

**YOUNG CENTER FOR IMMIGRANT CHILDREN'S RIGHTS
SHADOW REPORT ON THE UNITED STATES' COMPLIANCE WITH THE
INTERNATIONAL CONVENTION ON THE ELIMINATION OF RACIAL
DISCRIMINATION
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I. Introduction: A Legacy of Racial Discrimination that Continues to Harm Children Seeking Protection in the United States

The Young Center for Immigrant Children's Rights is a non-profit organization appointed by the federal government to advocate for the best interests of unaccompanied and separated immigrant children in federal custody. As independent Child Advocates, the Young Center makes recommendations to federal agencies concerning children's wishes, safety, family reunification and well-being.¹ The Young Center also advocates for changes in federal policy that would safeguard the rights of all immigrant children and youth as set forth in the Convention on the Rights of the Child.

On June 2, 2021, the United States Government (USG) submitted its Combined Tenth to Twelfth Periodic Reports under Article 9 of the Convention to Eliminate Racial Discrimination (hereinafter "Convention"), the former of which was due in 2017.² The Young Center welcomes the opportunity to contextualize the USG's submission with respect to the impact of racially discriminatory immigration policy enforcement, particularly as it pertains to children. Consistent with the list of themes published on June 24, 2022, our comments address but are not limited to: racist hate speech targeted at migrants; systemic racism in immigration law enforcement; and the impact of race-based immigration policies on non-citizens, including migrants, refugees, and asylum-seekers.³

We also write to offer our recommendations for the elimination of racial discrimination from United States immigration policy. The legacy of racial discrimination in both the immigration and child welfare systems in the United States is historic and deeply entrenched. Under the

¹ William Wilberforce Trafficking Victim Protection Reauthorization Act, 8 U.S.C. § 1232(c)(2) (2008).

² Combined Tenth to Twelfth Periodic Reports under Article 9 of the Convention to Eliminate Racial Discrimination, CERD/C/USA/10-12 (Dec. 20, 2021), https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/USA/CERD_C_USA_10-12_7522_E.docx.

³ United Nations, International Convention on the Elimination of All Forms of Racial Discrimination, List of Themes in relation to the combined tenth to twelfth reports of the United States of America, (Jun. 24, 2022), <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-elimination-all-forms-racial>.

administration of Donald J. Trump, the USG attempted to deter migration to the U.S. by adopting restrictive policies rooted in white nationalist ideology.⁴ These anti-immigrant policies, effected through over 400 executive actions, resulted in heightened criminalization, separation, and detention of predominantly Black, Indigenous, and Latinx immigrants.

To demonstrate the USG's failure to comply with its obligations under the Convention, we highlight how three such policies heightening the criminalization of migration – namely, “Zero Tolerance,” “Remain in Mexico” and “Title 42” – have had a devastating impact on migrant children and particularly Black, Indigenous, and Latinx children. We also discuss how the conditions and treatment immigrant youth face in federal immigration custody – and which continue even after reunification with their families – can exacerbate the harms of racial discrimination they experience on their migration journey and at the U.S. border. We also recommend remedies for children harmed by these policies which explicitly account for disparate impact to Black, Indigenous, Latinx and other children, and recommend that the USG engage in a complete overhaul of its immigration policies.

II. The Disparate Impact of Heightened Criminalization on Black, Indigenous, and Latinx Immigrants

Under the Trump administration, the USG repeatedly ascribed criminality to undocumented immigrants and asylum seekers from predominantly Black, Latinx, Muslim and Asian countries and implemented policies that aligned with this viewpoint.⁵ Within its first month in office, the administration banned migration from predominantly Muslim countries in Africa and the Middle East, preventing thousands of immigrants and asylum seekers from those countries from accessing safety and reunifying with their families.⁶ Many of the administration's subsequent immigration policies focused on deterring or stopping lawful migration along the southern border, where the majority of migrants—including thousands of children—are Black, Indigenous, and/or Latinx.⁷

⁴ Jayashri Srikantiah & Shirin Sinnar, *White Nationalism as Immigration Policy*, 71 Stan. L. Rev. Online. 197 (2019), <https://review.law.stanford.edu/wp-content/uploads/sites/3/2019/02/71-Stan.-L.-Rev.-Srikantiah-Sinnar.pdf>.

⁵ Charles Kamasaki, *US immigration policy: A classic, unappreciated example of structural racism*, Brookings Institute (Friday, March 26, 2021), <https://www.brookings.edu/blog/how-we-rise/2021/03/26/us-immigration-policy-a-classic-unappreciated-example-of-structural-racism/>.

⁶ Exec. Order No. 13769, 82 Fed. Reg. 8977 (Jan. 27, 2017), <https://www.govinfo.gov/content/pkg/FR-2017-02-01/pdf/2017-02281.pdf>; see also, *License to Discriminate: Trump's Muslim and Refugee Ban*, Amnesty International UK (Oct. 6, 2020, 6:12 AM), <https://www.amnesty.org.uk/licence-discriminate-trumps-muslim-refugee-ban>.; Press Release, International Refugee Assistance Project, *President Biden Removed the Muslim Ban but He Didn't Fix the Harm*, IRAP, (April 7, 2022), <https://refugeerights.org/news-resources/president-biden-removed-the-muslim-ban-but-he-didnt-fix-the-harm-irap-files-lawsuit-on-behalf-of-separated-somali-refugee-family>.

⁷ Nick Miroff, *As Migrants Arrive from More Nations, their Paths to U.S. Border Diverge, New Data Show*, Washington Post, https://www.washingtonpost.com/national/migrant-routes-border-mexico/2021/07/06/baa23c2c-db49-11eb-ae62-2d07d7df83bd_story.html.

