



**Columbia
Law School**

Testimony of

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Regarding a Hearing on

The Trump Administration's Child Separation Policy:
Substantiated Allegations of Mistreatment

Before the U.S. House of Representatives
Committee on Oversight and Reform

Washington, D.C.
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Chairman Cummings, Ranking Member Jordan, and distinguished Members of the Committee. Thank you for inviting me to appear before you today.

I am the Jerome L. Greene Clinical Professor of Law at Columbia Law School and the Director of Columbia Law School's Immigrants' Rights Clinic. My teaching and practice focus on representing children and families seeking asylum and Special Immigrant Juvenile Status. I have been representing asylum seekers for more than sixteen years. Over the past twelve years, I have worked extensively with children detained in federal immigration custody. Since 2014, I have spent well over a thousand hours in immigration detention facilities, including hundreds of hours interviewing detained immigrant children and families.

My testimony focuses on (1) what I witnessed in June 2019 when I met with children detained at the U.S. Customs and Border Protection (CBP) facility in Clint, Texas; and (2) the ongoing daily separations of children from their family members at our southern border. Based on what I have witnessed, I am gravely concerned about the safety and well-being of children in CBP custody. I urge immediate congressional oversight to protect children in federal immigration custody.

My Background

I first represented asylum seekers as a law student in a clinical program in 2003. I graduated from Yale Law School in 2005. I clerked for the Honorable Jan E. DuBois at the U.S. District Court for the Eastern District of Pennsylvania the following year. From 2006 to 2007, I served as the Marvin M. Karpatkin Legal Fellow at the American Civil Liberties Union (ACLU). I worked as an associate at the civil rights law firm Emery Celli Brinckerhoff & Abady, LLP from 2007 to 2010, then rejoined the ACLU as a staff attorney from 2010 to 2013. From 2013 to 2014, I served as a Clinical Teaching Fellow at Columbia Law School. In 2014, I established the Immigrants' Rights Clinic at Columbia Law School and became an Associate Clinical Professor of Law. On July 1, 2018, I was named the Jerome L. Greene Clinical Professor of Law at Columbia Law School. Since 2014, I have represented hundreds of children and families seeking asylum and other forms of immigration relief.

Overview

In June 2019, a small team of lawyers, a doctor, and I met with nearly 70 immigrant children detained at the CBP facility in Clint, Texas. Never before have I witnessed, heard of, or smelled such degradation and inhumane treatment of children in federal custody. The children at Clint were dirty and distressed, held for days and weeks without access to soap, showers, toothbrushes, clean clothing, adequate nutrition, or adequate sleep. Over the past year, at least seven children are known to have died in federal immigration custody or shortly after being released. These tragedies occurred after nearly a decade of no reported child deaths.

Every day, children are ripped apart from their family members at our borders and detained without access to their loved ones. These separations leave young children isolated for days, weeks, and months without their parents, grandmothers, aunts, siblings and other familial adult caregivers. Nearly all the children my colleagues and I met with in Clint had traveled to

the United States with a family member and/or had an adult family member waiting to receive them upon their release from detention. Critically, more than 80% of children released from the custody of the U.S. Department of Health and Human Services (HHS) Office of Refugee Resettlement (ORR) have been reunited with family members in the United States.¹ Nearly 100% of children released from the custody of U.S. Immigration and Customs Enforcement (ICE) in the United States are released with their own parent.

Congress must exercise oversight to protect immigrant children. Families belong together. Family separations that do not account for a child's best interests must end. Children must not be detained in degrading and inhumane conditions. Children should be promptly released to family members and potential guardians with appropriate safeguards to ensure that they can appear for immigration proceedings. Congress must ensure that all children, including immigrant children, are treated with basic human dignity as required by law.

Relevant Legal Framework

In 2017, the American Academy of Pediatrics (AAP) recommended that no child should be placed in detention.² The AAP explained that detention can stunt child development, cause psychological trauma, and result in long-term mental health risks, including depression and post-traumatic stress disorder.³ Medical and mental health experts have concluded that the forced separation of migrant children who fled violence can have particularly harmful consequences, even if the separation is brief.⁴

The legal framework protecting children in federal immigration custody recognizes the particular vulnerability of youth and requires their expeditious release. Five pillars govern legal protections for children in federal immigration custody: (1) the 1997 *Flores* Settlement Agreement; (2) the Trafficking Victims Protection Reauthorization Act of 2008 (known as the TVPRA); (3) the *Ms. L* class action; (4) the CBP National Standards on Transport, Escort, Detention, and Search (TEDS); and (5) regulations specifically providing for the release of children simultaneously with a parent, legal guardian, or adult relative.

