



NEW YORK
CITY BAR

**COMMITTEE ON
IMMIGRATION & NATIONALITY LAW**

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July 26, 2018

The Honorable Chuck Grassley
Chairman
U.S. Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510-6275

The Honorable Dianne Feinstein
Ranking Member
U. S. Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, DC 20510-6275

The Honorable Bob Goodlatte
Chairman
U.S. House Committee on the Judiciary
2309 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Jerry Nadler
Ranking Member
U.S. House Committee on the Judiciary
2109 Rayburn House Office Building
Washington, DC 20515

Re: Need for Oversight and Investigation on Border Crisis

Dear Chairmen Grassley and Goodlatte and Ranking Members Feinstein and Nadler:

On behalf of the New York City Bar Association (“City Bar”), I am writing regarding the need for the Senate and House Judiciary Committees to use their oversight roles to conduct comprehensive hearings regarding the Department of Justice and Department of Homeland Security’s (“DHS”) “zero tolerance” policy requiring criminal prosecution of all irregular entrants to the United States. The City Bar has significant concerns about the effect these policies have had on individuals and families seeking asylum and believe they are out of line with human rights obligations and customary international law, as well as our country’s core values. We applaud the Senate Judiciary Committee for scheduling an oversight hearing on immigration enforcement and family reunification efforts on July 31st and urge the House to follow suit.

As is further outlined in our July 6th letter to Attorney General Sessions and DHS Secretary Nielsen, the City Bar believes that our immigration policies must adhere to guiding principles of fairness, proportionality, and respect for this country’s tradition as a refuge for the persecuted and endangered.¹ Towards that end, we echo the calls of organizations such as the

¹ Available at <http://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/criminal-prosecution-separation-and-detention-of-families-seeking-asylum>; a copy of our letter has also been appended.

Project On Government Oversight (POGO)² in urging Congress to investigate immigration enforcement and detention at the southern border. In conducting the upcoming hearing and considering areas to explore, we hope that members of the Senate Judiciary Committee will find our enclosed letter to be a useful resource. It is important that Congress exercise its role as a co-equal branch of government to conduct hearings that will help determine (1) what policies are actually being enforced at the border; and (2) how they can be improved to ensure that our border remains secure without undermining the fundamental right to seek asylum and other forms of protection, both under the U.S. Constitution and customary international law. Congressional oversight and input is critical to fully understanding what has taken place over the past several months and, ultimately, to reforming our nation's immigration system.

Thank you for your consideration.

Respectfully,



Victoria F. Neilson

Cc: Members of the Senate Judiciary Committee
Members of the House Judiciary Committee

Enclosure

² "POGO Calls for Congressional Investigation and Oversight of "Zero Tolerance" and Border Crisis," Project on Government Oversight, July 18, 2018, available at <http://www.pogo.org/our-work/letters/2018/pogo-calls-for-congressional-investigation-and-oversight-of-zero-tolerance-and-border-crisis.html>.



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July 6, 2018

The Honorable Jefferson Beauregard Sessions III, Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, D.C. 20530

The Honorable Kirstjen Nielsen, Secretary
U.S. Department of Homeland Security
3801 Nebraska Avenue NW
Washington, D.C. 20528

RE: Criminal Prosecution, Separation, and Detention of Families Seeking Asylum

Dear Attorney General Sessions and Secretary Nielsen:

On behalf of the undersigned committees of the New York City Bar Association (“City Bar”) and its more 24,000 members,¹ we call on each of you to rescind your respective Departments’ publicly announced policies of referring for criminal prosecution all persons allegedly attempting or effecting entry into the United States other than at a designated port of entry, including those seeking asylum.² These policies have caused the separation and detention of migrant children and families, and the improper denial of access to asylum and other forms of humanitarian protection provided for under U.S. law and international law. In view of the state of flux of the administration’s policies, practices, and stated aims with respect to arrivals of refugees and migrants at the southern border, we respectfully request that, as the cabinet members charged with responsibility for enforcing the country’s immigration laws, you pledge publicly to do so in adherence to guiding principles of fairness, proportionality, and respect for this country’s tradition as a refuge for the persecuted and endangered.

¹ With 24,000 members, the City Bar has a longstanding mission to equip and mobilize the legal profession to practice with excellence, promote reform of the law, and advocate for access to justice in support of a fair society.

