



November 29, 2023

The Honorable Xavier Becerra  
Secretary  
Dept. of Health and Human Services  
Washington, D.C. 20201

Mr. Toby Biswas  
Director of Policy  
Unaccompanied Children Program  
Office of Refugee Resettlement  
Administration for Children and Families  
Dept. of Health and Human Services  
Washington, D.C. 20201

Subject: Notice of Proposed Rulemaking: 45 C.F.R. Part 410  
“Unaccompanied Children Program Foundational Rule”

Dear Mssrs. Becerra and Biswas:

These comments on the above-referenced rulemaking are submitted on behalf of America’s Future, where I serve as Executive Director.

### **AMERICA’S FUTURE**

America’s Future (“AF”) is one of the nation’s oldest policy-oriented nonprofit organizations, having been founded in 1946, and is a leader in the fight to protect children from exploitation and trafficking. AF administers [“Project Defend & Protect our Children”](#) (“PDPC”) which has three core tenets:

- EXPOSE the causes and truth of trafficking, neglect, exploitation, and abuse inflicted on our children;
- EDUCATE the public with facts to raise awareness in our communities that this tragedy must end; and
- ERADICATE child trafficking and exploitation of children in America once and for all.

As part of America’s Future PDPC initiative, Get In The Fight campaigns have been established to raise awareness through education and training in states across the nation to help end child exploitation and trafficking in America. The first Get In The Fight campaign was held in August in Sarasota, Florida, where hundreds of people participated. Other states have scheduled their local state campaigns, including Michigan (Dec. 8-9, 2023); Illinois (Jan. 26-27,



2024); Texas (Feb. 23-24, 2024); Pennsylvania (May 17-18, 2024); and Ohio (June 14-15, 2024). More states are in the planning stages through 2024.

As America’s Future’s Executive Director, I recently testified before the [Florida Grand Jury](#) investigating threats to our nation’s children. The Grand Jury was impaneled on June 28, 2022 to study, *inter alia*, “parents, guardians, or other family members of unaccompanied alien children who have conspired with transnational criminal organizations (TCOs) or other illicit actors to smuggle, and thus endanger, their children.” It has issued multiple reports, and both the third and fourth report of that Grand Jury are cited herein:

- Third Presentment of the Twenty-First Statewide Grand Jury Regarding Unaccompanied Alien Children (UAC), March 29, 2023.
- Fourth Presentment of the Twenty-First Statewide Grand Jury, October 20, 2023.

### SUMMARY OF COMMENTS

For the reasons stated below, AF **strongly opposes** the Notice of Proposed Rulemaking (“NPRM”) entitled “Unaccompanied Children Program Foundational Rule,” that has been promulgated by the Department of Health and Human Services (“HHS”), to establish new rules governing the Office of Refugee Resettlement (“ORR”).

The NPRM purports “to provide care and custody for unaccompanied children in a manner that is consistent with their best interests.” 88 *Fed. Reg.* 68908, 68916. But a careful reading reveals that the NPRM appears designed to provide regulatory cover for the ORR’s ongoing failure to meet its current legally mandated obligations. It does so by apparently lowering the threshold of care required in investigating the backgrounds of potential placement for Unaccompanied Children immigrants (“UACs”), regularizing a deeply flawed system which places vulnerable children at serious risk from human traffickers.

### COMMENTS

#### **I. The NPRM Largely Codifies ORR’s Current Dangerous Policies Which Leave Unaccompanied Minors in Danger of Child Trafficking.**

AF’s overriding concern is that many unaccompanied children processed by ORR appear to be ending up as victims of the illicit child trafficking trade due to insufficient ORR background checks.

The statewide grand jury empaneled by the Supreme Court of Florida has made a large number of deeply disturbing findings. The grand jury noted in its Fourth Presentment on October 20, 2023, that large numbers of unaccompanied children are “transported by federal agencies into our state [Florida], where many are effectively abandoned.”<sup>1</sup> The grand jury noted that although the Department of State takes the position that it “strongly supports child protection

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<sup>1</sup> Florida Statewide Grand Jury, “Fourth Presentment” at 1 (Oct. 20, 2023).

and takes into account the best interest of the child in certain immigration actions, it is not always a ‘primary consideration.’” *Id.* at 1.

