



Statement for the Record by Kids in Need of Defense (KIND)
“The Biden Border Crisis: Part I”
U.S. House Committee on the Judiciary
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Kids in Need of Defense (KIND) is the leading U.S.-based organization dedicated to the protection of unaccompanied children. KIND was founded by the Microsoft Corporation and the United Nations Refugee Agency (UNHCR) Special Envoy Angelina Jolie. We have served more than 30,000 unaccompanied children in removal proceedings and formed pro bono partnerships with over 755 corporations, law firms, law schools, and bar associations. KIND’s social services program facilitates the coordinated provision to unaccompanied children of counseling, educational support, medical care, and other services. KIND also helps children who are returning to their countries of origin to do so safely and to reintegrate into their home communities. KIND’s programs in Mexico and Central America work to address the root causes of forced migration and help protect the safety and well-being of migrant children at every phase of their migration journey. Through its European Initiative, KIND and partners in Belgium, France, Greece, Ireland and the United Kingdom work to ensure access to high quality pro bono legal assistance for unaccompanied children in Europe.

In recent years, more than 89 million people worldwide have been forcibly displaced, nearly 41 percent of them children.¹ A combination of factors, such as war, violence, political instability, economic insecurity, and natural disasters, has forced millions of children to flee their countries, as threats to their lives and wellbeing make even routine activities such as going to school perilous and impede their ability to grow in safety. Many children may migrate alone or become separated from parents or other family members during their journey. These children often confront particular dangers on account of their age and developmental stage, and frequently are targeted for violence, trafficking, exploitation, and other harms.

Following World War II, countries around the world committed to ensuring that people fleeing persecution and other threats to their lives and safety would never be returned to harm. International law similarly recognizes the particular vulnerability of children and articulates special concern for their rights and protection. These fundamental principles, which are reflected in the United States’ values and laws, have only grown in importance as the U.S., like other nations, works to establish safe, orderly and humane border processes and to improve the asylum system’s responsiveness to migration compelled by multiple humanitarian crises around the world.

The United States faces an unprecedented opportunity to demonstrate its leadership in these efforts—by deploying sufficient resources and humanitarian reception capacity to safely manage border processing; ensuring processing consistent with U.S. law and standards and the unique needs of children; and fully and fairly considering cases for humanitarian protection. These measures must include ensuring that unaccompanied and separated children can request protection at U.S. ports of entry and that policies and practices provide for their treatment as children first and foremost. A safe and secure border necessitates, and must never compromise, the protection of children.

Recent debates around the Title 42 policy and other measures for addressing migration at the Southwest border include proposals that would undermine legal safeguards for the asylum seekers and others seeking protection in an effort to restrict or deter migration to the Southwest border. By threatening longstanding humanitarian and antitrafficking safeguards, however, these proposals would only increase the dangers facing children in particular—and deepen their vulnerability, exploitation, and need to flee for protection. Meaningful measures to address challenges at the Southwest border must not turn away from Congress’ decades-long commitment to and progress in protecting the most vulnerable, but rather *toward* practical solutions that can enhance compliance with these

¹ UNHCR, Figures At a Glance, <https://www.unhcr.org/en-us/figures-at-a-glance.html>.

safeguards, child protection, and border security and efficiency.

KIND recommends the following practical and achievable measures to reduce risks to children in government custody, achieve new processing and resource efficiencies, and better leverage the expertise and experience of border personnel: 1) end the Title 42 policy and ensure access to protection at ports of entry; (2) hire child welfare professionals in CBP facilities; (3) facilitate co-location of Department of Health and Human Services (HHS) professionals in CBP facilities; (4) ensure fair access to protection and expand legal representation for unaccompanied children; and (5) undertake broader reforms to create a humanitarian reception model.

KIND strongly supports the Administration's efforts to date to comply with protections for unaccompanied children and to exempt unaccompanied children from expulsions without due process that risk their return to trafficking and other harm. We additionally support the Administration's commitment to legal representation for unaccompanied children consistent with the TVPRA to help ensure children will not have to face immigration court alone or face return to trafficking or other harm for lack of an attorney to represent them in complex proceedings. KIND also supports the Administration's recent efforts to increase lawful pathways, including through the Central American Minors program, Uniting for Ukraine, Operation Allies Welcome, and the Cuba, Haiti, Nicaragua, and Venezuela parole programs, through which qualified individuals may apply to come to the U.S. and avoid dangerous journeys to safety. We remain deeply concerned, however, about simultaneous measures that would expand the use of Title 42 expulsions and impose new restrictions on U.S. asylum based on a protection seeker's transit through another country while in search of safety. These policies risk the return of children, families, and others to harm and potential family separations, and only deepen the challenges facing the U.S. at the Southwest border.