² Dep’t of Justice, Attorney General Announces Zero Tolerance Policy for Criminal Illegal Entry (Apr. 6, 2018), <https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry> ; Dep’t of Homeland Security, Fact Sheet: Zero Tolerance Immigration Prosecution – Families (June 15, 2018), <https://www.dhs.gov/news/2018/06/15/fact-sheet-zero-tolerance-immigration-prosecutions-families>. (All websites last visited July 5, 2018)

I. EXECUTIVE SUMMARY

A variety of position statements offered by Administration officials have led to uncertainty in the administration's policies with respect to border-crossing families and the separation of parents and children – an issue that has come to dominate public discourse for several weeks and counting. Meanwhile, a series of legal and policy developments signals further change.

After the separation of thousands of children from their families with no publicly stated plans for reunification, on June 20, 2018, the President signed Executive Order 13840, stating, among other things, that it is the Administration's policy "to maintain family unity" of families crossing the border.³ It remains unclear how the provisions of the Executive Order will be carried out. Although widely interpreted as curtailing family separation,⁴ the Executive Order perpetuates policies and practices that violate basic human rights principles of family unity, child welfare, and refugee protection.

The Executive Order fails to provide for the reunification with their parents of the more than 2,300 forcibly separated children, and it does not address whether separation will continue while the administration identifies or constructs detention facilities to hold families. And, the Executive Order's directive to seek a modification of the 1997 *Flores* Settlement Agreement⁵ ("*Flores*") blatantly undermines the "best interest of the child" principle and other U.S. human rights obligations. Family detention is not a solution for family separation. Both policies—tearing children away from their parents and holding children in jail-like conditions with their parents—are repugnant to American values and contrary to U.S. and international human rights law. Both will have lasting psychological and physical impact on vulnerable children and families fleeing life-threatening harm.

Meanwhile, court actions are also shaping the course of family separation practices. On June 26, 2018, a federal district court granted a class-wide preliminary injunction requiring, among other things, the reunification of children and parents separated by immigration officials.⁶ The

³ Affording Congress an Opportunity to Address Family Separation, <https://www.whitehouse.gov/presidential-actions/affording-congress-opportunity-address-family-separation/>. The Executive Order states, among other things, that "it is...the policy of this Administration to maintain family unity, including by detaining alien families together where appropriate and consistent with law and available resources."

⁴ See, e.g., Customs and Border Protection, Statement on Implementing the President's Executive Order (June 21, 2018), <https://www.cbp.gov/newsroom/speeches-and-statements/cbps-statement-implementing-presidents-executive-order-affording>.

⁵ *Flores v. Reno*, Case No. CV 85-4544, Stipulated Settlement Agreement (Jan. 17, 1997), https://www.aclu.org/sites/default/files/assets/flores_settlement_final_plus_extension_of_settlement011797.pdf. In settlement of a 1985 class action lawsuit, the Flores agreement requires federal immigration authorities to comply with standards pertaining to the conditions for detaining and releasing children from federal custody.

⁶ Order Granting Plaintiffs' Motion for Classwide Preliminary Injunction, *Ms. L. v. ICE*, Case No.: 18cv0428 DMS (June 26, 2018), <https://www.aclu.org/legal-document/ms-l-v-ice-order-granting-plaintiffs-motion-classwide-preliminary-injunction>.

same day, 18 Attorneys General filed a lawsuit challenging the separation practices on Constitutional and statutory grounds.⁷

We urge you to end the systematic criminal prosecutions that lead to family separation. In addition, in response to extraordinary levels of public concern, we urge that you publicly voice your commitment to the principles of family unity, the best interests of the child, and the rights of migrants fleeing danger to seek protection in a country of refuge. Parents and children should not be separated in the absence of good cause and due process, and members of families apprehended while fleeing harm should be released together whenever feasible in order to pursue claims for asylum or other humanitarian relief.

II. CRIMINAL PROSECUTION OF ASYLUM-SEEKING FAMILIES SHIFTS LAW ENFORCEMENT RESOURCES AWAY FROM SAFETY AND SECURITY PRIORITIES

At least 21 lawyers from the Judge Advocate General corps will reportedly be detailed to the border—not in response to evidence of a surge in organized crime activity or violent crimes, but to help prosecute improper entry cases.⁸ Such a deployment could prove both ineffective and costly. Notably, after two prior administrations implemented a border patrol initiative aimed at reducing recidivism in illegal crossing, the Department of Homeland Security (“DHS”) Office of Inspector General (“OIG”) found that Customs and Border Protection had not been adequately measuring the effectiveness or costs of the initiative.⁹ Under the current policy, even if the human costs of detaining and separating asylum-seeking families (discussed below) could be offset, your Departments have not offered the public a projected cost-benefit analysis of prosecuting all improper entries without exception. Indeed, there is reason to believe the costs will be high: “the DHS projects there will be an average of 51,379 people held in immigration detention centers each day in fiscal 2018, a sizable jump from the last few years, which have hovered near the low 30,000s.”¹⁰ By Immigration and Custom Enforcement’s (“ICE”) estimate, each bed in an ICE