Specifically, the USG imposed restrictive policies aimed at curbing entry of migrants through the U.S.-Mexico border and pledged an unprecedented deployment of active military forces to enforce them.⁸ One such example was the Trump administration's "Zero Tolerance" policy, in which federal law enforcement authorities criminally prosecuted undocumented migrants crossing the border between ports of entry before pursuing their removal (deportation) in civil immigration proceedings. This policy radically escalated the criminalization of undocumented migrants entering the U.S. from Mexico. As discussed below, the USG also intentionally designed the policy to punish migrants and further deter migration by causing the separation of thousands of children from their parents—nearly all of them Latinx, Indigenous, or Black children—many of whom remain separated today.⁹

The USG has also increased its reliance on racial profiling and allegations of gang membership or gang activity as a basis for deporting both children and adults, with a disproportionate impact on Latinx youth. Latinx youth are routinely racially profiled by immigration officials and placed in restrictive detention facilities under the pretense of suspected gang involvement.¹⁰ In 2018, the Immigrant Legal Resource Center (ILRC) reported a rising trend of immigration officials targeting immigrant youth for gang involvement.¹¹ The ILRC found that immigration officials routinely and falsely accuse immigrant youth of gang involvement, leading to their detention, deportation, and denied access to immigration relief. Regardless of demonstrated disengagement from gang activity or participation in rehabilitation programs, many formerly gang-affiliated

⁸ Jeffrey S. Passel & D'Vera Cohn, *Mexicans decline to less than half the U.S. unauthorized immigrant population for the first time*, Pew Research Center (June 12, 2019), <https://www.pewresearch.org/fact-tank/2019/06/12/us-unauthorized-immigrant-population-2017/>; Michael D. Shear & Thomas Gibbons-Neff, *Trump Sending 5,200 Troops to the Border in an Election-Season Response to Migrants*, NYTIMES, (Oct. 29, 2018), <https://www.nytimes.com/2018/10/29/us/politics/border-security-troops-trump.html>; Office of Sen. Patrick Murray, *Senators Slam Trump Administration for Doubling Down on its Unprecedented Use of Thousands of Active Duty Servicemembers on Southern U.S. Border*, <https://www.murray.senate.gov/senators-slam-trump-administration-for-doubling-down-on-its-unprecedented-use-of-thousands-of-active-duty-servicemembers-on-southern-u-s-border/>; Richard Gonzales, *Trump Says He'll Send As Many As 15,000 Troops To The Southern Border*, NPR (Oct. 31, 2018, 8:01 PM), <https://www.npr.org/2018/10/31/662735242/trump-says-hell-send-as-many-as-15-000-troops-to-the-southern-border>.

⁹ Andre M. Perry, *Trump Reveals 'Zero Tolerance' for Democracy*, Brookings Institute, (June 25, 2018), <https://www.brookings.edu/blog/the-avenue/2018/06/25/trump-reveals-zero-tolerance-for-democracy/>.

¹⁰ *Id.* at 2; see also, Jonah M. Temple, *The Merry-Go-Round of Youth Gangs: The Failure of the Immigration Removal Policy and the False Outsourcing of Crime*, Boston Crime, Boston College 31 Third World Law Journal, Vol. 31 193, 200 (2011), Issue 1, Jan. 2011 p. 200, <https://lawdigitalcommons.bc.edu/twlj/vol31/iss1/8>.

¹¹ Laila L. Hlass & Rachel Prandini, *Deportation by Any Means Necessary*, Immigrant Legal Resource Center Immigrant Legal Resource Center (2018), <https://www.ilrc.org/deportation-by-any-means-necessary>.

youth are denied access to legal protection and deported back to dangerous conditions where they face retaliatory violence from gang members and police.¹²

Especially problematic and harmful to young people is the lack of a clear definition under immigration law of what constitutes gang involvement. This ambiguity allows immigration officials to interpret gang involvement subjectively and to present weak or unreliable evidence from inaccurate gang databases to substantiate their allegations.¹³ A lack of a clear definition concerning gang involvement invites decisions grounded in implicit bias, or even explicit bias and outright racism. It also undermines the due process rights of youth in the immigration system and subjects children to the risk of being removed (deported) to dangerous situations.¹⁴ The lack of a clear definition and the lack of safeguards to ensure that these allegations by immigration enforcement officials are based on credible evidence disproportionately harm Latinx and Black youth in the immigration system.¹⁵

III. Family Separation and the Ongoing Harms of Policies Designed to Deter or Even Punish Migration, Including by Asylum-Seekers

Parent-child separation, a long-practiced instrument of cultural genocide and white supremacy, originated as formal U.S. immigration policy in the early 20th century, as immigrants from Asian countries were routinely and forcibly separated from their families and detained on California's Angel Island.¹⁶ A century later, the practice reemerged as central to the design of the Trump

¹² Daniel Berlin, et al, *Between the Border and the Street: A Comparative Look at Gang Reduction Policies and Migration in the United States and Guatemala*, Georgetown University Law Center, Human Rights Institute, p. 1, 21, 50, (2007), http://scholarship.law.georgetown.edu/hri_papers/2.

¹³ Hlass and Prandini at 5; *Saravia v. Sessions*, 280 F.Supp.3d 1168, 1199 (2017) (“DHS sometimes makes an inference of gang membership from conduct, clothing, or associations that are far from unequivocal evidence of that conclusion”).