We look forward to working with Congress and the Administration to advance practical solutions that prioritize the safety and wellbeing of unaccompanied children and a safe, orderly, and humane border.

Unaccompanied Children at the Southwest Border

During the past decade, increasing numbers of unaccompanied children have fled to the United States in search of safety and protection. In FY 2014, CBP encountered 68,541 unaccompanied children at the U.S.' Southwest border.² In FY 2019, numbers of unaccompanied children arriving increased to 80,634, and in FY 2021, CBP encountered 146,925 unaccompanied children.³ In fiscal year 2022, more than 152,057 unaccompanied children were encountered at the Southwest border.⁴ Nearly 37,452 unaccompanied children have been encountered in fiscal year 2023 to date.⁵

High numbers of unaccompanied children seeking protection in the U.S. reflect multiple, intersecting dynamics and factors, including ongoing humanitarian crises in the Central American countries of El Salvador, Guatemala, and Honduras as well as in Haiti, Venezuela, Nicaragua, Cuba, Ukraine, and Afghanistan, among others. In many countries, the COVID-19 pandemic only exacerbated the dangers facing migrants and refugees, as support services and protection from public institutions became even more strained.

In recent years, the Title 42 policy--first implemented in March 2020--has led to more than 2.4 million expulsions,⁶ including of unaccompanied children, without affording them a meaningful opportunity to request protection or providing them with vital legal protections and procedural safeguards set forth in U.S. and international law. These expulsions, coupled with related restrictions at U.S. ports of entry, have only compounded the perils confronting children and others in search of safety by forcing them to remain in danger,

² See Congressional Research Service, "Unaccompanied Alien Children: An Overview" (Oct. 9, 2019), at 3, <https://fas.org/sgp/crs/homsec/R43599.pdf>.

³ CBP, Southwest Land Border Encounters, <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters>. Conducted data search using the terms "FY 19" for FY and "UC/Single Minors" under Demographic. The search was repeated for "FY 21."

⁴ *Id.* (Conducted data search using the term "FY22" under FY and "UC/Single Minors" under Demographic.).

⁵ *Id.* (Conducted data search using the term "FY23" under FY and "UC/Single Minors" under Demographic.).

⁶ Camilo Montoya-Galvez, "What is Title 42, the COVID border policy used to expel migrants?," CBS News (Jan. 22, 2023), <https://www.cbsnews.com/news/title-42-immigration-border-biden-covid-19-cdc/>.

and they have contributed to significant bottlenecks at the border. Facing the same or worse dangers than those they initially fled, many children who were expelled or turned back under Title 42 have been left with no meaningful choice but to again request protection at the border, including after the Biden Administration exempted unaccompanied children from the Title 42 policy in February and July 2021⁷ and permanently terminated the Title 42 order as applied to unaccompanied children in March 2022.⁸

Recognizing the particular vulnerability of unaccompanied children in the immigration system, Congress with bipartisan support enacted the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) more than a decade ago.⁹ The TVPRA provides legal and procedural safeguards to ensure that unaccompanied children are screened for protection needs and risks of trafficking, cared for by child welfare professionals as the federal government works to vet safe and suitable caregivers for them, and provided access to counsel and independent child advocates to assist them in navigating immigration proceedings and to safeguard children's best interests so they are not returned to trafficking or other harm. These protections, together with minimum standards provided by the *Flores* Settlement Agreement and developed over decades, remain of paramount and lifesaving importance today as the U.S. works to advance the safety and security of the Southwest border and the wellbeing of children who arrive to it in search of protection.

KIND urges the federal government to implement additional practical reforms, including those detailed below, to strengthen its capacity to respond to current and emerging needs and to ensure humanitarian reception of unaccompanied children and other protection seekers.

Recommendations to Ensure Access to Protection and Safe Reception of Unaccompanied Children

End the Title 42 Policy and Ensure Access to Ports of Entry. While processing of unaccompanied children consistent with the TVPRA has largely resumed, KIND remains concerned that unaccompanied children could still be turned away or forced to undertake dangerous routes to safety as a result of confusion about or inconsistent application of entry restrictions or the Title 42 policy at the border. Despite the Administration's initial efforts to begin winding down the Title 42 policy it was recently expanded as litigation around the policy continues. The continued use and broadening of this policy, which runs contrary to U.S. and international law, even as the pandemic recedes puts children and others in greater danger and only frustrates efforts to achieve a safe, orderly, and humane border, as individuals denied access remain in dire need of protection.