⁷ Complaint, *Washington v. US*, Case No. 18cv00939 (June 26, 2018), https://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Another/News/Press_Releases/complaint_6.pdf. In yet another related development, on July 2, 2018, a federal district court granted a class-wide preliminary injunction and held that DHS must follow its “Parole Directive” and give asylum-seekers individualized parole determinations. *Damus, et al. v. Nielsen*, Case No. CV 18-578 (D.D.C., July 2, 2018), https://www.humanrightsfirst.org/sites/default/files/memorandum_opinion.pdf.

⁸ Will Racke, Pentagon Sending Military Lawyers to Border to Prosecute Illegal Immigration Cases, *Conservative Daily News* (June 21, 2018) <https://www.conservativedailynews.com/2018/06/pentagon-sending-military-lawyers-to-border-to-prosecute-illegal-immigration-cases/>. Under 8 U.S.C. §1325, anyone who enters the country at an “[i]mproper time or place” can be sentenced to six months in jail and a fine of up to \$250 (repeat offenders can be jailed for up to two years and fined up to \$500). *But see* note 32 and accompanying text regarding rights of migrants to seek asylum regardless of port of entry.

⁹ DHS Office of the Inspector General, OIG-15-95, Streamline: Measuring its Effect on Illegal Border Crossing (May 15, 2015), preamble, https://www.oig.dhs.gov/assets/Mgmt/2015/OIG_15-95_May15.pdf.

¹⁰ Jaden Urbi, This Is How Much It Costs to Detain an Immigrant in the US, *CNBC* (June 20, 2018) <https://www.cbc.com/2018/06/20/cost-us-immigrant-detention-trump-zero-tolerance-tents-cages.html>.

facility costs taxpayers approximately \$133.99 per day, although other estimates are much higher, and ICE’s estimates have been criticized by the Government Accountability Office.¹¹

III. CRIMINAL PROSECUTION OF ASYLUM-SEEKING FAMILIES IS LINKED TO SYSTEMATIC FAMILY SEPARATION AND DETENTION

In 2015, Customs and Border Protection (“CBP”) concurred in a recommendation of the DHS Office of Inspector General that CBP adopt guidelines to avoid violating U.S. obligations under the 1967 United Nations Protocol Relating to the Status of Refugees¹² by referring for criminal prosecution those who express fear of persecution or fear of return to countries of origin.¹³ We call on Secretary Nielsen to instruct DHS employees to use prosecutorial discretion to avoid penalizing asylum-seekers for their manner of entry or unlawful presence through an inappropriate referral for criminal prosecution.

A country’s sovereign right to regulate its borders must be exercised in compliance with treaty obligations and international standards on human rights. Prosecuting asylum seekers may violate longstanding and internationally-recognized protections for asylum-seekers, and where those being prosecuted are parents, the result is thousands of children forcibly and unnecessarily separated from their mothers and fathers for prolonged periods.¹⁴ Incidents of family separation occurred under prior administrations, but the systematic separation of parents and children with the aim of deterring entry of asylum-seeking families is new and accelerating.¹⁵ According to DHS, 2,342 children were separated from their parents over the course of approximately seven weeks starting in May 2018,¹⁶ in contrast to approximately 700 children taken from adults claiming to be their parents between October 2017 and April 2018.¹⁷

This unprecedented increase in forcible separation closely followed the Attorney General’s announcement of a “zero tolerance” policy requiring criminal prosecution of all irregular

¹¹ *Id.*

¹² UN General Assembly, *Protocol relating to the Status of Refugees*, 16 December 1966, A/RES/2198, <http://www.refworld.org/docid/3b00f1cc50.html>.

¹³ DHS OIG, OIG-15-95, *Streamline: Measuring its Effect on Illegal Border Crossing* (May 15, 2015), at preamble and 16-18, https://www.oig.dhs.gov/assets/Mgmt/2015/OIG_15-95_May15.pdf.

