DEPARTMENT OF HEALTH AND HUMAN SERVICES, ADMINISTRATION FOR CHILDREN AND FAMILIES, AND OFFICE OF REFUGEE RESETTLEMENT

Proposed Information Collection Activity;	**)**	
Services Provided to Unaccompanied Alien	**)**	
Children (OMB #0970-0553)	**)**	**(Feb. 25, 2021)**

Joint Comments of —
Counsel to Plaintiff Class in
Lucas R. v. Becerra, No. 18-CV-05741-DMG (C.D. Cal.)

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I. INTRODUCTION

The Office of Refugee Resettlement ("ORR"), Administration for Children and Families ("ACF"), U.S. Department of Health and Human Services ("HHS") (collectively, the "Agencies"), propose several forms that the Agencies intend to use to provide services to Unaccompanied Children ("UC") in ORR custody (collectively, the "Proposed Forms").[1]

The Proposed Forms include 11 revised forms and 11 new forms that the Agencies intend to incorporate into ORR's case management system, UAC Path.[2] The Commenting Parties have several objections and concerns related to the Proposed Forms. *First*, the Proposed Forms contain private and confidential information concerning sponsors and children—information that is broadly protected by federal and state laws as well as the *Flores* Settlement Agreement ("FSA"). To comply with these legal protections, the Agencies must create a robust firewall to ensure that any files or records maintained by ORR are not accessible to nor shared with third parties without a court order or compliance with applicable state and federal laws and policies.

Second, the Proposed Forms seek irrelevant and unnecessary information about sponsor applicants that appears motivated by immigration enforcement concerns rather than child welfare. These fields and questions must be removed from the forms so that they do not create a chilling effect on sponsors resulting in prolonged detention of children in ORR custody and delayed family reunification.

Third, the Proposed Forms seek information about criminal history, substance abuse, and gang involvement, all of which raise self-incriminations concerns. Thus, a Miranda warning is necessary before the Agencies or their representatives attempt to elicit such information from sponsors or children.

Fourth, the Proposed Forms raise serious privacy concerns associated with DNA testing—concerns particularly pronounced for vulnerable populations like the children in ORR custody and their sponsors. These concerns are even more pronounced given the Agencies' failure to provide any clarity surrounding the details of when, how, and why DNA testing will be used and what the consequences will be, if any, for refusing such testing.

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[1] Proposed Information Collection Activity; Services Provided to Unaccompanied Alien Children (OMB #0970-0553), 86 Fed. Reg. 11537-11541 (Feb. 25, 2021) (hereinafter "Federal Register").

[2] The Agencies use "UAC" to refer to "Unaccompanied Alien Child." "UAC" and "UC" are used interchangeably herein.

Finally, the Agencies have failed to provide the predetermined menu options for the numerous drop-down menu fields contained in the Proposed Forms. The Agencies' failure to provide this relevant information is a violation of the Administrative Procedure Act ("APA"). These concerns and additional form-specific concerns are discussed in more detail below.

II. COMMENTING PARTIES

The Center for Human Rights and Constitutional Law ("CHRCL") is a non-profit, public interest law foundation dedicated to furthering the legal, civil, human, and constitutional rights of immigrants, refugees, children, indigenous peoples, and the indigent. CHRCL is counsel to the plaintiff class in *Flores v. Sessions*, No. 85-CV-4544 (C.D. Cal) ("*Flores*") and *Lucas R. v. Becerra*, No. 18-CV-05741-DMG (C.D. Cal.) ("*Lucas R.*"). CHRCL has nationally recognized expertise in law and policy affecting its target populations. CHRCL devotes a majority of its resources to major class action litigation. CHRCL also conducts administrative and legislative advocacy, and policy analysis on behalf of its target populations. CHRCL also serves as a resource for policy makers, advocacy coalitions, and community-based organizations in the areas of migration, refugees, and labor-related immigration law and policy.

The *University of California Davis School of Law, Immigration Clinic* (the "Clinic") is a nonprofit, public interest clinic dedicated to serving detained immigrants and educating law students. The Clinic is counsel to the plaintiff class in *Lucas R.* and has national expertise in federal litigation, criminal defense, and immigration law. The Clinic is the second oldest immigration law clinic in the United States and has decades of experience defending asylum seekers, immigrant children, and vindicating the rights of immigrants in federal court.

Cooley LLP is a global law firm specializing in a range of practice areas and industries. Clients partner with Cooley on transformative deals, complex IP and regulatory matters, and high-stakes litigation, where innovation meets the law. Cooley is also committed to giving back and serves its communities by representing hundreds of pro bono clients annually. Cooley helps clients overcome obstacles that appear insurmountable without legal assistance. Through pro bono work, Cooley empowers individuals to seek justice and opportunity, provides nonprofit organizations the tools they need to effect change, and supports the economic development of underserved communities. Consistent with this charge, Cooley has collaborated with local and national legal services organizations to serve as counsel to the plaintiff class in *Lucas R.*

III. OVERARCHING CONCERNS WITH PROPOSED FORMS

A. The Agencies Must Create a Robust Firewall Between ORR and Third Parties to Protect Private and Confidential Information Shared by Sponsors and Children.

Children's information and privacy is protected broadly under numerous state and federal laws.[3] In California, for example, privacy and confidentiality laws have long protected information and files concerning juvenile delinquency or dependency proceedings.[4] Only certain individuals and agencies are permitted to access such records; anyone not statutorily authorized is required to obtain a court order before accessing the records.[5] And parties authorized to inspect or receive copies of juvenile records are prohibited from disclosing their content to unauthorized parties.[6] California does not authorize disclosure of juvenile information in any form to federal officials absent an order from a juvenile court judge.[7] Indeed, the California legislature has articulated its intent in enacting laws protecting the confidentiality of juvenile court records "to clarify that juvenile court records should remain confidential regardless of the juvenile's immigration status."[8] And the scope of the protection is broad: the law protects not only court records and case files but also general "information related to the juvenile, including, but not limited to, name, date or place of birth, and . . . immigration status."[9] Other federal and state laws are similarly protective of juvenile delinquency and dependency records.[10]

Consistent with these laws, the FSA mandates that ORR "develop, maintain and safeguard individual client case records. Agencies and organizations are required to develop a system of

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[3] *See, e.g.*, 20 U.S.C. § 1232g (2018); Ariz. Rev. Stat. Ann. § 8-807(K) (2018); Cal. Welf. & Inst. Code § 825-836 (West 2021); Fla. Stat. § 985.045(2) (2020); N.Y. Crim. Proc. Law § 720.35.2 (Consol. 2021); Tex. Fam. Code Ann. § 58.005(a-1)(10) (West 2019); Fla. Stat. § 39.0132; Fla. Stat. § 39.2021; N.Y. Soc. Serv. Law § 372.3; Tex. Fam. Code Ann § 700.203 (a)-(e); VA Code Ann. § 16.1-305.

[4] *E.g.*, Cal. Welf. & Inst. Code § 827 (West 2021).

[5] *Id*.

[6] *Id*., § 827(a)(4); *see also In re Tiffany G.*, 29 Cal. App. 4th 443, 451 (1994).

[7] Cal. Welf. & Inst. Code § 831(b) (West 2016); *see also In re Elijah S.*, 125 Cal. App. 4th 1532, 1541 (2005) ("[A] juvenile court has broad and exclusive authority to determine whether and to what extent to grant access to confidential juvenile records pursuant to section 827.").

[8] Cal. Welf. & Inst. Code § 831(a) (West 2021).

[9] *Id*., § 831(e).

[10] *See, e.g.*, 20 U.S.C. § 1232g (2018); Ariz. Rev. Stat. Ann. § 8-807(K) (2018); Fla. Stat. § 985.045(2) (2020); N.Y. Crim. Proc. Law § 720.35.2 (Consol. 2021); Tex. Fam. Code Ann. § 58.005(a-1)(10) (West);

accountability which *preserves the confidentiality of client information and protects the records from unauthorized use or disclosure*."[11] ORR's website states, "HHS does not release information about individual children or their sponsors that could compromise the child's location or identity."[12] ORR's statements reinforce the FSA's requirement that the child has "a reasonable right to privacy."[13] This right naturally includes the right to privacy of the child's own records and, more broadly, all the information a child provides to ORR.

Yet nothing in the Proposed Forms suggests that ORR intends to comply with state privacy and confidentiality laws or its own mandate in the FSA. Indeed, as currently drafted, the Proposed Forms appear to allow ORR to release private and confidential information shared by children and their proposed sponsors to third parties, including but not limited to the Department of Homeland Security ("DHS"), Immigration and Customs Enforcement ("ICE"), the Department of Justice ("DOJ"), and United States Citizenship and Immigration Services ("USCIS'). However, the information in a child's ORR file, including but not limited to the private and confidential information sought by these forms, should not be accessible to third parties.