The *Flores* Settlement Agreement seeks to protect all children in federal immigration custody.⁵ It requires the government to release children expeditiously to sponsors and hold them in the least restrictive environment if detention is necessary for any period of time. It requires the government to house the children it does detain in facilities that are "safe and sanitary" and

¹ Steven Wagner, then the Acting Assistant Secretary for the Administration for Children and Families at the U.S. Department of Health and Human Services (HHS), testified as follows: "In FY 2017, ORR released 93 percent of children to a sponsor. Of those, ORR released 49 percent to parents, 41 percent to close relatives, and 10 percent to other-than-close relatives or non-relatives. In FY 2018, we have released 90 percent of children to individual sponsors and of those sponsors, 41 percent were parents, 47 percent were close relatives, and 11 percent were other-than-close relatives or non-relatives." Statement of Steven Wagner, Acting Assistant Secretary, Administration for Children and Families, U.S. Dep't HHS, Before the Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs, U.S. Senate (Apr. 26, 2018).

² JULIE M. LINTON ET AL., AM. ACAD. OF PEDIATRICS, DETENTION OF IMMIGRANT CHILDREN 6 (2017).

³ *Id.*

⁴ KIND, WOMEN'S REFUGEE COMM'N & LUTHERAN IMMIGRATION SERV., BETRAYING FAMILY VALUES: HOW IMMIGRATION POLICY AT THE UNITED STATES BORDER IS SEPARATING FAMILIES 12 (2017).

⁵ Stipulated Settlement Agreement, *Flores v. Meese*, 2:85-cv-4544 (C.D. Cal. 1997).

provide “access to toilets and sinks, drinking water and food as appropriate, medical assistance if the minor is in need of emergency services, [and] adequate temperature control and ventilation.” *See* Agreement §12A. The Agreement also requires that within three to five days of arrest, the federal government either release a child or transfer her to a non-secure licensed facility; “in the event of an emergency or influx of minors into the United States,” that transfer must take place “as expeditiously as possible.” *See* Agreement §§ 6, 12A, 19. A 2017 court order interpreting the *Flores* Settlement Agreement requires children to be provided with “soap, towels, showers, dry clothing, [and] toothbrushes,”⁶ adequate access to clean drinking water, access to edible food, and “adequate temperature controls at a reasonable and comfortable range.”⁷

The TVPRA limits to 72 hours the time that children unaccompanied by their parents can be in CBP custody, “[e]xcept in the case of exceptional circumstances.” 8 U.S.C. § 1232(b)(3). It also requires that these children “be promptly placed in the least restrictive setting that is in the best interest of the child,” subject to considerations of flight and danger. 8 U.S.C. § 1232(c)(2)(A).

The *Ms. L* class action seeks to reunify children and parents who have been forcibly separated in federal immigration custody from January 2017 onwards. The Court in *Ms. L* recognized that the U.S. Constitution protects the right to family integrity⁸ and ordered reunifications of children with their parents.⁹ Approximately 2,167 children in the *Ms. L* class have been reunified with their parents.¹⁰ Nearly 33,000 additional children’s case files are currently being reviewed to determine if the children were forcibly separated from a parent.¹¹ The case is pending in the U.S. District Court for the Southern District of California.

The TEDS Standards govern CBP’s interactions with detained individuals. The TEDS state: “Officers/Agents will consider the best interest of the juvenile at all decision points beginning at the first encounter and continuing through processing, detention, transfer, or repatriation. Officers/Agents should recognize that juveniles experience situations differently than adults.” TEDS § 1.6.

Federal regulations specifically provide for the release of children to family members whom the children have identified. Where “the juvenile has identified a parent, legal guardian, or adult relative in [immigration] detention, simultaneous release of the juvenile and the parent, legal guardian, or adult relative shall be evaluated on a discretionary case-by-case basis.”¹²

⁶ Order, *Flores v. Sessions*, No. 2:85-cv-4544, 2017 WL 6060252 (C.D. Cal. June 27, 2017).