¹⁴ Nongovernmental organizations such as the Women’s Refugee Commission, Kids in Need of Defense (“KIND”), the American Civil Liberties Union, and Amnesty International have reported on the increasing trend of family separation and how the policy and practice violate U.S. law and international human rights obligations. *See, e.g.*, KIND, *Death by a Thousand Cuts: The Trump Administration’s Assault on the Protection of Unaccompanied Children*, at 2, https://supportkind.org/wp-content/uploads/2018/05/Death-by-a-Thousand-Cuts_May-2018.pdf.

¹⁵ *See, e.g.*, Gregg Re, *Sessions Rebukes Critics Who Compare Border Situation to Nazi Germany*, Fox News (June 19, 2018), <http://www.foxnews.com/politics/2018/06/19/sessions-rebukes-critics-who-compare-border-situation-to-nazi-germany-fundamentally-were-enforcing-law.html>.

¹⁶ Camila Domonoske, *What We Know: Family Separation and Zero Tolerance at the Border*, NPR (June 19, 2018), <https://www.npr.org/2018/06/19/621065383/what-we-know-family-separation-and-zero-tolerance-at-the-border>.

¹⁷ Caitlin Dickerson, *Hundreds of Immigrant Children Have Been Taken from Parents at the Border*, NY Times (Apr. 20, 2018), <https://www.nytimes.com/2018/04/20/us/immigrant-children-separation-ice.html>.

entrants.¹⁸ In January 2018 Secretary Nielsen stated, “[w]e’re looking at a variety of ways to enforce our laws to discourage parents from bringing their children here.”¹⁹ Former Secretary of Homeland Security John Kelly, now President Trump’s chief of staff, suggested the blanket criminal prosecution policy as early as March 2017 “in order to deter” asylum-seeking adults from fleeing to the United States with their children.²⁰ Thus, despite official denials, there is a demonstrable link between the policy of mass irregular entry prosecutions and an escalation in family separation.²¹ Even assuming no official policy of separating children and parents, the blanket prosecution policy as implemented, amounts to a *de facto* policy of systematic family separation.²²

Under the Executive Order’s mandate to detain families “during the pendency of any criminal improper entry or immigration proceedings,” the continuation of this “zero tolerance” policy will result in the indefinite detention of families. Prolonged detention would be an unacceptable return to 2014 government policies that were ultimately halted in the wake of a court order²³ and public outrage.

IV. FAMILY SEPARATION AND FAMILY DETENTION VIOLATE CHILDREN’S RIGHTS, U.S. CHILD WELFARE STANDARDS, AND U.S. OBLIGATIONS UNDER HUMAN RIGHTS AND REFUGEE LAW

The administration has not explained the rationale for its assertions that it *must* separate children from parents who face criminal charges for unlawful entry, nor has it explained how the presence of children would otherwise “give you immunity from arrest and prosecution” on misdemeanor charges when warranted.²⁴ In practice, the vast majority of parents convicted of misdemeanor criminal entry are sentenced to time served, often without ever leaving the custody

¹⁸ Attorney General Announces Zero Tolerance Policy for Criminal Illegal Entry (Apr. 6, 2018), <https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry>.

¹⁹ Secretary Kjiirsten Nielsen, Senate Hearing Testimony Transcript, (Jan. 16, 2018), <http://transcripts.cnn.com/TRANSCRIPTS/180116/cnr.04.html>.

²⁰ John Haltiwanger, John Kelly Proposed Separating Children from Their Parents to Deter Illegal Immigration Last Year, Business Insider (June 18, 2018), <http://www.businessinsider.com/kelly-proposed-family-separation-to-deter-illegal-immigration-in-2017-2018-6>.

²¹ Philip Bump, Here are the Administration Officials Who Have Said That Family Separation is Meant as a Deterrent, Washington Post (June 19, 2018), https://www.washingtonpost.com/news/politics/wp/2018/06/19/here-are-the-administration-officials-who-have-said-that-family-separation-is-meant-as-a-deterrent/?noredirect=on&utm_term=.381649f05d8c.

²² Blair Guild, Jeff Sessions Argues It’s Necessary to Separate Children from Parents When Detained at Border, CBS News (June 19, 2018), <https://www.cbsnews.com/news/jeff-sessions-argues-its-necessary-to-separate-children-from-parents-when-detained-at-border/>.

²³ See ACLU *RILR v. Johnson* webpage, <https://www.aclu.org/cases/rilr-v-johnson?redirect=immigrants-rights/rilr-v-johnson>.

²⁴ See, e.g., Adam Edelman, Sessions Cites Bible in Defense of Breaking Up Families (NBC News, June 14, 2018), <https://www.nbcnews.com/politics/immigration/sessions-cites-bible-defense-breaking-families-blames-migrant-parents-n883296>.

of CBP, other than to attend federal court.²⁵ Nothing prevents the administration from reuniting a parent and child after completion of the parent’s criminal sentence. What is clear is that punishing families for seeking asylum violates U.S. law and human rights obligations.