One of the consequences of including a child's ORR file (or documents contained within their ORR file) in the child's "Alien File" ("A-File") or allowing DHS, ICE, DOJ, USCIS, and others access to a child's ORR file or information, is that it may allow confidential records to be used to prejudice the child's immigration case to the detriment of the child without their consent or understanding. For example, a reference to alleged gang-affiliation or involvement in a child's ORR file, if shared with DHS, ICE, DOJ, or USCIS, could make it more likely that the child is denied future immigration benefits or relief.[14]

Fla. Stat. § 39.0132; Fla. Stat. § 39.2021; N.Y. Soc. Serv. Law § 372.3; Tex. Fam. Code Ann § 700.203 (a)-(e); VA Code Ann. § 16.1-305.

[11] *Flores v. Reno*, Case No. 85-cv-4544 (C.D. Cal.), Stipulated Settlement Agreement Ex. 1, ¶ E (Jan. 17, 1997), https://www.aclu.org/sites/default/files/assets/flores_settlement_final_plus_extension_of_settlement011797.pdf (emphasis added) (hereinafter "*Flores* Settlement Agreement").

[12] Health and Safety, Office of Refugee Resettlement, https://www.acf.hhs.gov/orr/about/ucs/health-and-safety (last visited Apr. 5, 2021).

[13] *Flores* Settlement Agreement, *supra* note 11, at Ex. 1, ¶ A.12.

[14] N.Y. Civil Liberties Union & N.Y Immigration Coal., *Stuck with Suspicion* 14-17 (2019), https://www.nyclu.org/sites/default/files/field_documents/020819-nyclu-nyic-report.pdf.

Another danger of sharing a child's ORR file with third parties is the potential of prolonging a child's stay in ORR custody. Sharing highly sensitive information—such as information about potential sponsors collected in Forms S-5, S-7, S-11, and S-12—between the Agencies and DHS has lengthened children's time in detention and delayed the family reunification process. For example, in April 2018, HHS and DHS entered into a Memorandum of Agreement ("2018 MOA") that required ORR to send the information it collects on potential sponsors to ICE.[15] On March 12, 2021, almost three years later, HHS and DHS finally announced the termination of the 2018 MOA and in doing so acknowledged that it "undermined the interest of children and had a chilling effect on potential sponsors (usually a parent or close relative) from stepping up to sponsor an unaccompanied child placed in the care of HHS."[16] Not only did the 2018 MOA have a chilling effect,[17] it also violated the FSA's provisions requiring timely release and far exceeded any safety-related requirements set forth in the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 ("TVPRA").[18] Any deviation from a full firewall between the two agencies is a departure from ORR's child welfare mission and invites ORR to become DHS's eyes and ears. ORR must ensure that its practices protect, rather than impede, child welfare. Efforts that delay the family reunification process or prejudice a child's immigration case are antithetical to the child's best interests of family unity and safety.

Given the potential consequences of sharing child and sponsor information outside of ORR, any files or records maintained by ORR should not be accessible to or shared with third parties

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[15] *See* Mem. of Agreement Among the Office of Refugee Resettlement of the U.S. Dep't of Health & Hum. Servs. & U.S. Immigration & Customs Enf't, U.S. Customs & Border Prot. of the U.S. Dep't of Homeland Sec. Regarding Consultation & Information Sharing in Unaccompanied Alien Children Matters (2018), https://www.texasmonthly.com/wp-content/uploads/2018/06/Read-the-Memo-of-Agreement.pdf.

[16] Dept. of Homeland Sec., HHS and DHS Joint Statement on Termination of 2018 Agreement (Mar. 12, 2021), https://www.dhs.gov/news/2021/03/12/hhs-and-dhs-joint-statement-termination-2018-agreement.

[17] *See* Women's Refugee Comm'n, Nat'l Immigration Justice Ctr. & Am. Univ. Wash. Coll. of Law, Children as Bait: Impacts of the ORR-DHS Information-Sharing Agreement 1 (2019) https://immigrantjustice.org/sites/default/files/content-type/research-item/documents/2019-03/Children-as-Bait.pdf.

[18] Neither the TVPRA nor the FSA requires HHS to collect immigration status information on parents or other sponsors, to collect any information on other adult members of the household, or to use any information collected to deport families of unaccompanied children. *See* 8 U.S.C. § 1232(c)(2)(A) (outlining evaluative methods necessary to determine that a potential sponsor will be "capable of providing for the child's physical and mental well-being," and making no mention of immigration status); *Flores* Settlement Agreement, *supra* note 11, at ¶¶ 14, 18.

unless ORR and its care providers have complied with applicable state and federal laws as discussed above. Moreover, children and sponsors should be advised of the potential consequences of disclosing their personal information to ORR, including that it may be shared with third parties consistent with federal and state laws and policies.

Accordingly, to protect the private and confidential information of both children in ORR custody and their proposed sponsors, we recommend that ORR add the following language to, at a minimum, Forms S-5, S-6, S-7, S-8, S-9, S-11, S-12, and S-20:

> This form is restricted to ORR staff or ORR grantee staff (*e.g.*, care provider staff) who require access to make placement, release, or services-related recommendations or decisions. This information, as well as access to this information, cannot be shared with any individual or agency outside of ORR, including but not limited to DHS, without a court order or compliance with applicable state and federal laws and policies.

We also recommend that ORR require a sponsor's express authorization prior to releasing information about the sponsor to third parties without an applicable court order.[19] Without robust protections, ORR's information collection activities are likely to deter sponsors from coming forward thereby prolonging children's time in ORR custody. Such a result is not only contrary to child welfare principles but also a violation of the prompt release requirements set forth in the FSA and TVPRA.[20]

B. The Proposed Forms Seek Irrelevant and Unnecessary Information About Proposed Sponsors.

The Proposed Forms seek highly sensitive information about proposed sponsors that is irrelevant to the family reunification and release process and appears to be motivated by immigration enforcement goals rather than protection of children in ORR custody. For example, Forms S-5, S-6, and S-7 all seek "Country of Birth" information, which has no relevance to a sponsor's current ability to care and provide for a child. If ORR fails to create a robust firewall between it and immigration enforcement agencies, as recommended above, questions like these will have a significant chilling effect on sponsors resulting in even longer detentions for children in ORR custody. (*See supra* Section III.A.) The Commenting Parties urge the Agencies to remove

[19] ORR already requires a sponsor's signature prior to releasing home study and post-release service records (*see* Authorization for Release of Records, Form ORR UAC/C-5); however, it is critical that this protection apply to each form containing sponsor information, including the Proposed Forms addressed herein.

[20] *See* 8 U.S.C. § 1232(c)(2)(A); *Flores* Settlement Agreement, *supra* note 11, at ¶¶ 14, 18.

irrelevant and unnecessary questions about sponsors as addressed in more detail below in connection with specific forms.

C. Forms Seeking Information About the Criminal History, Substance Abuse, and Gang Involvement of Children or Sponsors Raise Self-Incrimination Concerns.

Several fields in the Proposed Forms, including all questions related to criminal history and drug abuse, raise concerns that children and sponsors are being asked questions that may elicit incriminating information with no prior Miranda advisal that the information they divulge could result in criminal and/or immigration consequences. (*See, e.g.*, Forms S-5, S-6, S-7, S-8, S-9, S-11, S-12.)

The privilege against self-incrimination is not limited to the trial setting, but extends to "any other proceeding, civil or criminal, formal or informal, where the answers might incriminate [a person] in future criminal proceedings."[21] In the broader immigration context, while Miranda warnings may not be required in "booking exception" settings involving routine questions,[22] they do apply to booking questions designed to elicit incriminating responses.[23] Because of this, "[c]ivil as well as criminal interrogation of in-custody defendants by INS investigators should generally be accompanied by the Miranda warnings."[24] Questions purportedly directed at obtaining biographic information that could be used to elicit incriminating responses are not exempt from the Miranda requirement.[25] Accordingly, to determine whether Miranda warnings must be given in civil contexts, the Ninth Circuit employs an objective factor test based on *Rhode Island v. Innis* that focuses on whether, based on the totality of the circumstances, the questioner should have known that questioning was likely to elicit incriminating information.[26]

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[21] *Minnesota v. Murphy*, 465 U.S. 420, 426 (1984) (quoting *Lefkowitz v. Turley*, 414 U.S. 70 (1973)).

[22] *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980).

[23] *See Pennsylvania v. Muniz*, 496 U.S. 582, 601-602 (1990) (finding that in this case the routine booking questions were not subject to Miranda, while still recognizing that routine booking questions could be subject to Miranda if they are designed to elicit incriminating responses); *United States v. Arellano-Banuelos*, 912 F.3d 862, 868 (5th Cir.2019) (holding that an ICE agent's questioning exceeded the scope of the routine booking exception when it went beyond basic biographical information to include inquiries into whether or not Arellano-Banuelos had been previously deported and whether he had received permission from the Attorney General to reenter the United States).