The grand jury detailed a list of administrative decisions by ORR that appear to have damaged the safety net that previously protected these children. The grand jury found that: “not only have **rapid DNA tests** [to ascertain familial relationships between UACs and prospective placements] been exceedingly rare, they are now being **discontinued altogether.**” *Id.* at 3 (emphasis added). Additionally, it found that “ORR does not and will not ‘terminate custody arrangements,’ even in the case of sponsors who have abused and/or trafficked the children given to them.” *Id.*

On April 18, 2023, the Subcommittee on National Security, the Border, and Foreign Affairs of the House Oversight Committee held a hearing on “Oversight of the Office of Refugee Resettlement’s Unaccompanied Alien Children Program.” ORR Director Robin Marcos was repeatedly unable to answer pertinent questions about basic oversight functions of the Office. Director Marcos could not account for some **85,000 children who have simply gone missing** from HHS oversight in the past two years alone.<sup>2</sup> Marcos could not state the percentage of cases in which ORR communicates with even one parent of UACs before making placement determinations. *Id.* She could not answer a question as to what percentage of child sponsorship applications are rejected for unfitness. *Id.*

This year, the *New York Times* interviewed scores of caseworkers across the country and estimated that two-thirds of UACs end up in full-time jobs.<sup>3</sup> Many of these are under brutal and dangerous conditions and with poor pay. *Id.* Some children “find that they have been misled by their sponsors and will not be enrolled in school.” *Id.* The *New York Times* noted that “as more and more children have arrived, the Biden White House has ramped up demands on staffers to move the children quickly out of shelters and release them to adults. Caseworkers say they rush through vetting sponsors.” *Id.* Rather than addressing border security, the Biden Administration, via HHS, simply “began paring back protections that had been in place for years, including some background checks and reviews of children’s files,” to allow quicker processing of an exploding wave of UACs. *Id.*

At a July hearing of the House Energy & Commerce Committee’s Oversight and Investigations Subcommittee, Representative Cathy McMorris Rodgers (R-WA) noted that ORR’s “post-release follow-up is already a low bar [as] ORR considers it a success if they merely speak with a child or a sponsor over the phone.”<sup>4</sup> Rodgers criticized Secretary Becerra, noting that he “allowed ORR to **waive criminal background checks, including checks of the sex offender and child abuse registries,** for sponsors and other adults living in households

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<sup>2</sup> House Committee on Oversight & Accountability, “[Hearing Wrap Up: ORR Director Fails to Answer Questions About 85,000 Lost Unaccompanied Alien Children, Flawed Vetting of Sponsors, and More](#)” (Apr. 18, 2023).

<sup>3</sup> H. Dreier, “[Alone and Exploited, Migrant Children Work Brutal Jobs Across the U.S.](#),” *New York Times* (Feb. 25, 2023).

<sup>4</sup> “[McMorris Rodgers to HHS Sec. Becerra: “I am Very Concerned About a Culture of Arrogance and Lawlessness,”](#)” House Committee on Energy & Commerce (July 26, 2023).

where children are placed.” *Id.* (emphasis added). “Under your watch, digital fingerprinting to confirm the identity of sponsors dropped by 55 percent,” Rodgers noted. *Id.*

Despite the documented problems, “H.H.S. behaves as if the migrant children who melt unseen into the country are doing just fine.”<sup>5</sup> Now, the NPRM appears designed not to address the systemic failures identified by the *New York Times* and the House Oversight and Investigations Subcommittee, but to simply lower the standard and turn a failing ORR grade into a passing one.

## II. The NPRM Designates Critical ORR Responsibilities to Protect Children as Optional rather than Mandatory.

In instance after instance, the NPRM outlines critical ORR responsibilities for ensuring the protection of UACs against exploitation, child labor, and trafficking, only to make performance of those responsibilities purely discretionary.