A. Family separation

Family unity is a fundamental Constitutional right²⁶ – a right the Supreme Court has emphasized is “far more precious . . . than property rights.”²⁷ U. S. law is clear that deliberate government intervention into the child-parent relationship is permissible only in very limited circumstances.²⁸ The Fifth and Fourteenth Amendments provide both substantive and procedural due process protections for the right of family integrity.²⁹ These due process rights belong to the child as well as to the parents.³⁰

The forcible separation of families without process and without a demonstrated compelling state interest blatantly violates these Constitutional protections. Such separations also violate U.S. obligations under customary international law, including respect for the human right to establish a family and to be free from arbitrary or unlawful interference with the family unit.³¹ These norms and standards require judicial review of the separation of children and parents and a best interest

²⁵ See, e.g., Russell Berman, 85 Immigrants Sentenced Together Before One Judge, *The Atlantic* (June 19, 2018) (“federal judges along the southern border have been giving out minimum sentences to a majority of undocumented immigrants, particularly those with no criminal histories who were caught crossing illegally for the first or second time”), <https://www.theatlantic.com/politics/archive/2018/06/zero-tolerance-inside-a-south-texas-courtroom/563135/>.

²⁶ See, e.g., *Troxel v. Granville*, 530 U.S. 57 (2000) (“In light of th[e] extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.”).

²⁷ *May v. Anderson*, 345 U.S. 528, 533 (1953).

²⁸ See, e.g., *Stanley v. Illinois*, 405 U.S. 645 (1972).

²⁹ See *id.*; *Yoder v. Wisconsin*, 406 U.S. 205 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); see *D.B. v. Cardall*, 826 F.3d 721, 740 (4th Cir. 2016) (quoting *Berman v. Young*, 291 F.3d 976, 983 (7th Cir. 2002)). States have upheld these Constitutional rights as to immigrant parents in child welfare cases. See, e.g., *In re Doe*, 281 P.3d 95 (Idaho 2012); *In re E.N.C.*, 384 S.W.3d 796 (Tex. 2010); and *In re Interest of Angelica L.*, 767 N.W.2d 74 (Neb. 2009).

³⁰ *Duchesne v. Sugarman*, 566 F.2d 817, 825 (2d Cir. 1977) (“[T]he reciprocal rights of both parents and children [include the interest] of the children in not being dislocated from the ‘emotional attachments that derive from the intimacy of daily association’ with the parent.”); *Santosky v. Kramer*, 455 U.S. 745, 760 (1982) (“[T]he child and his parents share a vital interest in preventing the erroneous termination of their natural relationship. . . .”).

³¹ Universal Declaration of Human Rights (“UDHR”), Articles 16(1), 25; American Declaration on the Rights and Duties of Man, Articles VI, VII; American Convention on Human Rights, Articles 17, 19; International Covenant on Civil and Political Rights (“ICCPR”), Articles 17(1), 23(2); U.N. Convention on the Rights of the Child (“CRC”), art. 9 (Sept. 2, 1990); General Comment 6 to the Convention, “Treatment of Unaccompanied and Separated Children Outside their Country of Origin” (CRC 2005); Final Act of the 1951 U. N. Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Recommendation B. See also Subcommittee on Best Interests, Interagency Working Group on Unaccompanied and Separated Children, Framework for Considering the Best Interests of Unaccompanied Children (Young Center for Immigrant Children’s Rights, May 2016). While the U.S. has signed but not ratified the CRC, the convention’s principles remain obligations under international human rights law.

of the child analysis. The individual right to family life is also a factor that countries must take into account in decisions on individuals' entry, residence, deportation or expulsion.³² Threatened and forced family separations further undermine compliance with U.S. refugee law by impeding access to asylum and other forms of protection which individuals have a right to pursue regardless of point of entry. Consistent with international law, U.S. law expressly provides for the right to apply for asylum irrespective of whether entry to the U.S. was "at a designated port of arrival."³³

Moreover, forcing children to undergo immigration proceedings alone after separation from their parents severely restricts their ability to achieve protection where their claims are factually linked to those of their parents.³⁴ This is particularly true for very young children who are unable to articulate the claim. Furthermore, separation can result in only one family member retaining documents critical to establishing family members' identities or supporting their claims. Separation impedes the regular communication between children and parents that is critical for a child and parent to pursue a joint claim for protection.