[24] *United States v. Mata-Abundiz*, 717 F.2d 1277, 1279 (9th Cir. 1983) (emphasis omitted).

[25] *Id.* at 1278-79.

[26] *See, e.g.*, *United States v. Chen*, 439 F.3d 1037, 1040 (9th Cir. 2006) (affirming district court's decision

The questions contained in the Proposed Forms are objectively incriminating. They go far beyond routine biographical questions to seek information about criminal history, substance abuse, child abuse, and gang affiliation. For example:

- Sponsor Assessment (Form S-5) has a section entitled "Self-Disclosed Criminal History" with fields for criminal convictions and child abuse or neglect history;
- Home Study Assessment (Form S-6) asks whether the UC has "any history of criminal charges, substance abuse, or gang involvement";
- Adult Contact Profile (Form S-7) likewise has a section entitled "Self-Disclosed Criminal History";
- Initial Intakes Assessment (Form S-8) asks whether the UC has thoughts of hurting others or is taking any medication other than what they have been prescribed;
- UAC Assessment (Form S-11) and UAC Case Review (Form S-12) both ask (1) whether the proposed sponsor has any substance use, domestic violence, or child abuse or neglect concerns or a criminal history; and (2) whether the UC has any criminal concerns, gang affiliation, or footguide experience.

For children, the information collected in the Proposed Forms can be used by ORR care provider staff to seek a transfer of the child to a more restrictive setting, including in some cases juvenile jails. The same information is then used by ORR staff to make final placement decisions. For sponsors, the information collected can be referred to law enforcement or immigration authorities. Under these circumstances, a Miranda warning is necessary before the Agencies

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to require Miranda warning during INS interview of an immigrant in INS custody where he was questioned in a district that has a practice of prosecuting the specific crime at issue and where the prosecutor had a desire to pursue charges against him to obtain his cooperation against another defendant); *United States v. Gonzalez-Sandoval*, 894 F.2d 1043, 1046-47 (9th Cir. 1990) (stating that inquiries by Border Patrol agents constituted interrogations in violation of detainee's Miranda rights when questioned about his place of birth, immigration status, and use of aliases, which were then used to prove charges of illegal entry and being a deported alien found in the U.S.); *Mata-Abundiz*, 717 F.2d at 1280 (requiring a Miranda warning where INS investigator of 23 years knew that evidence of alienage plus evidence of firearms possession could lead to a federal prosecution and the investigator had reason to know that any admission of alienage would be highly incriminating). Courts in the D.C. Circuit apply a similar test. *See, e.g.*, *United States v. Sheffield*, 821 F. Supp. 2d 351, 356 (D.D.C. 2011) ("[I]n determining whether the questioning was reasonably likely to elicit an incriminating response, the court looks at the totality of the circumstances and conducts an objective inquiry where the subjective intent of the officer is relevant but not dispositive.") (quoting *United States v. Bogle*, 114 F.3d 1271,1275 (D.C. Cir. 1997) (internal quotation marks omitted)).

attempt to elicit the self-incriminating information sought in Forms S-5, S-6, S-7, S-8, S-11, and S-12.

D. The Proposed Forms Raise Serious Privacy Concerns Associated with DNA Testing.

Forms S-7, S-8, S-11, and S-12 include sections entitled "DNA Testing Details." It is unclear under what authority, regulation, or policy these forms will be utilized or for what purpose. To adequately assess the impacts of the Proposed Forms, more information is necessary, including but not limited to:

- the type of test;
- methodology of collection;
- whether the test is compulsory and, if so, who has the discretion to determine it will be required, what factors are considered for such a determination, and how the decision maker will be trained to assess and weigh those factors;
- how ORR would obtain informed consent from children and potential sponsors;
- the consequences of declining to take a test and/or the consequences of any particular test result;
- what recourse children and potential sponsors will have should they fail to participate in a DNA test or should the results of a DNA test deny, delay, or otherwise impact reunification;
- the means for storage and timeframe for destruction of samples;
- whether, how, and to whom DNA samples will be shared;
- what protective mechanisms ORR will employ to ensure that DNA information is not stored, shared, or otherwise acquired by third parties or added to any aggregate databases; and
- how ORR will meet the needs of children impacted by any attendant consequences of DNA test results.

Notwithstanding this dearth of information, as explained more fully below, the Commenting Parties have at least four general concerns about DNA testing of unaccompanied children and their proposed sponsors that warrant further consideration before forms referencing DNA testing are promulgated. First, DNA testing ignores the realities that refugees face and imposes a dehumanizingly narrow conceptualization of family. Second, DNA testing can create unnecessary legal and administrative hurdles to family reunification that further prolong family

separation and detention. Third, the inherently coercive nature of ORR custody makes voluntary consent from detained children and their sponsors a legal fiction. Fourth, DNA testing of unaccompanied children presents grave ethical, privacy, and security concerns, particularly without strict safeguards of such sensitive information.

1. DNA testing of refugee children discounts the complexity of the meaning of family, particularly for people in crisis.

Across the globe, "there is no universal or static definition of family."[27] The United States generally employs a fluid definition of family that expands beyond biology and acknowledges that the narrow notion of a nuclear family fails to account for the diverse constellation of relations that constitute family.[28] Thus, "[t]he double standard used to determine a family—by applying a culturally homogenous, monogamous, genetic conception of family on refugees, while U.S. family law applies a more flexible, liberal conception to its 'own' families—perverts principles of cultural diversity, dignity, human rights, and fundamental freedoms applicable to all persons."[29]

Perhaps nowhere is the definition of family more elusive than for refugees fleeing violence, where "family is a group of individuals whom war and emergencies have separated, scattered, and shattered, and who then reconstitute, absorb survivors, and press on."[30] Families are comprised of "orphans raised by nonparental kin, foster children, unaccompanied child laborers, former fighters who escaped rebel armies, and all manner of nonnuclear relatives, friends, and strangers banding together to beat the odds."[31] These are "families of choice or circumstance" created by "necessity and humanity… not biology."[32]

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[27] Granados Moreno, P. *et. al.*, *Does the end justify the means? A comparative study of the use of DNA testing in the context of family reunification*, Journal of Law and the Biosciences, Volume 4, Issue 2, 250, 253 (2017).

[28] *Moore v. City of East Cleveland*, 431 U.S. 494, 503-06 (1977); Amato, P. *What is a family?* National Council on Family Relations, available at https://www.ncfr.org/ncfr-report/past-issues/summer-2014/what-family.

[29] Dove, E. *Back to Blood: The Sociopolitics and Law of Compulsory DNA Testing of Refugees*, 8 U. Mass. L. Rev. 466 (2013).

[30] Holland, E., *Moving the Virtual Border to the Cellular Level: Mandatory DNA Testing and the U.S. Refugee Family Reunification Program*, Cal. L. Rev. 99:1635 (2011).

[31] *Id.*

[32] *Id.*

International human rights organizations recognize the importance of promoting "a liberal and wide definition of 'family' to enable refugees to maintain the unity of their families as they are accustomed to in their country of origin."[33] The United Nations High Commissioner for Refugees ("UNHCR") recommends that "[r]egard should be given to social and cultural norms of the society from which the refugees originate, as well as emotional dependency and long term acceptance of the claimed relationships when considering family reunification of refugee families."[34]

As explained by Jen Smyers, the former director of policy and advocacy for the Church World Service Refugee and Immigration Program and current Chief of Staff for ORR, DNA testing to *prove* familial connections is "completely tone-deaf."[35] Ultimately, "DNA testing cannot appreciate the refugee family or the refugee experience, because DNA neither detects nor reflects the harsh realities that refugees face" and instead, "might end up punishing families that are not nuclear but "sustained . . . by social forces [more powerful] than biological realities."[36]

Moreover, there are untold attendant consequences of DNA testing for families generally. The Proposed Forms indicate no mechanism for preparing children, who are already trauma-impacted, for the potential fallout of what DNA tests can reveal, including the "particularly adverse effect upon children who discover that the individuals they call parents are not in fact biologically related to them."[37] DNA results have revealed cases of rape, allowed otherwise disallowable claims to inheritance, and disrupted families who otherwise were unaware of the existence—or absence—of a biological connection. DNA testing in this context can also place an exorbitant burden on children, in which they feel responsible for making their family subject to genetic surveillance or for any subsequent criminalization or deportation of family members that occurs following DNA testing in the reunification context.[38]

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[33] United Nations High Commissioner for Refugees, *Note on DNA Testing to Establish Family Relationships in the Refugee Context* (2008), available at https://www.refworld.org/pdfid/48620c2d2.pdf.

[34] *Id*.