¹⁴ Between 2017 and 2019, the Department of Homeland Security deported 16,000 noncitizens on suspicion of gang involvement. See, TRAC Immigration, Latest Data: Immigration and Customs Enforcement Removals (ICE Data through June 2020), <https://trac.syr.edu/phptools/immigration/remove/>; See also, Chad F. Wolf, Acting Sec’y, Dep’t of Homeland Security, Address at Arizona Sheriff’s Association (Oct. 22, 2020), Remarks as Prepared by Acting Secretary Chad F. Wolf Highlighting Border Security and Immigration Policies of the Trump Administration (Oct. 22, 2022) (transcript available in the DHS.gov archive), <https://www.dhs.gov/news/2020/10/22/remarks-prepared-acting-secretary-chad-f-wolf-highlighting-border-security>). However, there is no public data on how many of the 15,520 unaccompanied youth and 10,739 family units deported during those years due to gang-related charges. U.S. Immigration and Customs Enforcement Fiscal Year 2019 Enforcement and Removal Operations Report, p. 20 (<https://www.ice.gov/sites/default/files/documents/Document/2019/eroReportFY2019.pdf>).

¹⁵ Maritza Perez, Center for American Progress, *Mistaken Identity the Dangers of Sweeping Gang Labels for Black and Latino Youth* (Sept. 2018), <https://americanprogress.org/wp-content/uploads/2018/09/GangDatabases-brief-41.pdf>.

¹⁶ Elisa Minoff, *Entangled Roots: The Role of Race in Policies that Separate Families*, Center for the Study of Social Policy 7 (Oct. 2018), <https://cssp.org/wp-content/uploads/2018/11/CSSP-Entangled-Roots.pdf> Available at: <https://cssp.org/resource/entangled-roots>.

administration's "Zero Tolerance" policy, a coordinated effort to deter migrants and asylum seekers from Latinx, Indigenous, and Black communities from entering the United States. The Trump administration's forcible separation of families directly contravened international laws, including the universal prohibition against torture and ill treatment as well as children's right to family relations under the Convention on the Rights of the Child.¹⁷ At least 2,816 children were separated from their families in the first six weeks of the policy's enforcement, which formally began on May 7, 2018 but which was quietly piloted as early as March 2017.¹⁸ On June 26, 2018, a district court judge issued an injunction against the practice of separating families at the border and ordered that all affected families be reunited within 30 days.¹⁹ Yet, family separations continued for approximately 1,000 more children and in 2019, the U.S. Department of Justice disclosed that the Trump administration had separated an additional 1,556 children during the policy's pilot launch, bringing the total reported number of separated children to between 5,300 and 5,500.²⁰

As early as 2017, the Young Center worked with children separated from their families in order to facilitate their reunification, document the ongoing separation of families based on allegations of the parents "criminal history,"²¹ testify before the United States Congress on the impact of allegations of criminality.²² Today the Young Center remains part of efforts to provide support and services to previously-separated families²³ and to help reunify over 200 children still separated from their families.

¹⁷ Press Release, Young Center, The Young Center Submits Report to UN Condemning Parent-Child Separations under the Trump Administration's "Zero Tolerance" Policy as Torture (Sept. 14, 2021) <https://www.theyoungcenter.org/media-press-releases/2021/9/14/the-young-center-submits-report-to-un-condemning-parent-child-separations-under-the-trump-administrations-zero-tolerance-policy-as-torture>.

¹⁸ Congressional Research Service, *The Trump Administration's "Zero Tolerance" Immigration Enforcement Policy* (Feb. 2, 2021), <https://sgp.fas.org/crs/homesecc/R45266.pdf>.

¹⁹ Michael D. Shear et al., *Federal Judge in California Halts Splitting of Migrant Families at Border*, NY TIMES, (June 26, 2018), <https://www.nytimes.com/2018/06/26/us/politics/family-separations-congress-states.html>.

²⁰ Congressional Research Service, *supra* note 20; see also Camilo Montoya-Galvez, *1,556 more migrant families were separated under Trump than previously known*, CBS NEWS, (Oct. 25, 2019), <https://www.cbsnews.com/news/family-separation-1556-more-migrant-families-were-separated-under-trump-than-previously-known/>.

²¹ Young Center for Immigrant Children's Rights, *Family Separation is Not Over: How the Trump Administration Continues to Separate Children from Their Parents to Serve Its Political Ends* (2020), <https://bit.ly/YoungCenterFamilySeparationIsNotOver>.

²² Written Testimony of Jennifer Nagda, Young Center for Immigrant Children's Rights, United States House of Representatives Committee on Oversight and Reform (July 12, 2019), <https://bit.ly/YoungCenterNagdaTestimonytoHouseOversightCommittee>.

²³ Young Center for Immigrant Children's Rights, *Young Center Recommendations to Prevent Family Separation*, Feb. 3, 2022, <https://www.theyoungcenter.org/stories/2022/2/3/young-center-recommendations-to-prevent-family-separation>.

From the start of the Biden administration, immigration advocates and public health officials have called on President Biden to reverse other anti-immigrant policies enacted by the Trump administration.²⁴ Though the Biden administration formally rescinded the Zero Tolerance policy in January 2021, families continue to endure involuntary and prolonged separations as a result of Trump-era policies still in force at the U.S.-Mexico border, including the “Migration Protection Protocols” (herein referred to as “Remain in Mexico”) and the “Title 42” policy.

The Remain in Mexico policy – boldly and incorrectly named the “Migrant Protection Protocols” by the Trump administration – forces asylum seekers to return to Mexico and await the adjudication of their asylum petitions. Remain in Mexico has subjected tens of thousands of people to dangerous conditions, particularly Black, Indigenous, and Latinx migrants who experience racial hostility and targeted threats of violence in Mexico.²⁵

The arrival of the COVID-19 pandemic provided the Trump administration with a political opportunity to completely shut down the U.S.-Mexico border to asylum seekers. Relying on the pandemic as its purported rationale, the Trump administration invoked Title 42,²⁶ an obscure public health provision of the U.S. code, to close the border to all persons, including asylum-seekers.²⁷ Immigrants and asylum seekers apprehended under Title 42 are summarily expelled back to Mexico or their home countries without the opportunity to be heard on their fear of persecution or claims for immigration relief.