While DHS and the Office of Refugee Resettlement ("ORR") are implementing a hotline to connect parents with children and coordinate communication between separated family members,³⁵ this effort is belated and haphazardly effective. Furthermore, the administration has offered no plans to reunite separated children and parents. According to multiple media accounts and the experience of our members and pro bono volunteers, many parents have endured long periods without knowledge of the whereabouts or well-being of their children and when they are locating their children, the costs of travel can be prohibitive. Parents are even being deported to their country of origin without their children and potential guardians are encountering significant obstacles³⁶ to gaining custody of the children.

B. Family detention

International human rights standards contain a strong presumption against the detention of asylum-seekers and immigrants.³⁷ Detention should be used only as a measure of last resort; it

³² Human Rights Committee, General Comment No. 15, par5. CAT, GC_No.4 (2017), Article 3(14).

³³ 8 USC § 1158(a)(1); *see also, e.g.*, 8 USC § 1101(a)(15)(T), (U), defining nonimmigrant status for victims of severe forms of trafficking in persons, and certain victims of criminal activity, respectively.

³⁴ American Immigration Lawyers Ass'n, *Policy Brief: New Barriers at the Border Impede Due Process and Access to Asylum* (June 1, 2018) at 6-7 (enumerating conditions that "will put more pressure on children to withdraw asylum applications and accept removal, despite their fear of harm in their countries of origin"), <https://www.aila.org/File/DownloadEmbeddedFile/76208>.

³⁵ DHS and ORR, *Next Steps for Families*, https://www.dhs.gov/sites/default/files/publications/18_0615_CBP_Next-Steps-for-Families.pdf.

³⁶ One such obstacle is, undoubtedly, new DHS regulations that will require ORR to communicate with DHS regarding the immigration status of a potential caretaker and of household members. The City Bar opposed this new regulation, stating "The regulations undoubtedly will have a chilling effect on family members' desire to come forward to ensure children's release from ORR detention facilities to their care." http://s3.amazonaws.com/documents.nycbar.org/files/2017397-DHS_ORR_Info_Sharing.pdf

³⁷ *See, e.g.*, ICCPR, *supra*, n. 31 (setting out the right to be free from arbitrary detention); and U.N. High Commissioner for Refugees, *Detention Guidelines: Guidelines on the Applicable Criteria and Standards Relating to*

must be justified in each individual case and subject to judicial review. Detention is appropriate only when authorities can demonstrate in an individual case that it is necessary and proportionate to the objective being achieved and on grounds prescribed by law, and that alternatives (such as reporting requirements, bail, or financial deposits) would not be effective.³⁸

The U.N. Special Rapporteur on torture and other cruel and inhuman or degrading treatment or punishment has concluded that “detention based solely on migration status can amount to torture, most notably where it is being intentionally imposed or perpetuated for purposes such as deterring, intimidating, or punishing irregular migrants or their families, coercing them into withdrawing their requests for asylum, subsidiary protection or other stay, agreeing to voluntary repatriation, providing information or fingerprints.”³⁹

Detention is rarely in the best interest of a child. When children are detained, it should be in the least restrictive environment and for the shortest period of time necessary, only following an individualized assessment and judicial review, and adhering to the 1997 *Flores* Settlement Agreement.

The cases of parents and children should be processed together so that they may be released together under an appropriate alternative to detention. Family detention is unnecessary given the extensive alternatives to detention. The now-terminated Family Case Management Program (“FCMP”) was 99 percent effective in ensuring that asylum-seeking parents and their children appeared for their immigration court proceedings by helping them find legal representation, guiding them through the court system, and connecting them with other community resources.⁴⁰ It demonstrated that alternatives to detention can be effective in supporting an asylum-seeker while accomplishing the government’s interests, without resorting to punitive ankle monitors or physical detention. DHS retains other cost-saving alternatives to detention, including release on recognizance, parole, or bond, as well as community-based alternatives to detention programs. The U.S. can implement humane and rights-respecting policies that neither separate nor detain families seeking protection in the United States.

the Detention of Asylum-Seekers and Alternatives to Detention (2012), citing CRC, <http://www.unhcr.org/505b10ee9.html>.

³⁸ *Id.* See also *Damus v. Nielsen*, *supra* note 7; City Bar Letter to President Obama and Secretary Johnson, May 26, 2015 (“The City Bar believes that the United States can and must stop family detention, in accordance with due process and domestic and international law on the treatment of children and asylum seekers.”), <https://www2.nycbar.org/pdf/report/uploads/20072910-LettertoPresidentObamareLarge-ScaleDetentionofImmigrantMothersandChildren.pdf>.