[35] Worth, K., *For Some Refugees, Safe Haven Now Depends on a DNA Test*, PBS (2015), available at https://www.pbs.org/wgbh/frontline/article/for-some-refugees-safe-haven-now-depends-on-a-dna-test/.

[36] *Id.*

[37] Holland, E., *Moving the Virtual Border to the Cellular Level: Mandatory DNA Testing and the U.S. Refugee Family Reunification Program*, Cal. L. Rev. 99:1635, 1654 (2011).

[38] Lowenberg, K., *Applying the Fourth Amendment When DNA Collected for One Purpose is Tested for*

2. DNA testing may prolong detention and delay family reunification.

ORR's primary mandate is the timely release and reunification of children with their sponsors and it is axiomatic that delay of this mandate has tragic consequences for children's mental, emotional, and physical health.

DNA testing creates an inherent barrier to release. Undoubtedly there will be children and sponsors who do not wish to provide their genetic material to the U.S. government. Indeed, the majority of children in ORR custody come from Central America and Mexico and empirical studies of Latinx communities reveal "mistrust about how their genetic information could be misused in the future" and an overarching cultural concern "that genetic information is akin to the most private of information disclosable to a party, and without knowing what that information will be used for, many families are extremely averse to participating in DNA testing, even if it means the reunification of family."[39]

This aversion is understandable and undoubtedly heightened given that "enhanced vetting of sponsors involving the collection of biometrics data, and the sharing of that information between ORR and DHS, has deliberately slowed down the release of children and exposed the sponsors to deportation."[40] Information collection has consistently been utilized to "fuel ICE enforcement operations that target individuals who come forward as a sponsor, potential sponsor, or other caregiver of an unaccompanied immigrant child."[41] Without substantial protections and safeguards, children and their proposed sponsors have no assurance that the collection of their DNA information—the most intimate and private of data—will not be utilized in the same manner, creating a chilling effect on sponsorship of vulnerable children and avoidable delay.[42]

Further compounding these concerns is the fact that nothing in the Proposed Forms indicates the consequences of refusing a DNA test or whether children or their sponsors have any

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Another, U. of Cincinnati L. Rev. 79:4, Article 1 (2011).

[39] Farahany, N., Chodavadia, S. & Katsanis, S., *Ethical Guidelines for DNA Testing in Migrant Family Reunification*, The American Journal of Bioethics, 19:2, 4-7 (2019).

[40] National Immigrant Justice Center, 85 FR 56338; USCIS Docket No. 19-0007; NIJC comment in Opposition to Proposed Rulemaking: Collection and Use of Biometrics by U.S. Citizenship and Immigration Services (Oct. 13, 2020), available at https://immigrantjustice.org/sites/default/files/uploaded-files/no-content-type/2020-10/NIJC-Comment-on-the-Collection-and-Use-of-Biometrics-by-USCIS_Oct-2020.pdf.

[41] *Id.*

[42] *Id.*

redress for ORR's apparently discretionary decision to condition release from detention on the results of such a test.

3. Unaccompanied children in ORR custody cannot provide informed consent to DNA testing.

"No person should ever be coerced into taking a DNA test, especially not separated minors."[43] Even adults who are not in crisis "appear ill-equipped to understand the complexity of genetic testing."[44] Members of the 2018 American Anthropological Association Annual Meeting "argued that separated minors who likely have little genetic literacy would not be able to provide appropriate informed consent, potentially even with adult supervision" and "no person should be forced into a genetic test for reunification purposes under such a state of duress."[45]

The relationship between detained minors and ORR agents is inherently coercive and precludes informed decision-making because "when children's rights are presented to them in a stressful situation in which they are separated from their close-knit families and faced with a new culture, they cannot make a knowing and voluntary choice. Rather, the natural tendency is to defer to the authority before them, especially for those children accustomed to autocratic governments."[46] Given this inherent tension, there is no such thing as a voluntary DNA test for this population and compulsory DNA tests defy the ethical mandates of informed voluntary consent. A lack of informed consent is particularly disturbing when such significant private interests are at stake.

4. Without substantial safeguards, DNA testing implicates serious privacy and security concerns, particularly for vulnerable populations.

The privacy implications of DNA testing, especially of vulnerable populations, cannot be overstated. DNA data is "the most intimate information that you can take from someone. It is information you can use to find their family members, to know their histories."[47] As experts in biometric data collection from the Electronic Frontier Foundation explain:

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[43] Artz, M., *DNA Testing of Immigrants is Unethical*, Anthropology News (Jan. 26, 2021), available at https://www.anthropology-news.org/index.php/2021/01/26/dna-testing-of-immigrants-is-unethical.

[44] *Id.*

[45] *Id.*

[46] *Perez-Funez v. Dist. Dir., I.N.S.*, 619 F. Supp. 656, 661 (C.D. Cal. 1985).

[47] Allan, B. and Rose, J., *Justice Department Announces Plan to Collect DNA From Migrants Crossing The Border*, NPR (Oct. 21, 2019), available at https://www.npr.org/2019/10/21/772035602/justice-department-

> DNA contains our most private and personal information. Unlike fingerprints, which can only be used for identification, DNA provides "a massive amount of unique, private information about a person that goes beyond identification of that person." A DNA sample "contains [a person's] entire genetic code—information that has the capacity to reveal the individual's race, biological sex, ethnic background, familial relationships, behavioral characteristics, health status, genetic diseases, predisposition to certain traits, and even, allegedly, the propensity to engage in violent or criminal behavior."[48]

Thus, "given that DNA carries the most intimate of information about a person, which goes to the very heart of the person's hereditary make-up and identity, extracting DNA samples to gather data could lead to a violation of the right to privacy."[49]

If ORR proceeds with DNA testing of unaccompanied children, it must implement substantial protective mechanisms to ensure that DNA data is not stored or shared with other agencies. It is unknown whether the DNA profiles of unaccompanied children or proposed sponsors would be stored in government databases, or even in corresponding A-Files. Statistical geneticists are concerned that access to DNA information puts immigrants at risk of privacy violations and genetic discrimination, not to mention concerns for breaches in cybersecurity.[50] Thus, it is imperative that this information not be entered into databases, which come with significant security risks and are inherently discriminatory.[51] Data sharing agreements and especially foreign data sharing agreements heighten the risk that survivors' highly sensitive information will fall into the wrong hands and subject them to serious harm.

For the reasons discussed above, any reference to DNA testing of unaccompanied children should be removed from all forms promulgated by the Agencies, including Forms S-7, S-8, S-11, and S-12. Further, if the Agencies wish to proceed with DNA collection in the future, they must

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announces-plan-to-collect-dna-from-migrants-crossing-the-border.

[48] Amnesty International USA, *Comments on DHS's Sweeping New Biometric Surveillance Rule*, USCIS Docket No. USCIS–2019–0007-0001 (Oct. 13, 2020), available at https://www.amnestyusa.org/amnesty-international-usa-comments-on-dhss-sweeping-new-biometric-surveillance-rule/.

[49] *Id.*

[50] *Id.*

[51] Wessel, L. *Scientists concerned over US plans to collect DNA data from immigrants.* Nature (2019), available at: https://pubmed.ncbi.nlm.nih.gov/33020617/.

provide adequate notice of their intent to do so, which should include responses to the specific concerns articulated herein.

E. The Agencies' Failure to Provide Sufficient Information to Evaluate the Proposed Forms Violates the Administrative Procedure Act.

The Commenting Parties object to the issuance of the Proposed Forms to the extent the Agencies have failed to provide sufficient information to evaluate the Proposed Forms. This includes multiple forms with drop-down menu fields for which we were unable to examine and analyze the predetermined drop-down options. The Commenting Parties made multiple attempts to obtain copies of the drop-down menu options, including by emailing InfoCollection@acf.hhs.gov on March 22, 2021, April 12, 2021, and April 22, 2021. Despite this repeated outreach, we have not received the information requested as of the time of submitting this comment. As such, at a minimum, we are unable to fully comment on the affected sections and fields in Forms S-5, S-6, S-7, S-8, S-9, S-11, S-12, S-13, S-18, S-19, S-20, S-21C, S-21D, S-22, S-23, and S-24.

The Agencies' failure to provide all relevant information necessary to comment is itself a violation of the APA, and as such, the Proposed Forms cannot be implemented. *See* 5 U.S.C. § 553 (b)(3) (2018) (notice of proposed rule making "shall include . . . either the terms or substance of the proposed rule or a description of the subjects and issues involved"); *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 394 (D.C. Cir. 1973) ("In order that rule-making proceedings to determine standards be conducted in orderly fashion, information should generally be disclosed as to the basis of a proposed rule at the time of issuance."); *see also Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 236 (D.C. Cir. 2008).