### 1. Home studies.

The Florida grand jury noted that “ORR performs **home studies in fewer than one percent of cases.**”<sup>6</sup> ORR’s current self-imposed guidelines require home studies only in rare instances, where:

a nonrelative sponsor ... is seeking to sponsor: (1) multiple unaccompanied children; (2) additional unaccompanied children and the non-relative sponsor has previously sponsored or sought to sponsor an unaccompanied child; or (3) unaccompanied children who are 12 years and under.<sup>7</sup>

ORR now proposes that the NPRM enshrine this discretionary approach as a Final Rule. “ORR proposes both required and **discretionary home studies** depending upon specific circumstances.”<sup>8</sup> The NPRM proposes that, as a matter of course, children 13 and older would be released to non-relative placements without a home study. *Id.* It states:

**ORR would have the discretion** to initiate home studies **if it determines** that a home study is likely to provide additional information which could assist in determining that the potential sponsor is able to care for the health, safety, and well-being of the unaccompanied child. [*Id.* (emphasis added).]

These home studies are often the best way to determine if the children are not being abused, but the NPRM minimizes the occasions on which they are utilized.

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<sup>5</sup> H. Dreier, *supra*.

<sup>6</sup> Florida Statewide Grand Jury, “Fourth Presentment” at 16 (Oct. 20, 2023) (emphasis added).

<sup>7</sup> 88 *Fed. Reg.* 68933 n.98.

<sup>8</sup> *Id.* at 68930.

## 2. DNA testing for familial relationships.

While serving as Vice President in 2014, President Biden warned:

The majority of [unaccompanied minors] rely — we estimate between 75 and 80 percent — rely on very dangerous, not-nice, **human-smuggling networks** that **transport them** through Central America and Mexico to the United States. These smugglers ... routinely engage in **physical and sexual abuse, and extortion....** [N. Rappaport, “[Why are we encouraging Central American parents to send their children here with smugglers?](#)” *The Hill* (Aug. 15, 2023) (emphasis added).]

If between 75 and 80 percent of children are being abused during transit to the United States, there is every reason to believe that they face a high risk of continued abuse when located into the United States. Placement with a family member is by no means a perfect solution, but with a virtually open border, it provides the best protection for the massive numbers of children flooding into the country.

Those who would subject children to trafficking are certainly not above claiming a blood relationship where there is none. The Center for Immigration Studies points out that **false claims of familial relationship** are routinely made by immigrants with an agenda. “Recent DNA testing revealed false claims of ‘family connections’ as high as 90 percent in some groups.”<sup>9</sup> For some migrants, these false claims may simply stem from a desire to gain entry to the United States, but in far too many cases, there are more sinister purposes such as human trafficking.

Given the circumstances described by then-Vice President Biden, it would be expected that President Biden’s HHS would use all available technologies to ensure that unaccompanied minors are entrusted to family members, but that is not the case. The Florida grand jury, in its Third Presentment, noted that generally, “UAC are not rapid-DNA or biometric tested to see if, in fact, they might be an adult with a criminal history or if they are truly biologically related to either their putative parent or a proposed sponsor.”<sup>10</sup> “Since January 2021, approximately 165,000 UAC nationwide have been given to someone who is not their parent or legal guardian, approximately 90,000 have been turned over to someone claimed to be a family member without DNA testing and without adequate document verification.” *Id.* at 17.

Consistent with its present dangerous practice, the NPRM does not appear to impose any significant mandates for use of DNA testing whatsoever, placing into jeopardy the very unaccompanied minors whom then-Vice President Biden had once expressed such concern.

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<sup>9</sup> D. Barnett, “[Refugee Resettlement: A System Badly in Need of Review](#),” Center for Immigration Studies (May 2, 2011).

<sup>10</sup> Florida Statewide Grand Jury, “[Third Presentment of the Twenty-first Statewide Grand Jury Regarding Unaccompanied Alien Children \(UAC\)](#)” at 5 (Mar. 29, 2023).