Since its implementation in 2020, nearly two million people have been deported to Mexico or their home countries under Title 42.²⁸ Black immigrants continue to suffer acute harm due to deeply entrenched anti-Black racist attitudes in both the United States and Mexico.²⁹ Over 20,000 Haitian migrants were expelled under Title 42 between January 2021 and February 2022, making Haitians the 5th most frequently expelled group under the policy, despite constituting

²⁴ Young Center for Immigrant Children’s Rights, *What is Title 42 and How Does It Impact Children and Families?* (Oct. 12, 2021), <https://www.theyoungcenter.org/stories/2021/10/12/what-is-title-42-and-how-does-it-impact-children-and-families>.

²⁵ S. Priya Morley, *Reckoning with Racism Against Black Migrants in Mexico*, OPEN GLOBAL RIGHTS, (Feb. 16, 2021), <https://www.openglobalrights.org/reckoning-with-racism-against-black-migrants-in-mexico/>.

²⁶ 42 U.S.C. § 252; see also American Immigration Council, *A Guide to Title 42 Expulsions at the Border* (May 25, 2022), <https://www.americanimmigrationcouncil.org/research/guide-title-42-expulsions-border>.

²⁷ Young Center for Immigrant Children’s Rights, *Young Center Recommendations to Prevent Family Separation* (Feb. 3, 2022), <https://www.theyoungcenter.org/stories/2022/2/3/young-center-recommendations-to-prevent-family-separation>.

²⁸ U.S. Customs and Border Protection, Title 42 Expulsions for Fiscal Years (FY) 2020, 2021 and 2022: 155,848 in FY 2020; 1,071,081 in FY 2021; 734,028 in FY 2022, <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters-by-component>.

²⁹ Morley, *supra* note 25.

less than 10% of migrants apprehended at the border.³⁰ About two-thirds of the 20,000 people who were returned to Haiti were deported without a chance to ask for asylum or other protection, despite the fact that most had fled the country over a decade before, following the widely reported 2010 earthquake.³¹ About half of the Haitian migrants deported are families with children.³²

In September 2021, images of U.S. Customs and Border Protection (CBP) officials on horseback corralling Haitian migrants in Del Rio, Texas, with whips struck painful resonance with the Black community in the United States and helped draw long overdue public attention to the disparate treatment of Black migrants at the southern border.³³ Following public pressure and calls for accountability, the CBP Office of Professional Responsibility launched a nine-month-long internal investigation that culminated in a report released on July 8, 2022.³⁴ Though the Office identified “failures at multiple levels of the agency, a lack of appropriate policies and training, and unprofessional and dangerous behavior of individual agents,” the report made no recommendations for sanctions or disciplinary action, which remain under CBP internal review.³⁵ A lawsuit challenging CBP’s discriminatory treatment of Haitian migrants in Del Rio is also pending.³⁶

The impact of the Title 42 and Remain in Mexico policies on children has been significant, as families nearing the border or those who have been expelled or returned to Mexico have been forced to “choose” between returning to dangerous conditions with their children or separating in hopes that their children will be designated as “unaccompanied children” and have the opportunity to enter the United States and seek safety, instead of experiencing discrimination and insecurity in Mexico. The pressure to separate is especially intense for the most vulnerable, such

³⁰ Adam Isacson, *Weekly U.S.-Mexico Border Update: Haiti Expulsions, Remain in Mexico “Lite,” Migration Drops in January*, WOLA (Feb. 17, 2022), <https://www.wola.org/2022/02/weekly-u-s-mexico-border-update-haiti-expulsions-remain-in-mexico-lite-migration-drops-in-january/>. See also Joe Walsh, *Arrests of Haitian Migrants At The U.S.-Mexico Border Soared Last Month—Here’s Why*, FORBES (Oct. 22, 2021), <https://www.forbes.com/sites/joewalsh/2021/10/22/arrests-of-haitian-migrants-at-the-us-mexico-border-soared-last-month---heres-why/?sh=4d23c53d5ee8>.

³¹ Isacson.

³² *Id.*

³³ Alicia Schmidt Camacho, *Del Rio and the Call for Migrant Justice*, THE NEW YORKER (Jan. 19, 2022), <https://www.newyorker.com/news/our-columnists/del-rio-and-the-call-for-migrant-justice>.

³⁴ U.S. CUSTOMS AND BORDER PROTECTION OFFICE OF PROFESSIONAL RESPONSIBILITY DEL RIO HORSE PATROL UNIT INVESTIGATION, 202112280 (Jul. 8, 2022, 12:00PM), <https://www.cbp.gov/sites/default/files/assets/documents/2022-Jul/202112280-cbp-closing-report-public-redacted-final.pdf>.

³⁵ Press Release, U.S. Customs and Border Protection, CBP Releases Findings of Investigation of Horse Patrol Activity in Del Rio, Texas, (Jul. 8, 2022), <https://www.cbp.gov/newsroom/national-media-release/cbp-releases-findings-investigation-horse-patrol-activity-del-rio>.

³⁶ *Like I’m Drowning”: Children and Families Sent to Harm by the ‘Remain in Mexico’ Program*, Human Rights Watch (Jan. 6, 2021), <https://www.hrw.org/report/2021/01/06/im-drowning/children-and-families-sent-harm-us-remain-mexico-program>.

as those who fear persecution in Mexico or who find themselves without enough food or medicine to care for their children. Violence is a real concern and many families have faced the significant risk of kidnapping, rape, or assault.

