



185 West Broadway
New York, NY 10013
t 212-324-6558 | f 347.368.2213
www.safepassageproject.org

January 25, 2022

Re: Comments in Response to DHS Notice Requesting Comments on “Identifying Recommendations To Support the Work of the Interagency Task Force on the Reunification of Families,” Docket Number DHS-2021-0051

Submitted via Regulations.gov

To the Interagency Task Force on the Reunification of Families:

Safe Passage Project writes in response to your December 10, 2021 request for comments on how to minimize the separation of migrant parents and legal guardians and children entering the United States. As you know, during the Trump Administration’s “Zero Tolerance” policy, over 5,400 children were separated from their parents. This policy was designed to terrorize people and deter migration, and has caused long-lasting trauma and behavioral issues for children and parents alike.

Safe Passage Project, a non-profit legal services agency based in New York City and Long Island, represented over 60 children who had been forcibly torn from their parents’ arms. It is difficult to overstate how devastating the government’s actions were, and how cruel the effects. As part of our representation, Safe Passage attorneys met with children in Office of Refugee Resettlement shelters. Some were as young as 4 years old. Our staff attorneys introduced themselves and tried to explain what was going on, but the truth was, none of us knew. In small rooms painted with colorful murals, we watched little children sob because we couldn’t tell them where their parents were. Were they being punished? Had they been bad? Couldn’t we please, please, they begged us, let them talk to their mamá? Their papá?

Over the next several months, our staff worked tirelessly to locate parents and facilitate reunifications, but the government stymied the process at every turn. During immigration court hearings, when we requested that ICE divulge at least the location of a parent so that we could communicate with them about their child’s cases, ICE flatly refused. When we tried to facilitate a child’s release from ORR custody to another relative, we were told that the release process would take months longer than normal. Only through lawsuits, the threats of lawsuits, and the help of countless volunteer attorneys across the country, were we able to finally reunite all 63 children with their families. This never should have happened. It is the government’s responsibility to help these families heal, and to ensure that it never happens again.

From the selling of enslaved children to the capture and forced assimilation of Native American children, this policy was a continuation of our country’s long and shameful history of separating families. Family separations are unconscionable.

- I. Comments in response to the request for input on the causes of family separations that occurred incident to the “Zero-Tolerance” policy of the Trump Administration.



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The many, shameful family separations that occurred because of the Zero-Tolerance policy of the Trump Administration were the direct result of inhumane policies and practices that must be addressed.

End Criminalized Migration: The U.S. government must stop criminal prosecutions for unauthorized entry and reentry under 8 U.S.C. § 1325 (section 1325) and 8 U.S.C. § 1326 (section 1326). Migration offenses under sections 1325 and 1326 have become the most commonly prosecuted federal crimes.¹ Not only do these prosecutions represent a huge waste of government resources, they also result in family separations as parents and legal guardians are separated from their children in order to be criminally prosecuted. A recent report also found that prosecutions under sections 1325 and 1326 result in myriad due process violations.² Ending these prosecutions would be a significant step forward for the Biden Administration in achieving its stated goals of advancing racial justice and creating more humane immigration policies.

Admit Wrongdoing and Compensate: The Biden Administration must take responsibility for the family separations that occurred during the prior administration. That means admitting wrongdoing in court and paying for the wrongs committed against those affected by these atrocities. Separated families should not have to fight for compensation in court, which will inevitably require them to relive their trauma. Instead, the Department of Justice should settle lawsuits related to family separation and compensate these families for the harms they suffered. This will help ensure that future administrations do not implement similar policies designed to rip children away from their parents to deter migration. In the absence of clear consequences, future administrations will not hesitate to resurrect the intentional separation of families as a deterrence measure and the horrific results will be repeated.

Curb Enforcement and Detention: The U.S. government should discontinue the practice of arresting and detaining individuals for lack of immigration status. This practice was a focus of the Trump Administration and almost always leads to some type of family separation. The Biden Administration should exercise all lawful authority and discretion to allow people to remain lawfully in the United States until Congress creates viable immigration options for noncitizens living in the United States. Otherwise, family separations will continue to occur every day.