### 3. Background checks.

In its Third Presentment, the Florida grand jury revealed the slipshod nature of ORR’s background checks — or lack thereof — of potential sponsors for UACs. First, “most documents are submitted online (sometimes via What’sApp and similar software),” according to the grand jury. *Id.* at 18. Additionally, “[F]ingerprint checks are not conducted by federal or state law enforcement, but are contracted to a private vendor (with no ability to determine for example if a sponsor has an active warrant).” *Id.*

The same glaring problem exists in identifying young-appearing adults who may appear to be minors but have criminal records. “[B]ackground checks are likewise confined to public records and ‘backgroundchecks.com,’ a problematic method of checking.” *Id.*

Even if responsible background checks were routinely performed, children would still be vulnerable. Shockingly, “[c]riminal history (except for some major offenses), lack of citizen status (ORR prohibits asking, and **does not consider it disqualifying even if a sponsor has been ordered to be deported**), and **even total refusal to submit to a background check**, do not disqualify sponsors.” *Id.* (emphasis original). “**Even outright refusal to submit to these minimal checks** is not fatal to a sponsor’s attempt to take the child,” as “**ORR’s Policy Guide** states that it ‘may deny release’” — or it may allow release. *Id.* at 20 (emphasis original). Rather than a policy which requires responses, under the Policy Guide, “ORR will ‘consider the totality of the circumstances, including the adult household member’s refusal and all other relevant and available information to determine whether the release process may continue.’” *Id.*

The NPRM makes backgrounds checks discretionary, as it states ORR “**may also** conduct a background check on the proposed sponsor.”<sup>11</sup>

### 4. Follow-Up.

As ORR Director Marcos testified to the House Oversight Committee’s Subcommittee on National Security, the Border and Foreign Affairs, “ORR’s custodial care ends when they are released to a vetted sponsor, so **we do not track children**.”<sup>12</sup> Even in instances where ORR claims to attempt follow-up — such as 344 cases where it released a child to a sponsor who obtained **three or more unrelated children** — only **four home studies** were done.<sup>13</sup> Further, in its exceptionally minimal follow-up, ORR was often satisfied with simply attempting to place a phone call to check on the child. Of those 344 cases, “someone claiming to be the child was reached in 66% of cases, someone claiming to be the sponsor was reached in 84% of cases, and ... calls to 46 of those 344 children failed to reach either a sponsor or a child.” *Id.* at 4. “This should reassure absolutely no one,” the grand jury correctly noted. *Id.*

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<sup>11</sup> 88 *Fed. Reg.* 68928 (emphasis added).

<sup>12</sup> House Committee on Oversight & Accountability, “[Oversight of the Office of Refugee Resettlement’s Unaccompanied Alien Children Program](#),” (Apr. 18, 2023) (emphasis added).

<sup>13</sup> Florida Statewide Grand Jury, “Fourth Presentment” at 4.

In a single year selected for a self-audit, ORR reviewed in depth a mere one one-thousandth of one percent of its 130,000 UAC placements (0.0011%). “After giving the vetting process short shrift, ORR essentially washes its hands of responsibility for these children. ORR’s repeatedly-announced position that it ‘loses all jurisdiction’ over UAC thirty days after placing them with a sponsor appears to violate... federal law,” as the grand jury notes. *Id.* at 3.

Again, the NPRM would make even the most minimal follow-up on placements purely discretionary. “ORR notes that under existing policy, it provides Safety and Well Being Follow Up Calls (SWB calls) for all unaccompanied children who are released to sponsors.”<sup>14</sup> But “under this proposed rule, nevertheless ORR does not propose to codify [SWB calls], to preserve its flexibility....” *Id.*

### III. The NPRM Seeks to Avoid Accountability for ORR Failures, Punishing Whistleblowers and Covering up Crimes.

The failures chronicled by the *New York Times* and numerous congressional committees triggered an internal memo signed by 11 ORR managers, warning that “labor trafficking was increasing and ... that the office had become ‘one that rewards individuals for making quick releases, and not one that rewards individuals for preventing unsafe releases.’”<sup>15</sup>