Immigrants from Black and Indigenous communities are particularly susceptible to targeted racist harassment and violence in Mexico. Afro-Mexicans and Black migrants have been subjected to racist violent attacks by both Mexican civilians and Mexican police.³⁷ Mexican immigration officials routinely target Afro-Mexicans and Black migrants at immigration checkpoints.³⁸ The human rights violations experienced by Indigenous Mexicans, Afro-Mexicans and Black migrants are intertwined.³⁹

Legal challenges have resulted in lengthy litigation over Title 42 and Remain in Mexico, the latter of which reached the U.S. Supreme Court in 2022.⁴⁰ In January 2021, the Biden administration suspended Remain in Mexico enrollments and ultimately announced the termination of the policy in June 2021. Efforts to end the policy were stalled, however, after litigation challenging the administration's decisions resulted in a federal court-issued injunction in December 2021. The Supreme Court granted review of the injunction, and on June 30, 2022, issued a decision in favor of the Biden administration's authority to terminate the policy, remanding the case back to the lower district court.

With respect to Title 42, the Biden Administration announced in March 2022 its plan to terminate the policy by the end of May 2022.⁴¹ A number of states brought a lawsuit in a federal district court in Louisiana, challenging the decision to terminate Title 42. On May 20, 2022, a Louisiana district court enjoined the federal government from terminating Title 42. The USG appealed the district court's injunction, and their appeal is currently pending. In the meantime, the injunction remains in effect, barring the Administration from terminating Title 42.

³⁷ S. Priya Morley et al., "There is a Target on Us" – *The Impact of Mexico's Anti-Black Racism on African Migrants at Mexico's Southern Border* 17 (2021),

<https://www.immigrationresearch.org/system/files/The-Impact-of-Anti-Black-Racism-on-African-Migrants-at-Mexico.pdf>.

³⁸ Morley, *supra* n. 33, at 18.

³⁹ Marycarmen Lara Villanueva, *In Mexico, how erasing Black history fuels anti-Black racism*, THE CONVERSATION (Feb. 24, 2022), <https://theconversation.com/in-mexico-how-erasing-black-history-fuels-anti-black-racism-175315>.

⁴⁰ See *Biden v. Texas*, No. 21–954, slip. op., (U.S. Jun. 30, 2022), https://www.supremecourt.gov/opinions/21pdf/21-954_7148.pdf; Jasmine Aguilera & Madeleine Carlisle, *Federal Judge Blocks Biden From Ending Controversial Border Policy, Title 42*, TIME (May 20, 2022), <https://time.com/6176711/title-42-biden-judge-blocked/>.

⁴¹ The Biden administration issued an Executive Order suspending the enforcement of Title 42 against unaccompanied children in March 2021. Samantha Artiga & Drishti Pillai, *Title 42 and its Impact on Migrant Families*, KAISER HEALTH NEWS (May 26, 2022), <https://www.kff.org/racial-equity-and-health-policy/issue-brief/title-42-and-its-impact-on-migrant-families/>. However, it has continued to subject families and single adults to Title 42.

Despite this ongoing litigation, the Biden administration has a legal and moral obligation to ensure that asylum seekers are able to pursue protection and safety at our borders and are not returned to places where they are likely to face persecution and grave harm. To fulfill its obligations to asylum seekers, the USG should immediately take the legal steps necessary to terminate Remain in Mexico immediately and expeditiously process those enrolled in Remain in Mexico in a safe and fair manner. The USG should also vigorously pursue its appeal of the injunction against Title 42 termination and take immediate steps to restore access to asylum at the U.S. border for as many asylum seekers as possible.⁴² While these policies remain in place, thousands of children will be forced to risk separation from their families who remain under dangerous conditions in Mexico or their home countries.

The negative impact on a child's health and well-being because of family separation does not end once a child is reunited with their family. Even after reunification, children may endure life-long psychological and health damage like experiencing symptoms of post-traumatic stress disorder.⁴³ Detained children, separated from their family for even a short period of time, can develop psychological trauma and long-term mental health risks.⁴⁴ The USG has an obligation to ensure all children separated from family as a result of immigration policies receive comprehensive, holistic services to support their health and development. For Black, Indigenous, and Latinx children, the USG must take additional steps to ensure systemic racism (e.g., within schools, health systems, etc.) does not impede their ability to find and access these services.

IV. Impact of Racial Discrimination on Children in Detention

For immigrant youth placed in federal custody for some or all of their immigration case, the majority of whom are from Black, Indigenous, and Latinx families,⁴⁵ the impact of racist policies and practices within the intersecting immigration and child custody system is devastating and long-lasting.

⁴² Isabel Diaz, *Non-Mexican Migrants Awaiting US Hearing Must Stay in Mexico—for now*, MOTHER JONES (July 3, 2022), <https://www.motherjones.com/politics/2022/07/remain-mexico-supreme-court-injunction-dhs-alejandro-mayorkas/>.

⁴³ Claudio J. Perez, *How U.S. Policy Has Failed Immigrant Children: Family Separation in the Obama and Trump Eras*, Am. Bar Ass'n (Mar. 10, 2021), https://www.americanbar.org/groups/family_law/publications/family-law-quarterly/volume-54/issue-1/how-us-policy-has-failed-immigrant-children-family-separation-the-obama-and-trump-eras/; see also Linton, *supra* n. 52, at 6.

⁴⁴ Linton, *supra* n. 52, at 6.

⁴⁵ In 2018, countries of origin of youth in ORR custody were approximately as follows: Guatemala (54%); El Salvador (12%); Honduras (26%); and other (8%). Off. of Refugee Resettlement, U.S. Dep't of Health & Human Serv., *ORR Fact Sheet on Unaccompanied Children's Services* (Mar. 2019), <https://www.acf.hhs.gov/archive/orr/fact-sheet/orr-fact-sheet-unaccompanied-childrens-services>.