IV. ADDITIONAL CONCERNS WITH THE PROPOSED FORMS

In addition to the above overarching concerns, the Commenting Parties have the following specific concerns with the Proposed Forms.

A. Sponsor Assessment (Form S-5)

According to the Federal Register, the Sponsor Assessment (Form S-5) "is used by case managers to document their assessment of the suitability of a potential sponsor to provide for the safety and well-being of a UAC." ORR reorganized and reformatted the instrument and revised and added fields. The Commenting Parties have concerns about certain fields and questions as described in the following chart.

Section(s)	Field(s)	Comment
Sponsor Basic Information	• Country of Birth • Country of Residency	These fields should be removed from the form as they appear geared toward immigration enforcement rather than child welfare concerns. (*See supra* Section III.B.) Alternatively, the fields should be replaced with a single field asking for the proposed sponsor's "Address" or "U.S. State of Residency."
Family Relationships	• Did any of your children come to the U.S. with you? (*If not born in the U.S.*) • Have you ever been involved in a Dissolution of Marriage case?	This field should be removed from the form as it appears geared toward immigration enforcement rather can child welfare concerns. (*See supra* Section III.B.) Alternatively, the field should be replaced with a question asking whether the proposed sponsor has children living with them currently or children living in their home country. There is no apparent reason for specifying where a proposed sponsor's child was born or when they came to the U.S. The relevance of a proposed sponsor's involvement in a dissolution of marriage case to their ability to provide and care for a child is not clear. This is especially true given that ORR has removed another marriage-related field from Form S-5 ("Are you married to your partner"). Thus, without additional information, the Commenting Parties are unable to fully assess the impact of this field.
Proof of Immigration Status or U.S. Citizenship	• Proof of Immigration Document Type • Expiration Date (if applicable) • Date Document Issued (if applicable)	These proposed fields should be removed from the form as they appear geared toward immigration enforcement rather than child welfare concerns and are likely to have a chilling effect on sponsors being willing to come forward. (*See supra* Section III.B.)

	• Verified by Government Agency or Consulate	
Proof of Stability	• List proof of [stability] documents provided[52] • Proof of Financial Stability Document Type • Date Document Issued (if applicable)	These proposed fields should be removed, or at a minimum, ORR should clarify that they are non-mandatory fields for purposes of sponsorship. Documentation of financial stability is difficult to provide and especially so for undocumented sponsors who are often paid in cash. A family member's inability to provide documentation of financial stability should not be a barrier to sponsorship.
Self-Disclosed Criminal History	• Conviction • List any child abuse and neglect history	The Commenting Parties have concerns about how this information will be shared, if at all, with third parties. (*See supra* Section III.A.) Any information sharing should be consistent with, at a minimum, state and federal privacy and confidentiality laws and protections against self-incrimination. (*See supra* Section III.A, III.C.) Additionally, it is not clear what type of information the new "Conviction" field is intended to capture – is it asking only whether a conviction occurred or rather seeking detailed information about conviction type, length of sentence, length of imprisonment, etc.? Clarification is warranted given this ambiguity especially considering the privacy, confidentiality, self-incrimination, and immigration enforcement concerns implicated by such information—concerns which only become more heightened the

[52] There appears to be a typo in the form insofar as the field under "Proof of Stability" states: "List proof of ***address*** documents provided." (Emphasis added.)

		more specific the information sought is. (*See supra* Sections III.A, III.B, III.C.)
UAC Journey and Apprehension	Form S-5 maintains a number of fields included in this section and adds: "If there is a debt still owed for the UAC's journey, please explain."	The relevance of this entire section, including the newly added field, is not clear. Indeed, it seems specifically geared toward immigration enforcement and not child welfare. (*See supra* Section III.B.) For example, the form states that the section "will help assess how much the potential sponsor knows about the UAC's journey, which should be compared against the UAC Assessment responses." It is not clear, however, why such knowledge is relevant to the sponsor's ability to care and provide for the child, nor the consequences of a sponsor's inability to articulate the details of or reason for the child's journey to the United States. As such, the section should be removed or, at a minimum, ORR must provide additional detail concerning the relevance of the section and how it intends to protect this information from third parties, including DHS.
Human Trafficking	Form S-5 maintains a number of fields in this section, deletes a number of fields, and adds the following: • If you have travelled back to your country of origin since your arrival in the U.S., please explain • Were you ever restricted from quitting or leaving the work?	According to the form, this section is used "to document any trafficking concerns in the sponsor's country of origin and in the U.S. and to determine if additional services or referrals are needed." The form also states that "[i]t should be explained to the sponsor that this information is not for immigration purposes, but to have a better understanding of his/her journey and any challenges they may have faced during this time." As a threshold matter, it is insufficient to inform the sponsor that the information is not being

		collected for immigration purposes if there is not a robust firewall between ORR and third parties like DHS. (*See supra* Section III.A.) Relatedly, detailed questions about the ***sponsor's*** country of origin and journey to the United States seem irrelevant to concerns about the welfare and potential trafficking of the ***child***. Accordingly, the Commenting Parties advocate for removing this section or, at a minimum, significantly streamlining it and clarifying that the information is only to be shared pursuant to state and federal privacy and confidentiality laws and policies.

Additionally, Form S-5 contains more than 50 drop-down menus. Because the Agencies did not provide the list of options for each drop-down menu, the Commenting Parties are unable to assess or comment on the fields. This is a violation of the APA (*see supra* Section III.E).

B. Home Study Assessment (Form S-6)

According to the Federal Register, the Home Study Assessment (Form S-6) "is used by home study providers to document their assessment of a potential sponsor after performing a home site visit." ORR reorganized and reformatted the instrument and revised fields. The Commenting Parties have concerns about certain fields and questions as described in the following chart.

Section(s)	**Field(s)**	**Comment**
UAC Background	• Significant Incident Reports (SIRs) while in ORR/DUCO shelter care. Provide a brief summary of SIR's [sic] that are relevant to home study and inform your assessment • Does UAC have any history of criminal charges, substance abuse, or gang	SIRs often include gang allegations and/or criminal history information protected by privacy and confidentiality laws. (*See supra* Section III.A.) Such information should not be shared with third parties unless ORR has complied with state and federal laws regarding the sharing of such information. With respect to a child's history of criminal charges, substance abuse, or gang involvement, it is not clear

	involvement? How does the UAC plan to address these behaviors?	whether the home study provider is receiving this information from the child or ORR. If from ORR, this question raises privacy and confidentiality concerns. (*See supra* Section III.A.) If from the child, this question raises self-incrimination concerns. (*See supra* Section III.C.)
Sponsor Identifying Information	• COB [Country of Birth]	This field should be removed from the form as it appears geared toward immigration enforcement rather than child welfare concerns. (*See supra* Section III.B.)
Sponsor Background: Sponsor's Motivation and Relationship to UAC	• Was sponsor aware or involved in UAC's plan to migrate to the USA? Please include sponsor's awareness of any financial obligation for travel. • Was sponsor aware of UAC's apprehension by border authorities? Yes or No. Is the sponsor aware of the whether the UAC experienced any challenges on their journey or trauma along the way?	Any questions concerning a proposed sponsor's awareness of a child's plan to migrate to the United States should be removed from the form as they appear geared toward immigration enforcement rather than child welfare concerns. (*See supra* Section III.B.) Questions concerning the sponsor's awareness of a child's apprehension at the border or specific challenges faced by the child on their journey to the United States likewise appear to be irrelevant to the sponsor's ability to care and provide for the minor and, therefore, should be removed from the form.
Sponsor Background: Sponsor's Parenting Ability	• If there are any other children in the home, are their needs being met? • Is the sponsor aware of UAC's current behavior issues (if any), criminal history or significant trauma?	The question concerning other children living in the sponsor applicant's home is overly broad insofar as the sponsor could have household members with children, *i.e.*, there are children in the home for whom the sponsor is not responsible. The question is also unnecessarily intrusive to the sponsor applicant and his or her family. At a minimum, ORR should provide clarification as to how the home study provider should assess whether the children's needs are being met, including

		whether the home study provider is required to interview each child living in the sponsor's home. Asking a sponsor applicant to share information about a UC's criminal history has the potential to violate privacy and confidentiality laws. (*See supra* Section III.A.) The question should be reworded to make clear that the sponsor is not being asked to divulge potentially harmful information about the child but just to confirm whether or not the sponsor will be able to support the child in light of any known behavioral issues or past trauma. This question is even more problematic as currently worded because the only available response is a drop-down menu with options that have not been shared with the public or the Commenting Parties and are therefore impossible to comment on. (*See supra* Section III.E.)
Home & Community	• If renting: has the landlord approved the UAC living in the residence? • Note reason for not informing landlord and plan to confirm approval • Community Resource Data Entry Window	It is not clear why the sponsor applicant would need to seek and obtain approval from their landlord prior to the child living with him or her in the residence. The Fair Housing Act ("FHA") makes it unlawful to "discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color religion, sex, familial status, or national origin."[53] "Familial status discrimination" under the FHA "entails discrimination against families with children."[54] To the

[53] 42 U.S.C. § 3604(b).