Formally ending the Title 42 policy and ensuring access to protection at ports of entry are only the first steps toward ensuring humane and orderly processing at the U.S.-Mexico border. The Biden Administration must also abandon planned rulemaking that would restrict asylum access for certain protection seekers who transited through another country as they fled for safety¹⁰—a policy that would directly violate the TVPRA if applied to unaccompanied children and that could result in the return of thousands of people, including children and families, to countries in which their lives and safety are threatened.

Hire Child Welfare Professionals. Historically, children arriving to the U.S. have been held during initial processing in CBP facilities initially designed for use with single adults and that are ill suited to accommodate children's specific needs and appropriate care. These facilities are staffed by CBP agents and officers trained in law enforcement, rather than in the development, welfare, and care of children. While broader reforms are critical to ensure the humanitarian reception of children in child-appropriate spaces, DHS can take immediate steps toward improving care of children in government custody by hiring licensed child welfare professionals to

⁷ Camilo Montoya-Galvez, "U.S. will not expel unaccompanied migrant children under Trump-era policy now being reviewed," CBS News (Feb. 3, 2021), <https://www.cbsnews.com/news/migrant-children-biden-administration-will-not-expel-trump-policy/>; CDC, 86 Fed. Reg. 9942 (Feb. 17, 2021); CDC, 86 Fed. Reg. 38717 (July 22, 2021).

⁸ CDC, Public Health Reassessment and Immediate Termination of Order Suspending the Right to Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists with Respect to Unaccompanied Noncitizen Children (March 11, 2022), <https://www.cdc.gov/coronavirus/2019-ncov/more/pdf/NoticeUnaccompaniedChildren-update.pdf>.

⁹ William Wilberforce Trafficking Victims Protection Reauthorization Act, Pub. L. No. 110-457, 122 Stat. 5044 (2008).

¹⁰ DHS, DHS Continues to Prepare for End of Title 42; Announces New Border Enforcement Measures and Additional Safe and Orderly Processes (Jan. 5, 2023), <https://www.dhs.gov/news/2023/01/05/dhs-continues-prepare-end-title-42-announces-new-border-enforcement-measures-and>.

oversee the care and screening of children in CBP facilities along the border. These professionals, who should be licensed in social work and have requisite training and experience in children's needs and development, can not only make sure that children's basic needs are provided for, but can also conduct screenings for protection needs as required by the TVPRA. By assuming responsibility for these care and screening functions, child welfare professionals would not only improve conditions for children but also ensure that CBP agents and officers are able to dedicate their time to the law enforcement functions for which they have received specialized training.

House report language accompanying omnibus legislation signed into law in December 2022 provided nearly \$18 million to DHS to hire licensed child welfare professionals at border facilities. It is critical that DHS promptly onboard these experts.

Facilitate Co-Location of HHS professionals in CBP Facilities. Among the high numbers of unaccompanied children arriving at the border are many children who traveled to the U.S. with family members or caregivers such as aunt/uncles, grandparents, or adult siblings who are not their parents or legal guardians. These children meet the legal definition of an "unaccompanied alien child," as defined by the Homeland Security Act of 2002 and the Trafficking Victims Protection Reauthorization Act of 2008.¹¹ Accordingly, they must be afforded all the procedural protections accompanying this status through the conclusion of their immigration proceedings. At the same time, however, DHS and ORR can ensure that children do not face prolonged custody in CBP or ORR facilities or unnecessary separation from loving caregivers by commencing the family reunification process and vetting of potential sponsors while in CBP custody. Through the placement of HHS federal field specialists in CBP facilities, ORR could evaluate caregivers traveling with a child as potential sponsors and facilitate the potential release of a child and an approved caregiver together once vetting is complete. HHS staff can also rapidly identify children with known vulnerabilities or special needs and ensure their initial placement in facilities best suited for their needs and similarly ensure that the process of identifying potential sponsors for all unaccompanied children begins as soon as possible. This reform would also reduce children's length of stay in CBP or ORR facilities.

The federal government recently began piloting these efforts and should continue to identify opportunities for potential expansion as well as any improvements or modifications that may be necessary based on its experience.