Children have the right under federal law to be released to parents and other family members (known as “sponsors”) for the duration of their immigration case.⁴⁶ However, low-income and undocumented family members sometimes do not qualify as sponsors because they lack adequate resources to meet the conditions set by federal authorities to approve a child’s release. Moreover, with the chilling effect created by a hardline immigration system, some undocumented families fear making themselves known to U.S. immigration officials and risking deportation.⁴⁷ Additionally, efforts to reunify with family members can be exacerbated by implicit bias within the immigration systems (and similarly present in the separate domestic child welfare system).

Cultural and racially biased preconceptions by child welfare workers about what constitutes parental fitness can frustrate family reunification efforts and prolong children’s experience in detention.⁴⁸ For example, Young Center advocates have worked with many Central American parents who have spent years working in the United States to support their children in their home countries, who left their children in the custody of trusted family members, and who called or communicated regularly with their children during this separation. When those parents then step forward to “sponsor” their child’s release from federal custody after the child migrates to the U.S., they are often presumed to require parenting classes or other services before they reunify, as if their work, sacrifices, and long-distance support of their children were insufficient demonstrations of parenting. As a result of these obstacles to reunification, their children experience unnecessary and prolonged family separation.

While children are in custody, federal law establishes basic standards of care, custody, and prompt release with which the federal government must comply.⁴⁹ Critically, federal law requires that children be placed in the least restrictive setting that is in their best interest, with a

⁴⁶42 U.S.C. § 1232(c)(3); Stipulated Settlement Agreement, *Flores v. Reno*, No. 85-CV-4544 (C.D. Cal. 1997). See also Young Center for Immigrant Children’s Rights, *Reimagining Children’s Immigration Proceedings: A Roadmap for an Entirely New System Centered Around Children* 67 (Oct. 2020), <https://www.theyoungcenter.org/reimagining-childrens-immigration-proceedings>.

⁴⁷Gaby Del Valle, *ICE Has Arrested Hundreds of Prospective Sponsors for Migrant Kids*, VICE NEWS (July 25, 2019), <https://www.vice.com/en/article/d3nnna/ice-has-arrested-hundreds-of-prospective-sponsors-for-migrant-kids>.

⁴⁸ Sometimes children whose parents have been arrested or deported end up in state child welfare systems. Once in the child welfare system, children may be thwarted from reunifying with parents because of the lack of coordination between the immigration and child welfare systems, because of a parents’ inability to attend their child’s court hearings, or because biases or misinterpretations of agency policy lead staff to resist returning children to undocumented parents, to parents who do not speak English, and to parents living outside the United States. See, Ann Park, *Keeping Immigrant Families in the Child Protection System Together*, American Bar Association (Dec. 30, 2020), https://www.americanbar.org/groups/public_interest/child_law/project-areas/immigration/keeping-immigrant-families-in-the-child-protection-system-together/.

⁴⁹ Ennelly Medina, *From Flores to Title 42: Unaccompanied Children in Detention*, 35 HARVARD HUMAN RIGHTS J. (2022), <https://harvardhrj.com/2022/04/from-flores-to-title-42-unaccompanied-children-in-detention/>; see also Abbie Gruwell, *Unaccompanied Minors and the Flores Settlement Agreement: What to Know*, THE NCSL BLOG (Oct. 30, 2018), <https://www.ncsl.org/blog/2018/10/30/unaccompanied-minors-and-the-flores-settlement-agreement-what-to-know.aspx>.

preference for state-licensed small-scale shelters and foster homes.⁵⁰ Yet, as the number of unaccompanied children in federal custody increases, the federal government has resorted to detaining children in massive, unlicensed congregate care settings, including convention halls, military bases, and work camps, which operate without the oversight and transparency of state-licensed shelters. Children have reported feeling sad and desperate, experiencing worsened anxiety attacks, and developing depression because they desperately seek to reunify with their relatives.⁵¹

Many of the children the Young Center serves report racist abuse and violence on their journey to the United States, and xenophobic violence against migrants in Mexico is widely reported.⁵² Separation from their families and the stress of cultural and language barriers while in federal custody only compound the trauma they experienced on their journeys and severely impact their health and well-being. The American Psychological Association (APA) has stated that the reported symptoms for anxiety and depression in children increase the longer children are separated from their parents.⁵³ The mental health consequences of family separation for children include, “psychological distress, academic difficulties and disruptions in their development.”⁵⁴ Children suffer “excessive crying, disturbed sleep, and developmental setbacks like wetting the bed.”⁵⁵ The trauma that children have experienced and continue to experience the longer they are separated contributes to anxiety, depression, suicidal ideation, post-traumatic stress disorder, and behavioral issues.⁵⁶

⁵⁰42 U.S.C. § 1232(c)(2)(A); Stipulated Settlement Agreement, *Flores v. Reno*, No. 85-CV-4544 (C.D. Cal. 1997).

⁵¹ Camilo Montoya-Galvez, *Migrant children describe poor conditions at makeshift U.S. shelters in interviews with attorneys*, CBS NEWS (May 19, 2021), <https://www.cbsnews.com/news/immigration-border-migrant-children-poor-conditions-shelters/>; see also Camilo Montoya-Galvez, *Biden administration sued over substandard conditions at emergency sites for migrant teens*, CBS NEWS (August 10, 2021), <https://www.cbsnews.com/news/biden-administration-sued-over-substandard-conditions-at-emergency-sites-for-migrant-teens/?ftag=>.

⁵² Felipe Jacome, *Trans-Mexican Migration: A Case of Structural Violence*, Georgetown University Center for Latin American Studies, Working Paper Series No. 2, p. 26, <https://pdba.georgetown.edu/CLAS%20RESEARCH/Working%20Papers/WP2.pdf>.

⁵³ Jessica Henderson Daniel, President, Am. Psychological Ass’n, *Statement of APA President Regarding the Traumatic Effects of Separating Immigrant Families* (May 29, 2018), <https://www.apa.org/news/press/releases/2018/05/separating-immigrant-families>.