[54] *Iniestra v. Cliff Warren Invs., Inc.*, 886 F. Supp. 2d 1161, 1166 (C.D. Cal. 2012) (internal quotation marks omitted).

		extent approval is not required—and perhaps even unlawful if it would result in familial status discrimination—these questions appear to impose unnecessary and unhelpful obstacles to sponsorship that could result in prolonging a child's stay in ORR custody. Additionally, it is not clear what the purpose or utility of the "Community Resource Data Entry Window" is. Thus, without additional information, the Commenting Parties are unable to fully assess the impact of this new field. (*See supra* Section III.E.)

Additionally, Form S-6 contains more than 20 drop-down menus, including in response to critical fields/questions such as: (1) "Major Medical Issues"; (2) "Mental Health Issues"; (3) "Substance Use"; and (4) "How equipped is the sponsor to advocate for the UAC to receive necessary services." Because the Agencies did not provide the list of options for each drop-down menu, the Commenting Parties are unable to assess or comment on the totality of the form. This is a violation of the APA (*see supra* Section III.E).

C. Adult Contact Profile (Form S-7)

According to the Federal Register, the purpose of the Adult Contact Profile (Form S-7) "has been expanded; it now acts as a hub where users can access all records related to a sponsor, adult household member, or alternate adult caregiver." As a threshold matter, it is not reasonable—and does not appear necessary—to require all household members and alternate caregivers to provide the same detailed information as proposed sponsors. ORR's information collection activities should be tailored to the expected role of the adult in the child's life rather than the currently contemplated "one size fits all" approach. The Commenting Parties also have concerns about certain fields and questions as described in the following chart.

Section(s)	**Field(s)**	**Comment**
Basic Information	• COB [Country of Birth] • Legal Status	These fields should be removed from the form as they appear geared toward immigration enforcement rather than child welfare concerns. (*See supra* Section III.B.)

Associated UACs	N/A	It is not clear what additional information is intended to be included in the Associated UACs table that was not previously collected in connection with the "UAC Basic Information" section, which this table is apparently intended to replace. Thus, without additional information, the Commenting Parties are unable to fully assess the impact of this new field. (*See supra* Section III.E.) Additionally, there are multiple dropdown menus in the data entry window for this section, including "Relationship to UAC," "Type," and "Declined Reason," that the Commenting Parties are unable to assess without seeing the menu options. (*See supra* Section III.E.)
Additional Background Check Information	• FFS Requires FBI Background Check • FFS Requires State/Local Check • FFS Requires CA/N Check	These three fields regarding background checks required by the Federal Field Staff ("FFS") are checkboxes with no options to list the basis or rationale for requiring such background checks. The Commenting Parties respectfully suggest that the FFS be required to memorialize the rationale for each background check ordered.
Contact Flag Information / Self-Disclosed Criminal History	N/A	These sections are intended to elicit private, confidential, and potentially self-incriminating information. ORR must comply with all applicable confidentiality and privacy laws and provide a Miranda warning before asking proposed sponsors or other adult caregivers to provide this information. (*See supra* Sections III.A, III.C.) Additionally, it is critical that ORR put in place protections and firewalls to ensure that such information is not shared with third parties, including DHS. Otherwise, potential sponsors are

		likely to be deterred from coming forward to sponsor a child thereby prolonging a child's detention in ORR custody. (*See supra* Section III.A.)
Associated UAC Data Entry Window: DNA Testing Details	N/A	It is unclear under what authority, regulation, or policy these fields will be utilized or for what purpose. Thus, without additional information, the Commenting Parties are unable to fully assess the impact of such fields. (*See supra* Section III.E.) Moreover, there are significant concerns about DNA testing unaccompanied children and their proposed sponsors that risk prolonging a child's time in ORR custody and present serious ethical concerns related to privacy and confidentiality. (*See supra* Section III.D.)

Additionally, Form S-7 contains more than 10 dropdown menus, including in response to critical fields/questions such as (1) "Conviction"; and (2) "Conviction Type." Because the Agencies did not provide the list of options for each drop-down menu, the Commenting Parties are unable to assess or comment on the totality of the form. This is a violation of the APA (*see supra* Section III.E).

D. Initial Intakes Assessment (Form S-8)

According to the Federal Register, the Initial Intakes Assessment (Form S-8) "is used by care providers to screen UAC for trafficking or other safety concerns, special needs, danger to self and others, medical conditions, and mental health concerns." ORR reorganized and reformatted the instrument and revised fields. The Commenting Parties have concerns about certain fields and questions as described in the following chart.

Section(s)	**Field(s)**	**Comment**
Significant Information	Form S-8 adds six fields to a new "Significant Information" section, including the following: • Migrant Protection Protocol case? • MPP Case Updates	The Migrant Protection Protocols ("MPP") are no longer in place. Thus, it is improper for ORR to collect information related to this sunsetted program if the purpose is to deny children their rights under the

		TVPRA.[55] However, to the extent ORR intends to collect this information for a proper purpose, ORR should implement a process to notify Legal Service Providers ("LSPs") immediately whenever it learns that a child was previously in MPP proceedings and if or when any action is being taken against the child based on those proceedings. Prompt notification to the LSP is important to ensure the child is not inappropriately removed from the U.S. based on prior MPP proceedings.
Adult Contact Relationships Dat[a] Entry Window:[56] DNA Testing Details	N/A	It is unclear under what authority, regulation, or policy these fields will be utilized or for what purpose. Thus, without additional information, the Commenting Parties are unable to fully assess the impact of such fields. (*See supra* Section III.E.) Moreover, there are significant concerns about DNA testing unaccompanied children and their proposed sponsors that risk prolonging a child's time in ORR custody and present serious ethical concerns related to privacy and confidentiality. (*See supra* Section III.D.)
Family and Friends and Adult Contact Relationships (these new sections replace the former "Family Information" section)	N/A	The Commenting Parties recommend that the following fields, which were deleted, should be reinserted into one of the new sections: • Do you know anybody in the U.S.? Include relative and non-relative contacts in this section. • Is there someone we can contact to let them know you are here?
Medical and Mental Tab	Form S-8 replaces or rewords most fields in this	These questions as written are likely to elicit self-incriminating

[55] *See* 8 U.S.C. § 1232(a)(2)(B), (a)(3), (a)(5)(D).

[56] Note that there is a typo in the heading for this window. It should be "Adult Contact Relationships ***Data*** Entry Window." (Emphasis added.)

	section and reduces the number of fields seeking mental health information from nine to three. The remaining mental health fields include the following: • Thoughts of hurting yourself or others? • Taking anything other than prescribed	information to the extent the child admits having past or present thoughts of hurting others or engaging in any type of substance abuse. As such, a Miranda warning is necessary prior to asking the questions as currently drafted. (*See supra* Section III.C.) Alternatively, if the intent of the second question is to gather non-incriminating information (*e.g.*, if the child is taking any over-the-counter medication), the question should be narrowed to focus on such information. Finally, any information pertaining to a child's health or criminal history must be adequately safeguarded in compliance with all applicable federal and state laws concerning privacy and confidentiality. (*See supra* Section III.A.)

Additionally, Form S-8 contains multiple drop-down menus. Because the Agencies did not provide the list of options for each drop-down menu, the Commenting Parties are unable to assess or comment on the fields. This is a violation of the APA (*see supra* Section III.E).

E. Assessment for Risk (Form S-9)

According to the Federal Register, the Assessment for Risk (Form S-9) "is an assessment administered by care providers to reduce the risk that a child or youth is sexually abused or abuses someone else while in ORR custody." ORR reorganized and reformatted the instrument and reworded and revised some fields.

To the extent that the questions in this form are intended to elicit incriminating information about a child's risk of abusing others while in ORR custody, it is critical that the child be provided a Miranda warning prior to being asked these questions and that their answers be adequately safeguarded in compliance with all applicable federal and state laws concerning privacy and confidentiality. (*See supra* Sections III.A, III.C.) Moreover, because the Agencies did not provide the list of options for each drop-down menu contained in the form, the Commenting Parties are unable to assess or comment on the fields. This is a violation of the APA (*see supra* Section III.E).

F. UAC Assessment (Form S-11)

According to the Federal Register, the UAC Assessment (Form S-11) "is an in-depth assessment used by care providers to document information about the UAC that is used to inform provision of services (*e.g.*, case management, legal, education, medical, mental health, home studies), screen for trafficking or other safety concerns, and identify special needs." ORR reorganized and reformatted the instrument and reworded and revised some fields. The Commenting Parties have concerns about certain fields and questions as described in the following chart.