Staff members said in interviews that [HHS Secretary] Becerra continued to push for faster results, often asking why they could not discharge children with machine-like efficiency. “If Henry Ford had seen this in his plants, he would have never become famous and rich. This is not the way you do an assembly line,” Mr. Becerra said at a staff meeting last summer, according to a recording obtained by The Times. [*Id.*]

Secretary Becerra’s response was to **punish the whistleblowers**. He “told Cindy Huang, the O.R.R. director, that if she could not increase the number of discharges, he would find someone who could, according to five people familiar with the call. She resigned a month later.” *Id.*

The NPRM would continue the apparent HHS practice of discouraging whistleblowers. As the Florida grand jury noted, “HHS/ORR **intentionally do not ask...** ‘vetted sponsors’ about [involvement in smuggling and trafficking] and actually discourage case managers from doing so on their own.”<sup>16</sup>

Shockingly, the grand jury reported that government agencies elevate their own interests over the children: “ORR and its kindred agencies do everything within their power – including

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<sup>14</sup> 88 *Fed. Reg.* 68934.

<sup>15</sup> House Energy & Commerce Committee, “[Alone and Exploited, Migrant Children Work Brutal Jobs Across the U.S.](#),” (July 24, 2023).

<sup>16</sup> Florida Statewide Grand Jury, “Fourth Presentment” at 5 (emphasis added).

**retaliating against whistleblowers and ignoring subpoenas** from... Congress... not to protect UAC, but **to protect themselves from exposure.**<sup>17</sup>

AF strongly opposes the NPRM's apparent codification of secrecy, unaccountability, and punishment of whistleblowers. As the grand jury noted, "[the NPRM] reflects a particularly obtuse philosophy: Keep police away at all costs. Under proposed section 410.1304(b), involvement of law-enforcement would be a last resort and **a call by a care provider facility to law enforcement may trigger an evaluation of staff involved regarding their qualifications and training**.... [C]alls to law enforcement are not considered a behavior management strategy."<sup>18</sup>

Under proposed § 410.1201(b), consistent with existing policy, ORR would not disqualify potential sponsors based solely on their immigration status. In addition, ORR proposes that it shall not collect information on immigration status of potential sponsors for law enforcement or immigration enforcement related purposes. ORR will not share any immigration status information relating to potential sponsors with any law enforcement or immigration related entity at any time.<sup>19</sup>

In other words, as the grand jury noted:

ORR would, then, apparently be content placing a child with a person currently under a deportation order from our courts. Yet the agency would not communicate to law enforcement that someone trying to obtain one or more children had been ordered removed due to being convicted of molesting children in their country of origin.<sup>20</sup>

Finally, the NPRM attempts to prevent any outside agencies from reporting failures by ORR:

ORR also proposes in § 410.1303(g)(2) that the **records** in unaccompanied children's case files are the **property of ORR**, whether in the possession of ORR a care provider facility ... and care provider facilities and PRS providers **may not release** unaccompanied children's case file records or information contained in the case files ... without prior approval from ORR.... Under § 410.1303(g)(4), ORR proposes that employees, former employees, or contractors of a care provider facility or PRS [Post Relief Services] provider must not disclose unaccompanied children's case file records or provide information about unaccompanied children, their sponsors, family or household members to anyone ... without first providing advance notice to ORR of the request.<sup>21</sup>

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<sup>17</sup> *Id.* at 6 (emphasis added).

<sup>18</sup> *Id.* at 8 (quoting 88 *Fed. Reg.* 68992) (emphasis added).

<sup>19</sup> 88 *Fed. Reg.* 68928.

<sup>20</sup> Florida Statewide Grand Jury, "Fourth Presentment" at 11.

<sup>21</sup> 88 *Fed. Reg.* 68941 (emphasis added).