⁵⁴ *Id.*

⁵⁵ Press Release, Physicians for Human Rights, *U.S. Border Expulsion Policy Results in Family Separations, PTSD, Human Rights Violations: PHR Report* (Jul. 28, 2021), <https://phr.org/news/u-s-border-expulsion-policy-results-in-family-separations-ptsd-human-rights-violations-phr-report/>.

⁵⁶ Julie M. Linton et al., *Detention of Immigrant Children*, 139 AM. ACAD. OF PEDIATRICS 1, 6 (2017), <https://publications.aap.org/pediatrics/article/139/5/e20170483/38727/Detention-of-Immigrant-Children>; see also Sarah A. MacLean et al., *Mental health of children held at a United States immigration detention center*, 230 SOC. SCI. & MED. 303, 303-305 (2019), <https://doi.org/10.1016/j.socscimed.2019.04.013>; see also Rhitu Chatterjee, *Lengthy Detention of Migrant Children May Create Lasting Trauma*, *Say Researchers*, NPR (Aug. 23, 2019), <https://www.npr.org/sections/health->

Research has found that for adolescents, particularly Black, Latinx, and other youth of color, the behavioral manifestation of trauma symptoms is more likely to be perceived by clinicians as threatening due to implicit racial bias, leading to prolonged detention that only worsens their mental health.⁵⁷ “[C]linicians often over-pathologize behaviors of ethnic and racial minorities as more dangerous and disobedient and can hold personal and inadvertent biases of criminal behavior, aggression, violence, and hostility toward certain minority groups.”⁵⁸ Black, Latinx, Indigenous, and Asian children displaying behavior consistent with anxiety, depression, mood, or adjustment disorders are more likely to be diagnosed with “Conduct Disorder” or “Oppositional Defiance Disorder” (unlike non-Hispanic white children displaying comparable behaviors).

The Young Center has observed that such diagnoses and biased characterizations of trauma symptoms can prolong immigrant children’s detention and jeopardize their release to sponsors or community-based placements with the holistic therapeutic services they need, thereby worsening their mental health.⁵⁹ For example, children evacuated from Afghanistan following the withdrawal of U.S. troops from the country experienced significant mental and behavioral health problems due to the trauma of abrupt separation from their families, the threat of harm to their families, and the compounding stress of navigating cultural and linguistic barriers and the conditions of federal government detention on their own.⁶⁰ In some cases, facility staff have perceived the behaviors of many Afghan boys to be violent or threatening and have disproportionately responded by stepping them up to more restrictive settings or involving local law enforcement, resulting in arrest and criminal incarceration .

Young people who struggle to abide by inflexible and often culturally subjective facility rules may be transferred to more restrictive settings, even when their behavior can be explained by their trauma histories. Decisions to place children in more restrictive settings are often based on decontextualized Significant Incident Reports (SIRs) written by government facility staff which

[shots/2019/08/23/753757475/lengthy-detention-of-migrant-children-may-create-lasting-trauma-say-researchers](https://www.theyoungcenter.org/shots/2019/08/23/753757475/lengthy-detention-of-migrant-children-may-create-lasting-trauma-say-researchers).

⁵⁷ Matthew C. Fadus et al., *Unconscious Bias and the Diagnosis of Disruptive Behavior Disorder and ADHD in African American and Hispanic Youth*, 44 ACAD. PSYCHIATRY 95, 97 (2020), <https://doi.org/10.1007/s40596-019-01127-6>.

⁵⁸ *Id.* (“These biases can lead to diagnostic disparities, explaining why non-Hispanic white children who demonstrate comparable behaviors (that are often diagnosed as CD and ODD in ethnic and racial minority youth) tend to be diagnosed with conditions such as mood, anxiety, development, or adjustment disorders”).

⁵⁹ Melissa Sanchez et al., *As Months Pass in Chicago Shelters, Immigrant Children Contemplate Escape, Even Suicide*, PROPUBLICA (Sept. 6, 2018), <https://www.propublica.org/article/chicago-immigrant-shelters-heartland-internal-documents>.

⁶⁰ Melissa Sanchez, *Dozens of Traumatized Afghan Kids Struggle Inside a Shelter That’s Ill-Equipped to Care for Them*, PROPUBLICA (Oct. 28, 2021), <https://www.propublica.org/article/dozens-of-traumatized-afghan-kids-struggle-inside-a-shelter-thats-ill-equipped-to-care-for-them>.

document children's behavior.⁶¹ SIRs attempt to capture behavior that is perceived to threaten the safety of children or staff, incidents involving law enforcement, as well as incidents that stem from mental health issues such as detention fatigue, suicidal ideation, or other thoughts of harm; a child's criminal history; potential fraud, etc.⁶² While SIRs can be an effective tool for the protection of young people, the facilities that hold children in custody lack clear guidance on what behaviors warrant reporting, opening the door to bias, overreporting, and inconsistent reporting in which the same behavior will result in an SIR for one child but not for others. Moreover, SIRs are ineffective in addressing the trauma faced by children in custody and instead criminalize developmentally or psychologically appropriate reactions to separation, prolonged detention, delays in reunification, sexual abuse, depression, and anxiety.⁶³

V. **Recommendations for Redress and the Elimination of Racial Discrimination from Immigration Law and Policy**

Despite the USG's stated commitment in its submission to the CERD to "pursue a comprehensive approach to advancing equity for all" and "(redress) inequities in policies and programs that serve as barriers to equal opportunity," there has been lack of political will in Congress and by federal agencies to effect lasting structural changes.⁶⁴ Below, we recommend key actions that the USG must undertake to honor its commitments under the CERD:

First, the USG must recognize that separating a child from a parent violates many of its international obligations and parental rights under the U.S. Constitution and has a long history of being used as an instrument of racism and white supremacy against Black, Indigenous, Latinx, and Asian people. Therefore, the USG must not separate children from their caregivers unless there is verifiable evidence that a parent poses an imminent threat to the child's safety. Rare separations under those circumstances should be subject to prompt review by a court with expertise in child protection and with due consideration of whether implicit or explicit racial bias contributed to the decision to separate.