Section(s)	**Field(s)**	**Comment**
Age-determination or Identity Concern	Form S-11 adds this new section, which contains 11 fields, including "Concern with UAC's age or identity?"	It is not clear how this information will be used or shared in the context of providing services, including case management, to children in ORR custody. At a minimum, it is critical that this information not be shared with third parties, including DHS, and that ORR implement confidentiality and privacy protections consistent with federal and state laws. (*See supra* Section III.A.)
Family and Friends	Form S-11 removes the following fields and replaces them with a "Family and Friends" table: • Has family in Country of Origin? • Has family in the US? Form S-11 also adds the following fields: • Separated from Parents/Legal Guardian? • Parent Separation Case Updates • Migrant Protection Protocol case? • MPP Case Updates	It is not clear what the new "Family and Friends" field is intended to capture, particularly with the removal of the two identified fields. Is the table intended to capture just family and friends in the US? Family and friends in both the US and country of origin? And how broadly do the family and friend categories extend? This ambiguity risks wasting time and resources to the extent the child is asked to provide unnecessary information such as every single acquaintance in their home country. The new fields regarding family separation and the sunsetted MPP are improper if the purpose is to deny children their rights under the

		TVPRA.[57] However, to the extent ORR intends to collect this information for a proper purpose, ORR should implement a process to notify LSPs immediately whenever it learns that a child was previously in MPP proceedings and if or when any action is being taken against the child based on those proceedings.
Sponsor Information	Form S-11 replaces a table in the current form with an "Adult Contact Relationship" table and adds a section that displays "Previous Sponsor Applications." Form S-11 also includes the following fields: • Substance use concerns? • Domestic violence concerns? • Child abuse or neglect concerns? • Does Sponsor have a known history of involvement with immigration? • Does the sponsor have criminal history? • List/Explain disclosed criminal activity	It is not clear from Form S-11 whether the new "Adult Contact Relationship" table transfers over all of the fields in the current form. If it does, that would mean the table still includes a "Legal Status" field which is unnecessary and irrelevant and, at a minimum, must be shielded from third-party access. (*See supra* Sections III.A, III.B.) Additionally, it is not clear whether the new "Previous Sponsor Application" section is intended to document prior applications to sponsor the specific child documented in Form S-11 or children in ORR custody generally. The field should be limited to prior applications for the specific child at issue; anything else is unnecessary, irrelevant, and likely to violate the privacy rights of the other children who neither have access to nor control over this particular document. All questions seeking information about substance abuse, domestic violence, child abuse, history of involvement with immigration, and criminal history raise privacy, confidentiality, and self-incrimination concerns. ORR must comply with all applicable

[57] *See* 8 U.S.C. § 1232(a)(2)(B), (a)(3), (a)(5)(D).

		confidentiality and privacy laws and also provide a Miranda warning before asking proposed sponsors or other adult caregivers to provide this information. (*See supra* Sections III.A, III.C.) Additionally, it is critical that ORR put in place protections and firewalls to ensure that such information is not shared with third parties, including DHS. Otherwise, potential sponsors are likely to be deterred from coming forward to sponsor a child thereby prolonging a child's detention in ORR custody. (*See supra* Section III.A.)
Adult Contact Relationships Data Entry Window: DNA Testing Details	N/A	It is not clear under what authority, regulation, or policy these fields will be utilized or for what purpose. Thus, without additional information, the Commenting Parties are unable to fully assess the impact of such fields. (*See supra* Section III.E.) Moreover, there are significant concerns about DNA testing unaccompanied children and their proposed sponsors that risk prolonging a child's time in ORR custody and present serious ethical concerns related to privacy and confidentiality. (*See supra* Section III.D.)
Criminal	Form S-11 removes all prior fields from this section and replaces them with the following: • Criminal Concerns? • Gang Affiliation • Footguide Form S-11 also includes a Criminal Charges Data Entry Window with fields for charges and outcomes of criminal cases.	These fields raise privacy, confidentiality, and self-incrimination concerns. ORR must comply with all applicable confidentiality and privacy laws and also provide a Miranda warning before asking children to provide this information. (*See supra* Sections III.A, III.C.) Additionally, it is critical that ORR put in place protections and firewalls to ensure that such information is not shared with third parties, including DHS. (*See supra* Section III.A.)

Trafficking	• Did the UAC mention any U.S. immigration policy or practice as a factor in his/her decision to travel to the US? • Who planned/organized your journey? • Did a family member or family friend pay for your travel to the U.S.? • Does your family or family friend owe money to anyone for the journey?	The first field should be removed from the form as it appears geared toward immigration enforcement rather than child welfare concerns. (*See supra* Section III.B.) The second through fourth fields, taken together, could be used for immigration or law enforcement purposes. At the very least, any information gleaned from these questions should be shielded from third-party access. (*See supra* Section III.A.) Additionally, the Commenting Parties suggest rephrasing the questions to "Did someone pay for your travel to the U.S.?" and "Does someone owe money to anyone for the journey?" Answers to these rephrased questions would still provide necessary information regarding trafficking concerns without implicating the criminal or immigration liability of a specific individual.
Documents	Form S-11 adds a "Documents" section in which documents directly related to case management may be uploaded.	Any uploaded documents must be shielded from third-party access as they may include information that could impact a child's or sponsor's immigration case or criminal or civil liability. (*See supra* Section III.A.)

Additionally, Form S-11 contains numerous drop-down menus, including in response to critical fields/questions such as: (1)"Declined Reason"; and (2) "Based on the most recent screening for disabilities, does the child have a disability as defined in section 3 of the Americans with Disabilities Act of 1990, 42 USC 12102(1)?" As currently provided, for example, it is not clear if the "Declined Reason" field is intended to capture the reasons the sponsor was rejected by ORR or whether the field relates to reasons the sponsor withdrew their own application. Because the Agencies did not provide the list of options for each drop-down menu, the Commenting Parties are unable to assess or comment on the totality of the form. This is a violation of the APA (*see supra* Section III.E).

G. UAC Case Review (Form S-12)

According to the Federal Register, the UAC Case Review (Form S-12) "is used by care providers to document new information obtained after completion of the UAC Assessment." ORR reorganized and reformatted the instrument and reworded and revised some fields. The Commenting Parties have concerns about certain fields and questions as described in the following chart.

Section(s)	Field(s)	Comment
Age-determination or Identity Concern	Form S-12 adds this new section, which contains 11 fields, including "Concern with UAC's age or identity?"	It is not clear how this information will be used or shared in the context of providing services, including, case management, to children in ORR custody. At a minimum, it is critical that this information not be shared with third parties, including DHS, and that ORR implement confidentiality and privacy protections consistent with federal and state laws. (*See supra* Section III.A.)
Additional UAC Information	Form S-12 adds this new section, which contains multiple fields, including: • UAC Case Review Type • Separated from Parents/Legal Guardian? • Parent Separation Case Updates • Migrant Protection Protocol case? • MPP Case Updates	It is not clear what the new "UAC Case Review Type" field is intended to capture. Thus, without additional information, the Commenting Parties are unable to fully assess the impact of this new field. (*See supra* Section III.E.) The new fields regarding family separation and the sunsetted MPP are improper if the purpose is to deny children their rights under the TVPRA.[58] However, to the extent ORR intends to collect this information for a proper purpose, ORR should implement a process to notify LSPs immediately whenever it learns that a child was previously in MPP proceedings and if or when any action is being taken against the child based on those proceedings.

[58] *See* 8 U.S.C. § 1232(a)(2)(B), (a)(3), (a)(5)(D).

