritize Reuniting UACs with Their Families in Their Home Countries.

ORR must work with DHS to ensure that all inadmissible families and UACs who arrive illegally and are ineligible to obtain a lawful immigration status are reunited safely at home. Repatriating and reuniting UACs with their families in their home countries, rather than in the United States, is the most humane policy that maintains the integrity of the immigration system, consistent federal immigration law. Importantly, this policy eliminates the incentive to send minors on the dangerous journey alone or with smugglers to illegally cross the southern border and will mitigate the humanitarian crisis that has unsustainably strained and diverted the immigration system's limited resources.

Furthermore, amending this NPRM to prioritize the repatriation of UACs furthers Congressional intent in enacting the TVPRA. Specifically, current 8 U.S.C. § 1232(a)(5), titled "Ensuring the Safe Repatriation of Children," instructs the Secretary of HHS to, in conjunction with the Secretary of State and Secretary of Homeland Security to, "develop and implement best practices to ensure the safe and sustainable repatriation and reintegration of unaccompanied alien children into their country of nationality or of law habitual residence, including placement with their families, legal guardians, or other sponsoring agencies." In proposing this rule, ORR ignores this direction in favor of releasing UACs with domestic sponsors indefinitely, furthering traffickers' goals and encouraging additional illegal immigration to the United States.

D. The Proposed Rule Recklessly Allows ORR to Waive Requirements for Care to Facilities that Operate at Times of "Influx."

CIS strongly recommends that HHS withdraw or amend proposed 45 C.F.R. § 410.1001; § 410.1800; § 410.1801; and § 410.1802, which allow ORR to grant waivers to facilities who are

operating during an emergency or influx from complying with standard protocols and conducting background checks or when "ORR determines that such standards are operationally infeasible."[31]

ORR inappropriately has defined influx as an "exceptional circumstance," that allows the Office to relieve itself of the duty to receive a child from other federal agencies within 72 hours, comply with state or local law regarding the licensing of facilities, and permit a substandard level of care to UACs affected. In this rulemaking, however, HHS, has omitted data that shows how frequently ORR operates under conditions that would permit ORR to relax standards under this proposal.

CIS is concerned that there has not been a single month since January 2021 in which ORR or its contractors have not been operating at "influx" capacity, as defined by this NPRM. Promulgating this proposal, therefore, will allow ORR to absolve itself of the responsibility to comply with the terms of the *Flores* settlement agreement when it presents challenges to the agency, directly risking the safety of UACs for which the agreement was issued to protect.

CIS believes that facilities that house UACs must be held to the same standards of care when they are at high capacity than when they are not. It is when ORR or facilities' caregivers are overwhelmed that UACs are at heightened risk for exploitation, abuse, and mismanagement. Moreover, CIS requests that HHS make data available to the public regarding how frequently "emergency" or "influx" conditions are present.

E. ORR Must Require Any Facility that Houses UACs to be Licensed in the State They Are Located and At Least Meet Current Standards of Care under the Flores Agreement.

ORR must withdraw or amend proposed 45 C.F.R. § 410.1302 and § 410.1001 that permit UACs to be transferred to and housed in unlicensed facilities. Facilities that house U.S. citizen minors in need of government custody or foster care and UACs should not be governed by disparate criteria. Given the special vulnerabilities UACs face, ORR must not relax the standards for UAC care and placement.

Requiring facilities to be licensed in the state or locality in which they operate – in all instances – serves important purposes in not only ensuring that UACs are placed in facilities that provide high standards of care, but also that state and local licensing agencies are able to monitor ORR-funded facilities.[32] Adding an additional layer of oversight services ORR's interests in influx environments by ensuring that abuses do not go unnoticed or overlooked.

CIS does not believe the existence of an "influx" environment, of which this proposed rule defines as "a situation in which the net bed capacity of ORR's existing capacity in standard programs that is occupied or held for placement by unaccompanied children meets or exceeds 85 percent for a period of seven consecutive days," justifies relaxing standards of care for UACs. Allowing ORR to contract with facilities that do not comply with state law with regard to the

[31] Proposed 45 C.F.R. § 410.1801(d).
[32] U.S. Government Accountability Office, *Unaccompanied Children: Actions Needed to Improve Grant Application Reviews and Oversight of Care Facilities* (Sept. 15, 2020).

care and housing of minors is another reckless policy that needlessly allows UACs to be exploited and abused with the acquiescence of the U.S. government.

F. ORR Must Withdraw Proposed 45 C.F.R. § 410.1309 Because It Is *Ultra Vires*.

ORR must withdraw proposed 45 C.F.R. § 410.1309, which allows the Secretary of HHS to fund legal services for UACs to provide direct immigration legal representation to certain UACs subject to ORR's discretion at U.S. government (i.e., taxpayers') expense. While Congress has expressly authorized HHS to ensure UACs have access to legal services, it has not authorized such expenditures. Additionally, providing government-funded legal services to UACs will add yet another pull factor for smuggling a UAC into the United States.

Specifically, proposed 45 C.F.R. § 410.1309(a)(4) permits the Secretary of HHS to authorize funding for legal representation of UACs for direct immigration representation. Proposed 45 C.F.R. § 410.1309(b) further provides that the Secretary of HHS may authorize funding for legal services for specific purposes beyond direct immigration representation, including appellate procedures, representation in state juvenile court proceedings, and assistance in obtaining employment authorization documents.