⁶¹ Young Center for Immigrant Children's Rights, Letter to ORR re: ORR Proposed Information Collection Activity, 86 FR 5196; Comments in Opposition to Proposed Information Collection Activity; Placement and Transfer of Unaccompanied Children into ORR Care Provider Facilities (0970-0554), p. 2, (Mar. 18, 2021),

<https://bit.ly/YoungCenterCommentProposedInformationCollectionActivityLegalServices>.

⁶² Office of Refugee Resettlement, Admin. for Children & Families, U.S. Dep't of Health & Human Serv., ORR Guide: Children Entering the United States Unaccompanied § 5.8 (2015),

<https://www.acf.hhs.gov/orr/policy-guidance/children-entering-united-states-unaccompanied-section-5>.

⁶³ Young Center for Immigrant Children's Rights, Letter to ORR re: ORR Proposed Information Collection Activity, 86 FR 11537; Comments in Opposition to Proposed Information Collection Activity; Services Provided to Unaccompanied Alien Children (0970-0553), p. 10, April 26, 2021,

<https://bit.ly/YoungCenterCommentProposedInformationCollectionActivityServices>.

⁶⁴ U.S. Combined Tenth to Twelfth Periodic Reports under Article 9 of the Convention to Eliminate Racial Discrimination, Exec. Order No. 13,985, 86 Fed. Reg. 7,009 (Jan. 20, 2021).

Second, the Young Center calls for the immediate end of the Remain in Mexico policy, Title 42, and family separation policies that separate migrant children from their families and disproportionately harm Black, Indigenous, and Latinx immigrants. The USG must restore access to asylum at the U.S. border and stop the detention and deportation of asylum seekers and other migrants without true due process. The government must ensure that once re-established, access to asylum is available to all, regardless of race or country of origin.

Third, the USG must consider children's best interests in every decision that might affect a child, in line with article 3 of the Convention on the Rights of the Child, including the acute harms posed by racially discriminatory policies. As recommended in the Young Center's Report on Reimagining Children's Immigration Proceedings, judges and immigration officials should have the authority and obligation to consider children's safety, well-being and best interests in every decision.⁶⁵

Fourth, the USG must collect and make publicly available demographic data on populations impacted by its immigration policies. It should monitor for and investigate disparities for potential race discrimination and publish its findings. It should analyze the impact of policies like Zero Tolerance, Remain in Mexico, and Title 42 within the full historical context of family separation and racism in immigration laws. The government's investigation must duly consider the lasting impact of these policies on communities of color. Further, the USG must commit to ending racially discriminatory practices and policies and ensure that its immigration and child welfare agencies implement robust and effective policies to prevent their recurrence.

Fifth, the USG must collect and make publicly available demographic data on the treatment of unaccompanied children in its custody, e.g., the number of children who receive SIRs, are stepped up to more restrictive placements, are subjected to age redeterminations, are arrested while in government custody, and are subjected to discipline broken down by race, gender, country of origin, including whether a child is from an indigenous group. The USG should monitor for and investigate disparities in treatment and impact for potential race and national origin discrimination and publish its findings. It should analyze the impact of its policies and practices regarding the care and custody of unaccompanied children within the historical and broader present-day context of the overcriminalization and excessive discipline of Black and Latinx youth in the U.S. across various systems, including the criminal justice system. The USG must commit to ending racially discriminatory practices and policies impacting immigrant youth, particularly unaccompanied children in government custody, and implement robust and effective policies to prevent their recurrence.

Sixth, the USG must provide all reunified families with autonomous access to holistic health, housing, education and development services, including culturally competent mental health

⁶⁵ Young Center for Immigrant Children's Rights, *Reimagining Children's Immigration Proceedings: A Roadmap for an Entirely New System Centered Around Children* 67 (Oct. 2020), <https://www.theyoungcenter.org/reimagining-childrens-immigration-proceedings>.

support to address the long-lasting harm of separation and racial trauma. The USG must take concerted steps to ensure systemic racism does not impede Black, Indigenous and Latinx families' ability to find and access these services.

Seventh, the government must ensure that unaccompanied children who end up in its custody without available caregivers are placed in small-scale, state-licensed shelters or foster programs. The USG must ensure that all care providers for immigrant children are issued training and guidance that address and seek to mitigate against the harms of implicit bias.

Eighth, the USG must ensure that vulnerable unaccompanied children, particularly separated children, are appointed independent Child Advocates to identify and advocate for the child's best interests on all relevant decisions in the child's case. Additionally, every child in immigration removal proceedings should have appointed legal counsel.

Finally, we respectfully emphasize that the United States stands nearly alone in its failure to ratify the Convention on the Rights of the Child (CRC). The CRC's requirement to consider the best interests of children; to consider the expressed opinions of children with due regard for their age and maturity; and to protect family unity will fundamentally advance the rights of immigrant children in the United States, particularly the right to family unity.

The upcoming 107th Session of the Committee on the Elimination of Racial Discrimination presents the Biden Administration with an opportunity to rectify the past harms of the USG and actualize its commitments under the Convention. We submit the above recommendations in hopes that the USG meaningfully addresses them during its appearance before the Committee. The Young Center for Immigrant Children's Rights looks forward to engaging with the USG to ensure that immigrant children's best interests and right to equality, non-discrimination and dignity are protected.

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