Under this rule, as the Florida grand jury pointed out, “if a UAC dies in a sponsor’s care, ORR could prohibit release of any services or treatment records to the investigating agencies. ORR could easily conceal information in cases where it reflected poorly on ORR.”<sup>22</sup>

Whether in seeking to have any “responsibilities” made purely discretionary, covering its failures, or punishing whistleblowers, “ORR is consistent in this regard; long on bureaucratic doublespeak, short on accountability.” *Id.* It appears that the welfare of children is less important under the NPRM than ensuring no more negative stories about ORR in the *New York Times*.

#### **IV. If Applied Consistently with Another HHS Rulemaking, the NPRM Could Exclude the Most Qualified Caretakers and Endanger Children.**

The NPRM states that the “gender” and “LGBTQI+ status” of children were “additional factors that may be relevant to the unaccompanied child’s placement.” 88 *Fed. Reg.* 68921, 68983. The NPRM defines “LGBTQI+” to mean “lesbian, gay, bisexual, transgender, queer or questioning, and intersex.” 88 *Fed. Reg.* 68980. However, the NPRM actually gives no guidance whatsoever as to how these “additional factors” would affect placement.

The NPRM makes no reference whatsoever to the “sex” of the children, preferring to use the non-scientific, undefined, but politically correct term “gender.” Thus, the placement criteria would seem to authorize placement of a 14-year-old girl (who identifies as a boy) in a home together with, and sharing a bedroom with, a 17-year-old “cisgender” boy. This is an absurd result from an absurd rule.

In omitting such information, there is every reason to believe that ORR was hiding the ball from the American people on this issue, providing the American people with only an incomplete and evasive NPRM. The Department of Health and Human Services certainly has a view about how these factors would affect placement, discussed *infra*, but chose to conceal it, rendering the current NPRM defective. Thus, another NPRM should be issued revealing the truth as to how these rules will be applied.

What apparently is the HHS position, which ORR deliberately omitted from the NPRM here, was revealed recently in another NPRM. On September 28, 2023, the Administration for Children and Families published a Notice of Proposed Rulemaking entitled “**Safe and Appropriate Foster Care Placement Requirements for Titles IV-E and IV-B.**” 88 *Fed. Reg.* 66752-69 (Sept. 28, 2023).

ORR never states whether the proposed standards set out for placement of minors in “Foster Care” would also apply to placement of Unaccompanied Minors. However, should those Foster Parent rules be applied to Unaccompanied Minors, it would appear to prevent placement of children with families which have strong moral values, Biblical values, and accept the Judeo-Christian truth that no child can change his or her sex (or gender) at will. The NPRM on Foster Care demands that all LGBTQI+ children be placed in an atmosphere affirming of their

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<sup>22</sup> Florida Statewide Grand Jury, “Fourth Presentment” at 17.

perceived gender. Thus, based on the views of certain leftist medical societies such as the American Psychological Association, the NPRM endangers children rather than protect them. *See* 88 *Fed. Reg.* at 66755-57.

### CONCLUSION

The Florida grand jury detailed a laundry list of horrors inflicted upon children processed through ORR custody — all of which it had to discover from other sources, as the ORR prefers to cover up rather than to put children first. Among the tragic findings:

The Mexican national in Texas who pled guilty to running a **house of prostitution** featuring underage foreign children; multiple graphic accounts of children suffering **crippling injuries** working in slaughterhouses; MS-13 teens discovered posing as part of a ‘family’ crossing the border; the UAC who **sodomized and murdered** a girl with autism after being placed in her neighborhood; five-year-olds discovered by Texas troopers wandering between ports of entry in the desert; or the hundreds of UAC who end up in ... foster-care and dependency systems after **failed sponsorships** (just to name a very few of ORR-sponsored tragedies).<sup>23</sup>

The NPRM does not fix any of these devastating results from current ORR practices. Rather, the NPRM appears to be calculated to codify the lax regime that exists so as to avoid accountability for those injured by its past actions or its future actions.

For all the above-stated reasons, AF opposes the NPRM and respectfully requests that it be withdrawn in its entirety and that rules be proposed which will ensure Unaccompanied Alien Children are protected.

Sincerely yours,

*Mary O’Neill*

Mary O’Neill  
Executive Director

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<sup>23</sup> *Id.* at 6 (emphasis added).