HHS only has the authority to act as "authoritatively prescribed by Congress."[33] It is unlawful for agencies to act in violation of its own authorizing statutes.[34]

While Congress has authorized the Secretary of HHS, under 8 U.S.C. § 1232(c)(5) to ensure UAC who are in the custody of ORR *access* to counsel, it has conditioned this access consistently with the conditions of 8 U.S.C. § 1362, which expressly prohibits aliens in removal proceedings before an immigration judge, or in any appeal proceedings following any such removal proceedings, from being represented at the expense to the government.

Providing access to legal representation is distinct from funding such representation. Accordingly, because Congress has not authorized HHS to fund legal representation for UACs, such provisions are unlawful and must be withdrawn.

G. ORR Must Amend the Proposed Rule to Facilitate, Not Restrict, Information Sharing Between Federal Government Agencies and State and Local Law Enforcement.

CIS opposes ORR's proposed 45 C.F.R. § 410.1201(b), which provides that a potential sponsor's immigration status "would not disqualify" a potential sponsor from obtaining custody of a UAC and expressly prohibits ORR from sharing any immigration status information relating to potential sponsors with any law enforcement or immigration related entity at any time. CIS believes this restriction is overbroad and misguided. CIS also strongly recommends that ORR withdraw proposed 45 C.F.R. § 410.1304(b) that discourages contracts, grantees, or employees from calling state and local law enforcement for assistance. Proposed 45 C.F.R. § 410.1304(b)

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[33] *City of Arlington v. FCC*, 529 U.S. 290, 298 (2013).
[34] *Id*.; *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994).

states that "involving law enforcement should be a last resort" and that "a call by a facility to law enforcement may trigger an evaluation of staff involved."

ORR must resume its 2018 policy[35] of collecting and sharing information with ICE and CBP about UACs in their custody, such as, their arrests, unauthorized absences, deaths, abuse experienced, and violent behavior, as well as age determination findings and gang affiliation information. ORR, ICE, and CBP must also resume sharing information about potential sponsors and all adults living with them, including, but not limited to citizenship, immigration status, criminal history, employment history, and immigration history. Moreover, ORR must report all adults they undercover who fraudulently pose as minors in ORR facilities to ICE and state and local law enforcement.

At minimum, ORR should be restricted from placing a UAC with an alien who is subject to an order of removal. In such cases, an immigration judge has already concluded that potential sponsor has no legal right to remain in the United States and should be removed. Additionally, in many cases, aliens ordered removed are barred from returning to the United States for period of years, or in some cases, permanently. Placing UACs with sponsors who have been issued removal orders both undermines the integrity of the immigration system, encourages illegal immigration, and wastes taxpayer resources.

ORR should also be required to communicate to law enforcement and federal immigration officials if there is reason to believe that a potential sponsor has committed a serious crime or presents a threat to public safety or the security of the United States. Failure to do so recklessly endangers the safety of UACs, reduces public safety, and furthers the interests of traffickers and other criminal actors who exploit and abuse minors by allowing such criminal activities to continue without consequence.

H. ORR Must Work with Congress to Amend the TVPRA to Provide the Same Protections and Procedures of UACs from Non-Contiguous Countries as UACs from Mexico and Canada.

HHS must work with Congress to amend the TVPRA to require that UACs from non-contiguous countries be returned immediately to their country of origin if they are determined not to be a victim or at risk of being a victim of trafficking or they do not have a credible fear of return. As discussed above, the TVPRA's provisions that require the U.S. government to treat UACs from non-contiguous countries differently than UACs nationals of contiguous countries (Mexico or Canada) have become the primary pull factor for both the smuggling and trafficking of UACs into the United States. Parents and smugglers rely on these provisions to ensure that UACs brought to the United States illegally will be united with family in the (regardless of their immigration status) or sponsors, with the help of the U.S. government.

[35] Memorandum of Agreement Among the Office of Refugee Resettlement of the U.S. Department of Health and Human Services, and U.S. Immigration and Customs Enforcement and U.S. Customs and Border Protection of the U.S. Department of Homeland Security Regarding Consultation and Information Sharing in Unaccompanied Alien Children Matters, April 13, 2018.

The TVPRA, however, requires that UACs from Mexico or Canada are promptly returned to their home countries.[36] In such cases, CBP may permit the UAC to withdraw their application for admission, which allows the UAC to return voluntarily to their home country without an order of removal.[37] The statute also requires the Secretary of State to negotiate agreements with Mexico and Canada for repatriation of their UAC that serve to protect the children from trafficking. These agreements, at minimum, must include provisions that (1) ensure the handoff of the minor children to an appropriate government official; (2) prohibit returning UAC outside of "reasonable business hours;" and (3) require border personnel of the contiguous countries be trained in the terms of the agreements.

By enacting identical procedures for UACs from noncontiguous countries as are required for UACs from contiguous countries, Congress can alleviate many of the challenges that this rule is intended to remedy by reducing overall UAC arrivals. As explained above, repatriating and reuniting UACs with their families in their home countries, rather than in the United States, is the most humane policy that maintains the integrity of the immigration system, consistent federal immigration law.

III. Conclusion

The United States owes a special duty of responsibility to children – regardless of their immigration status – because they are generally more vulnerable to predation and exploitation. ORR's proposal unjustifiable allows the agency to waive protections that should be guaranteed to this population while simultaneously encouraging additional illegal immigration to the United States. The NPRM appears to be designed for the sole purposes of fast-tracking placement of UACs and insulating ORR from responsibility. While CIS strongly believes that the TVPRA must be amended to cut off the pull-factor for UAC arrivals, the U.S. government must ensure that UACs receive the same standard of care as U.S. citizen children in need of government custody.

Sincerely,

Elizabeth Jacobs
Director of Regulatory Affairs and Policy
Center for Immigration Studies

[36] 8 U.S.C. §1232(a)(2).
[37] *See* INA § 235(a)(4).