II. Comments regarding other policies, procedures, or regulations that may minimize the separation of migrant parents and legal guardians and children entering the United States.

Rescind Harmful Border Policies and Practices: The U.S. government must end border policies that force families to self-separate in order to keep their children safe. This includes the COVID-19 related closure of the southern border under Title 42, which public health officials have said has no public health basis,³

¹ National Immigration Project of the National Lawyers Guild, *Rooted in Racism: The Human Impact of Migrant Prosecutions* (Dec. 2021),

https://nipnlg.org/PDFs/practitioners/practice_advisories/pr/2021_21Dec_Rooted-in-Racism-Report.pdf.

² *Id.*

³ For example, see Camilo Montoya-Galvez, *How Trump officials used COVID-19 to shut U.S. borders to migrant children*, CBS News (Nov. 2020),



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and the Migrant Protection Protocols (MPP), a Trump-era policy that has grave implications for asylum seekers' safety while they wait for a hearing to present their asylum cases. In addition to creating a human rights catastrophe, both Title 42 and MPP have led directly to family separations. Parents and guardians desperate to keep their children safe have made the devastating decision to send their children across the border alone in the hopes that they might find safety on the other side of the border.⁴ Families should be able to exercise their legal right to asylum *together*. These border policies simply must be ended.

Expand the Interpretation of Family Unity: We encourage the U.S. government to view family unity through a broader lens and create and implement policies that keep children with trusted caregivers whether or not they are the child's parent or legal guardian. Many children migrate with non-parent caregivers who nonetheless are their primary caregiver or may be a safe alternative caregiver.

One way to operationalize expanded family unity would be to co-locate Department of Homeland Security (DHS) and Office of Refugee Resettlement (ORR) staff along with medical providers and language interpreters at the border. Once the determination is made that a child is unaccompanied but traveling with an immediate relative (e.g., siblings, grandparents, aunts, uncles, and cousins), safety screenings should be carried out at the border but with a presumption towards the maintenance of the family unit.

Locating ORR staff at the border to quickly assess non-parent caregivers will not only minimize family separations, it will also decrease the number of children being placed in government custody. Having fewer children in ORR custody would allow ORR to end its reliance on and permanently close inappropriate and harmful large-scale detention facilities, including influx and emergency intake sites (EIS). Additionally, this will allow ORR to refocus its limited resources on revamping family reunification capacity so that children do not spend long periods of time in government custody, and transitioning away from large-scale facilities to small, home or home-like shelter settings for unaccompanied children in exceptional cases where temporary government care may still be needed. ORR must shift its model of

<https://www.cbsnews.com/news/trump-administration-closed-bordersmigrant-children-covid-19/>, Letter to HHS Secretary Azar and CDC Director Redfield signed by leaders of public health schools, medical schools, hospitals, and other U.S. institutions (May 2020)
<https://www.publichealth.columbia.edu/public-health-now/news/public-health-experts-urge-us-officials-withdraw-order-enabling-mass-expulsion-asylum-seekers>, and Letter to Acting HHS Secretary Cochran and CDC Director Walensky (Jan. 2021),
<https://www.publichealth.columbia.edu/research/program-forced-migration-andhealth/letter-acting-hhs-secretary-cochran-and-cdc-director-walensky>.

⁴ See, e.g., Jack Herrera, *Biden Brings Back Family Separation – This Time in Mexico*, Politico (Mar. 20, 2021), <https://www.politico.com/news/magazine/2021/03/20/border-family-separation-mexico-biden-477309>.



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care away from large-scale detention facilities to small, home or home-like settings. Investments must also be made in community-based wraparound services in family-based placements.

Thank you for taking the time to review these comments. Should you have any questions, please do not hesitate to reach out to Alexandra Rizio, Managing Attorney for Training and Partnerships, at arizio@safepassageproject.org or (212) 324-6558.

Sincerely,

Safe Passage Project
185 West Broadway
NY, NY 10013