³⁹ Report of the UN Special Rapporteur on torture and other cruel and inhuman or degrading treatment or punishment to the UN Human Rights Council § 28, 29 (Feb. 26, 2018), https://www.ohchr.org/Documents/Issues/Torture/A_HRC_37_50_EN.pdf.

⁴⁰ Frank Bajak, *ICE Shuttles Detention Alternative for Asylum-Seekers*, U.S. News (June 9, 2017), <https://www.usnews.com/news/best-states/texas/articles/2017-06-09/ice-shuttles-detention-alternate-for-asylum-seekers>.

Detention also impedes access to a fair and efficient process for seeking asylum. Detention presents barriers to accessing legal representation,⁴¹ and impedes the ability to obtain documentation in support of protection claims. It is often difficult or impossible for those in detention to communicate with family members or other witnesses in the home country to obtain crucial documents to support the asylum claim.

The government's actions also contravene its own agency's standards on family separation and detention. In October 2016, ICE's Advisory Committee on Family Residential Centers ("ACFRC") stated that separating families is never in the best interest of the child and further recommended ending family detention altogether.⁴² The National Standards on Transport, Escort, Detention, and Search ("TEDS") for CBP require family units to remain together "to the greatest extent operationally feasible" absent concerns for security or safety. If separation must occur, TEDS further requires that "such separation must be well documented in the appropriate electronic system(s) of record."⁴³

C. The best interests of the child

The standard of the child's best interests has been increasingly incorporated into immigration law and policy. All 50 states, the District of Columbia, and U.S. territories require consideration of a child's best interests in decisions about the child's custody,⁴⁴ and likewise, the Convention on the Rights of the Child reflects virtually unanimous global consensus that "[i]n all actions concerning children ... the best interests of the child shall be a primary consideration."⁴⁵ Congress has incorporated the best interests of the child standard into multiple immigration law provisions respecting children.⁴⁶ Under a 2008 Congressional mandate, federal agencies that take unaccompanied children into custody must place them in the least restrictive setting that is in their best interests.⁴⁷ Detention that is any longer than necessary, with and especially without parents, is contrary to the child's best interests, and risks lasting harm, as further discussed below.

V. FAMILY SEPARATION AND FAMILY DETENTION TRAUMATIZE CHILDREN AND CAUSE LONG-TERM PHYSICAL AND EMOTIONAL STRESS

⁴¹ Human Rights First, *Ailing Justice: Texas: Soaring Immigration Detention, Shrinking Due Process* at 24-27 (June 2018), https://www.humanrightsfirst.org/sites/default/files/Ailing_Justice_Texas.pdf.

⁴² <https://www.ice.gov/sites/default/files/documents/Report/2016/acfrc-report-final-102016.pdf>.

⁴³ TEDS at 1.9 and 5.6 (2015).

⁴⁴ See Child Welfare Information Gateway, *Determining the Best Interests of the Child* (2012), https://www.childwelfare.gov/pubPDFs/best_interest.pdf (last viewed Apr. 13, 2018).

⁴⁵ United Nations, G.A. Res. 44/25, *Convention on the Rights of the Child*, art. 3 (Nov. 20, 1989). Every country in the world but the United States has ratified the Convention on the Rights of the Child, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtmsg_no=IV-11&chapter=4&lang=en.

⁴⁶ See, e.g., 8 U.S.C. § 1101(a)(27)(J) (incorporating a best interests finding into eligibility standards for special immigrant juveniles); Immigration and Naturalization Service, *Guidelines for Children's Asylum Claims* at 2, 6, 9 (Dec. 10, 1998) (applying "the internationally recognized 'best interests of the child' principle" to interview procedures for child asylum seekers).

⁴⁷ 8 U.S.C. § 1232(c)(2).