Ensure Fair Access to Protection and Expand Legal Representation for Unaccompanied Children. In addition to receiving children arriving to the U.S., the federal government has a vital role in upholding children's rights and ability to seek protection and to have their legal cases fully and fairly heard, both in immigration court and before U.S. Citizenship and Immigration Services (USCIS). Many unaccompanied children have claims for humanitarian protection such as asylum, Special Immigrant Juvenile Status, or visas for victims of severe crimes or human trafficking. The TVPRA provides several procedural protections to assist children in navigating the immigration system, including an opportunity to have asylum claims first heard by USCIS in a non-adversarial asylum interview, rather than in immigration court, access to counsel through HHS, and exemption from the one-year filing deadline for asylum claims, among other protections.

Congress and the Biden Administration should prioritize the provision of legal representation to unaccompanied children in immigration proceedings. Despite their unique vulnerabilities in the immigration system, many if not most unaccompanied children lack an attorney to assist them in navigating immigration proceedings with the highest of stakes for their lives and safety--and in which the federal government is itself represented by an attorney. Government data illustrate that unaccompanied children without an attorney have virtually no meaningful chance of receiving a fair day in court. EOIR statistics on completed immigration court cases from FY 2018 through the first half of FY 2021 show that immigration judges were almost one hundred times more likely to grant legal relief to unaccompanied children with counsel than unaccompanied children without legal counsel.¹² Legal representation also facilitates consistently high rates of attendance by unaccompanied children at their immigration court proceedings and conserves both immigration court and ICE time and resources by reducing the need for delays or postponements to allow time for children to find counsel. Legal representation

¹¹ Homeland Security Act of 2002, P.L. 107-296, 116 Stat. 2135 (Nov. 25, 2002); William Wilberforce Trafficking Victims Protection Reauthorization Act, Pub. L. No. 110-457, 122 Stat. 5044 (2008) (TVPRA).

¹² KIND calculated this figure based on Executive Office for Immigration Review (EOIR) data published by the Congressional Research Service in its report titled "Unaccompanied Alien Children: An Overview, p. 16 (September 1, 2021), <https://sgp.fas.org/crs/homsec/R43599.pdf>.

and additional post-release social services for unaccompanied children can also help to safeguard children following release from ORR care by providing additional professionals with whom children are regularly in contact who can assist in identifying and providing children with referrals for support regarding any risks to the child that may be observed.

Consistent with the TVPRA, ORR currently provides funding to support legal representation of unaccompanied children, although the number of children in need continues to significantly outpace existing funding and allocation. As steadily high numbers of unaccompanied children arrive to the United States, this due process crisis will only expand unless Congress and the Administration prioritize measures to ensure that no child faces immigration court alone.

Undertake Broader Reforms to Create a Humanitarian Reception Model. Transforming the current reception system to one that puts at its core the best interests and welfare of children will require long-term commitment and vision from the federal government at large. Through engagement of a nongovernmental humanitarian actor DHS and HHS can help ensure the appropriate reception, screening, and care of children who arrive to the United States at or between ports of entry, and allow border agents and officers to focus on law enforcement functions for which they are specially trained. DHS' engagement of the American Red Cross to assist with reception during a period of significant border arrivals in 2021 was an example of successful collaboration. Efforts to formalize a humanitarian reception model over the long term should continue and include outreach to and engagement with nongovernmental humanitarian organizations.

Cross-agency coordination can enable child-appropriate modifications to border facilities to provide child-friendly spaces for temporary processing, designated areas in which children can be screened by child welfare professionals in a confidential and child-appropriate manner, basic hygiene accommodations, and meeting spaces for in-person Know Your Rights presentations and other legal assistance by nongovernmental organizations. In addition, DHS should work to improve accountability and oversight of CBP's compliance with legal requirements and standards in the TVPRA, *Flores*, and TEDS by providing for access to CBP facilities and monitoring by independent third parties, including nongovernmental organizations. The best interests and wellbeing of migrant and refugee children should be prioritized at all times.

Conclusion

Amid unprecedented numbers of unaccompanied children arriving to the U.S., the Biden Administration has worked to ensure access to fundamental humanitarian protections and to pilot new strategies for improving care and reception of unaccompanied children. Compliance with the TVPRA and *Flores* as well as U.S. and international law related to asylum remains imperative, and these protections must never be sidelined or suspended for the purpose of deterring or restricting arrivals at the Southwest border. The federal government and Congress should collaborate to ensure an orderly and swift end to the Title 42 policy and deploy sufficient resources and capacity to manage border operations and security and ensure humanitarian reception of vulnerable populations, including children. KIND stands ready to work with Congress and the Administration to ensure the implementation of practical measures, such as the hiring of licensed child welfare professionals in border facilities, that can deliver benefits for safe, orderly, and humane border processes and the wellbeing of migrant and refugee children immediately and in the future.