Medical	Form S-12 removes the following fields: • Medical History • Medication Table	The Agencies have not provided any justification for removing these fields from Form S-12. Historically, this information has been helpful to include in 30-day reviews to document the progression of a child's case, including any changes in medical history and medication. The Commenting Parties recommend that these fields be added back to Form S-12.
Case Plan	Form S-12 adds a "Case Plan" section, which contains seven new fields.	It is not clear whether the new fields are text boxes or drop-down menus; if drop-down menus, the Agencies have not provided any information about the predetermined drop-down options for the new fields. Thus, without additional information, the Commenting Parties are unable to fully assess the impact of this new field. (*See supra* Section III.E.)
Sponsor Information	Form S-12 replaces a table in the current form with an "Adult Contact Relationship" table and adds a section that displays "Previous Sponsor Applications" Form S-12 also includes the following fields: • Substance use concerns? • Domestic violence concerns? • Child abuse or neglect concerns? • Does Sponsor have a known history of involvement with immigration? • Does the sponsor have criminal history?	It is not clear from Form S-12 whether the new "Adult Contact Relationship" table transfers over all of the fields in the current form. If it does, that would mean the table still includes a "Legal Status" field which is unnecessary and irrelevant and, at a minimum, must be shielded from third-party access. (*See supra* Sections III.A, III.B.) Additionally, it is not clear whether the new "Previous Sponsor Application" section is intended to document prior applications to sponsor the specific child documented in Form S-12 or children in ORR custody generally. The field should be limited to prior applications for the specific child at issue; anything else is unnecessary, irrelevant, and likely to violate the privacy rights of the other children who neither have access to nor

	• List/Explain disclosed criminal activity	control over this particular document. All questions seeking information about substance abuse, domestic violence, child abuse, history of involvement with immigration, and criminal history raise privacy, confidentiality, and self-incrimination concerns. ORR must comply with all applicable confidentiality and privacy laws and also provide a Miranda warning before asking proposed sponsors or other adult caregivers to provide this information. (*See supra* Sections III.A, III.C.) Additionally, it is critical that ORR put in place protections and firewalls to ensure that such information is not shared with third parties, including DHS. Otherwise, potential sponsors are likely to be deterred from coming forward to sponsor a child thereby prolonging a child's detention in ORR custody. (*See supra* Section III.A.)
Adult Contact Relationships Data Entry Window: DNA Testing Details	N/A	It is not clear under what authority, regulation, or policy these fields will be utilized or for what purpose. Thus, without additional information, the Commenting Parties are unable to fully assess the impact of such fields. (*See supra* Section III.E.) Moreover, there are significant concerns about DNA testing unaccompanied children and their proposed sponsors that risk prolonging a child's time in ORR custody and present serious ethical concerns related to privacy and confidentiality. (*See supra* Section III.D.)
Criminal	Form S-12 adds this section with the following new fields:	These fields raise privacy, confidentiality, and self-incrimination concerns. ORR must

	• Criminal Concerns? • Gang Affiliation • Footguide Form S-12 also adds a Criminal Charges Data Entry Window with fields for charges and outcomes of criminal cases.[59]	comply with all applicable confidentiality and privacy laws and also provide a Miranda warning before asking children to provide this information. (*See supra* Sections III.A, III.B.) Additionally, it is critical that ORR put in place protections and firewalls to ensure that such information is not shared with third parties, including DHS. (*See supra* Section III.A.)
Trafficking	• Who planned/organized your journey? • Did a family member or family friend pay for your travel to the U.S.? • Does your family or family friend owe money to anyone for the journey?	These fields, taken together, could be used for immigration or law enforcement purposes. At the very least, any information gleaned from these questions should be shielded from third-party access. (*See supra* Section III.A.) Additionally, the Commenting Parties suggest rephrasing the questions to "Did someone pay for your travel to the U.S.?" and "Does someone owe money to anyone for the journey?" Answers to these rephrased questions would still provide necessary information regarding trafficking concerns without implicating the criminal or immigration liability of a specific individual.
Documents	Form S-12 adds a "Documents" section in which documents directly related to case management may be uploaded	Any uploaded documents must be shielded from third-party access as they may include information that could impact a child's or sponsor's immigration case or criminal or civil liability. (*See supra* Section III.A.)

Additionally, Form S-12 contains numerous drop-down menus, including in response to critical fields/questions such as: (1)"Declined Reason"; and (2) "Based on the most recent screening for disabilities, does the child have a disability as defined in section 3 of the Americans with Disabilities Act of 1990, 42 USC 12102(1)?" As currently provided, for example, it is not

[59] Note that there is a typo in the heading for this window. It should be "Criminal Charges ***Data*** Entry Window." (Emphasis added.)

clear if the "Declined Reason" field is intended to capture the reasons the sponsor was rejected by ORR or whether the field relates to reasons the sponsor withdrew their own application. Because the Agencies did not provide the list of options for each drop-down menu, the Commenting Parties are unable to assess or comment on the totality of the form. This is a violation of the APA (*see supra* Section III.E).

H. 30 Day Restrictive Placement Case Review (Form S-16)

According to the Federal Register, the 30 Day Restrictive Placement Case Review (Form S-16) "is used by care providers to document their 30-day review for UAC in [sic] placed in a restrictive setting." ORR reformatted the form and added new fields.

First, the newly revised form is missing a footnote in the "Care Provider" field that should be added back to the form. The Commenting Parties suggest the following language: "If the UAC is placed in an out-of-network RTC, list name of 'base' care provider here."

Second, the fields for "Case Manager Recommendation," "Case Coordinator Recommendation," and "FFS Decision" must contain associated date fields to provide an accurate timeline for the 30-day placement review.

I. UAC Authorized/Restricted Call List and Call Log (Form S-20)

According to the Federal Register, the UAC Authorized/Restricted Call List and Call Log (Form S-20) "is used by case managers to create a list of authorized and restricted contacts to ensure safe communication for the UAC and document the details of phone calls made by a UAC. This is a new instrument that ORR plans to add to this collection."

The Commenting Parties are concerned that the stated purpose may cause confusion about what type of "details" case managers should document about calls. Requesting details about the substance of the calls, for example, implies that the calls are not private, which is a violation of the child's right to privacy and confidentiality. (*See supra* Section III.A.)

J. Post-Release Service (PRS) Event (Form S-22)

According to the Federal Register, the Post-Release Service (PRS) Event (Form S-22) "is used by post-release service caseworkers to document referrals made and services provided at critical junctures of service provision, such as 14 day, 6 month, 12 month, and closure. . . . This is a new instrument that ORR plans to add to this collection."

The Commenting Parties have insufficient information to comment on the fields contained in this new form because the Agencies have failed to provide adequate detail or explanation about

the purpose of the fields or the options contained in drop-down menu fields. For example, Form S-22 contains name and address information for a "Caregiver" yet fails to explain who that person is, including whether it is someone different than the sponsor to whom the child was released. Additionally, Form S-22 suffers from many of the same concerns identified above for other forms, including that it seeks irrelevant and unnecessary information like a sponsor's country of birth that is completely unrelated to child welfare. (*See supra* Section III.B.)

Because the Agencies have not provided sufficient information about this new proposed form, the Commenting Parties are unable to assess or comment on the totality of the form. This is a violation of the APA (*see supra* Section III.E).

K. Sponsor Application (Form S-24)

According to the Federal Register, the Sponsor Application (Form S-24) "is used by care providers to document certain information and milestones in the sponsor application process. This is a new instrument that ORR plans to add to this collection."

The Commenting Parties have insufficient information to comment on the fields contained in this new form because the Agencies have failed to provide adequate detail or explanation about the purpose of the fields or the options contained in drop-down menu fields. For example, it is unclear what date ORR will use for the "Application Completion Date" or what the "Assign using active assignment rule" means for case management and sponsor assessment purposes. The form also appears to be missing critical case management information, including but not limited to: (1) names and contact information for ORR and care provider staff working on the child's case and the assessments documented in the form; and (2) home study information, including details concerning home study recommendations, decisions, and completion dates.

Because the Agencies have not provided sufficient information about this new proposed form, the Commenting Parties are unable to assess or comment on the totality of the form. This is a violation of the APA (*see supra* Section III.E).

L. Ohio Youth Assessment System (OYAS) Reentry Tool

The Federal Register provides no information on the "OYAS Reentry Tool"—which includes an Interview Guide, Self-Report Questionnaire, and Score Sheet—other than to say that no changes have been made to the instrument.

The Commenting Parties have insufficient information to comment on whether the continued use of the OYAS Reentry Tool is appropriate for the population of children in ORR

custody. For example, we do not know when the tool is used (*e.g.*, for release purposes, for placement, or for some subset of release and/or placement decisions), or who is responsible for implementing it (*e.g.*, any care provider staff or just clinicians). Nor is it clear that the OYAS Reentry Tool was validated for and intended to be used with the population of children in ORR custody (*i.e.*, non-English speaking youth). To the extent the tool is intended to assess a child's dangerousness for purposes of release or placement, it should be validated, implemented by qualified individuals, and only used for informing decisions for which it was designed in the first instance. Otherwise, the Commenting Parties are concerned that ORR care providers will use the tool to arbitrarily deny release and/or step-down to a less restrictive placement in violation of the FSA, TVPRA, and Fifth Amendment Due Process Clause. Because the tool also asks about prior involvement with the law, drug use, criminal activity, and gang association, it raises privacy, confidentiality, and self-incrimination concerns that must be addressed and protected against before implementation. (*See supra* Sections III.A, III.C.)

Because the Agencies have not provided sufficient information about this tool, the Commenting Parties are unable to assess or comment on it. This is a violation of the APA (*see supra* Section III.E).

V. CONCLUSION

The Commenting Parties urge the Agencies not to promulgate the Proposed Forms as published for public comment. As detailed above, several of the Proposed Forms raise serious privacy, confidentiality, and self-incrimination concerns. Additionally, the Proposed Forms should not be implemented because the Agencies failed to provide sufficient notice under the APA.