Courts, the American Academy of Pediatrics (“AAP”), child welfare organizations, and medical and mental health professionals have documented the serious and lasting harm on children arising from forcible separation from their parents and being held in detention, even for short periods of time, let alone indefinitely. The AAP has stated, “[w]e know that family separation causes irreparable harm to children. This type of highly stressful experience can disrupt the building of children's brain architecture. Prolonged exposure to serious stress – known as toxic stress – can lead to lifelong health consequences.”⁴⁸ The American Psychological Association reports that “[d]ecades of psychological research show that children separated from their parents can suffer severe psychological distress, resulting in anxiety, loss of appetite, sleep disturbances, withdrawal, aggressive behavior and decline in educational achievement. The longer the parent and child are separated, the greater the child's symptoms of anxiety and depression become.”⁴⁹

Studies of detained immigrants have shown that children and parents may suffer negative physical and emotional symptoms from detention, including anxiety, depression and posttraumatic stress disorder. Numerous reports have documented substandard conditions in many U.S. detention facilities,⁵⁰ such as forcing children to sleep on cement floors, open toilets, constant light exposure, insufficient food and water, lack of bathing facilities, and extremely cold temperatures.⁵¹ Separating and detaining families serves to further traumatize those fleeing persecution and other targeted and life-threatening harm as they seek humanitarian protection.⁵²

VI. FAMILY SEPARATION IS NOT A DETERRENT TO IMPROPER ENTRY AND FURTHER ENDANGERS VICTIMS OF HUMAN TRAFFICKING AND PERSECUTION

Separating and detaining families as a deterrence measure will have little effect on those for whom refugee law and anti-trafficking measures are designed: adults and children fleeing the risk of death or severe harm or human rights abuses, in hope of life-saving protection. Instead, family separation prolongs the state of risk, vulnerability, and uncertainty for adults and children.

Deterrence-based policies targeting families have already failed under court scrutiny on Constitutional grounds,⁵³ and the current policy of forcible family separation is facing similar

⁴⁸ <https://www.aap.org/en-us/about-the-aap/aap-press-room/Pages/AAPStatementOpposingBorderSecurityandImmigrationReformAct.aspx>.

⁴⁹ American Psychological Ass’n, Statement of APA President Regarding Executive Order Rescinding Immigrant Family Separation Policy (June 20, 2018), <http://www.apa.org/news/press/releases/2018/06/family-separation-policy.aspx>.

⁵⁰ See, e.g., Human Rights First, Ailing Justice: New Jersey Inadequate Healthcare, Indifference, and Indefinite Confinement in Immigration Detention at 3-10 (Feb. 2018), <https://www.humanrightsfirst.org/resource/ailing-justice-new-jersey-inadequate-healthcare-indifference-and-indefinite-confinement>.

⁵¹ Julie Linton, et al., Detention of Immigrant Children, *Pediatrics* (Mar. 2017), <http://pediatrics.aappublications.org/content/early/2017/03/09/peds.2017-0483>.

⁵² American Academy of Pediatrics, Statement Opposing Separation of Mothers and Children at the Border (Mar. 4, 2017), <https://www.aap.org/en-us/about-the-aap/aap-press-room/Pages/immigrantmotherschildreparation.aspx>.

⁵³ See, e.g., *R.I.L.-R v. Johnson*, 80 F. Supp. 3d 164 (D.D.C. 2015) (enjoining the Obama Administration’s policy of deterring family immigration through civil detention), <https://www.aclu.org/cases/rilr-v-johnson>.

challenges. Likewise, the Executive Order’s ill-advised directive to modify the *Flores* Agreement should be withdrawn. Any changes to that agreement will result in lasting damage to children’s well-being. On June 6, 2018, a federal judge rejected the Administration’s argument that asylum-seeking families did not have a Constitutional right to remain together and ruled that a lawsuit challenging the practice may proceed, stating that “[s]uch conduct, if true, as it is assumed to be on the present motion, is brutal, offensive, and fails to comport with traditional notions of fair play and decency.”⁵⁴

Rather than focusing on deterrence and punitive use of detention, the U.S. government must live up to its commitments to provide protection for people seeking asylum. Family separation and family detention undermine the fundamental right to seek asylum and other forms of protection. The only effective way to address increased numbers of families and children seeking safety in the United States is to provide full access to the U.S. asylum system to determine who meets the legal standard for such protection. At the same time, the widespread violence that is the root cause of families’ and children’s flight must be addressed. Inadequate protection procedures in countries of origin feed the cycle of harm, insecurity, and flight for children and families.

VII. CONCLUSION

We urge you to replace the “zero tolerance” policy of criminally prosecuting those seeking asylum in the United States with a renewed commitment to U.S. and international law on the rights of asylum seekers. Further, we ask you to reunite all forcibly separated families, and refrain from separating additional families; and to release families to pursue claims for asylum and other humanitarian protections, in line with U.S. human rights obligations and customary international law, our country’s core values, and proud, long-standing tradition of offering refuge.

Respectfully,

Immigration & Nationality Law Committee

Victoria F. Neilson, Chair

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⁵⁴ *Ms. L. v. ICE*, No.18-cv-0428 (June 6, 2018).