⁷ *Id.*

⁸ *Ms. L. v. U.S. Immigration and Customs Enforcement*, 302 F. Supp. 3d 1149, 1161–67 (S.D. Cal. 2018).

⁹ *Ms. L. v. U.S. Immigration and Customs Enforcement*, 310 F. Supp. 3d 1133, 1149–50 (S.D. Cal. 2018).

¹⁰ *See* Joint Status Report at 3, *Ms. L. v. U.S. Immigration and Customs Enforcement*, No. 18-cv-428 DMS MDD, (S.D. Cal. June 6, 2019).

¹¹ *See id.* at 8. (“HHS has determined the correct number of cases to be reviewed was 32,972” to identify potential additional children who were separated from parents); OFFICE OF THE INSPECTOR GENERAL, U.S. DEP’T OF HEALTH & HUMAN SERVS., OEI-BL-18-00511, SEPARATED CHILDREN PLACED IN OFFICE OF REFUGEE RESETTLEMENT CARE at 11 (Jan. 17, 2019) [hereinafter HHS OIG REPORT], at 1, 6, 13 (reporting that “thousands of children may have been separated during an influx that began in 2017, before the accounting required by [the court in *Ms. L. v. Immigration and Customs Enforcement*], and HHS has faced challenges in identifying separated children”).

¹² 8 C.F.R. § 236.3 (b)(2).

My Work With Detained Immigrant Children from January 2007 to March 2019

I first began representing immigrant children detained by the federal government in 2007. Since then, I have participated in various litigation efforts seeking to protect immigrant children in federal custody.

I started investigating and working on *Flores* issues in January 2007. That year, I worked with a legal team to investigate conditions at the T. Don Hutto Family Detention Facility in Taylor, Texas; to represent the families detained there, many of whom were seeking asylum; to litigate numerous *Flores* violations at the facility; and to settle the case. When our investigation began, I saw detained children wearing identical prison uniforms. I met with children who were not allowed to go outdoors for an entire month. I learned that children were detained in small cells for 11 to 12 hours each day for weeks and months, denied sufficient food, denied toys and books, and denied privacy when using the toilet. Despite their urgent needs, many children did not have access to adequate medical, dental, and mental health treatment and were denied meaningful educational opportunities. Guards frequently disciplined children by threatening to separate them permanently from their parents. By the time the case settled in August 2007, some families had been detained at Hutto for nearly a year. The settlement resulted in improved conditions at Hutto, shortened how long families would be detained there, and required judicial oversight of the facility.¹³ Hutto was shut down as a family detention facility in 2009.

In 2014, I established the Immigrants' Rights Clinic at Columbia Law School. As part of my work with the clinic, I have represented hundreds of children and families seeking asylum and other forms of immigration relief.

In January 2015, I began providing *pro bono* legal services to the mothers and children detained at the South Texas Family Detention Center in Dilley, Texas. Nearly all the mothers and children detained there were seeking asylum or other humanitarian relief. The administration claimed the power to detain these families during the pendency of their immigration proceedings for weeks and months on end for the purpose of deterring future asylum seekers. In February 2015, the U.S. District Court for the District of Columbia in *R.I.L.-R. v. Johnson* held that this rationale for detaining families was impermissible.¹⁴ That same month, *Flores* plaintiffs' counsel challenged the administration's failure to expeditiously release children from family detention facilities. In subsequent months, *Flores* plaintiffs' counsel filed hundreds of pages of evidence documenting violations of the *Flores* Settlement Agreement at these facilities. I submitted detailed written testimony supporting the *Flores* plaintiffs to the U.S. District Court for the Central District of California on August 14, 2015. In my testimony, I expressed particular concern about the extended periods of time—weeks and months—that families were being detained at Dilley. The District Court ruled favorably for the *Flores* plaintiffs on August 21, 2015, holding that the *Flores* Settlement Agreement applies to children detained with their mothers and generally requiring that children be released to their mothers within twenty days of apprehension.¹⁵ The U.S. Court of Appeals for the Ninth Circuit affirmed in part and reversed in part the district court's ruling. In an opinion issued on July 6, 2016, the

¹³ *In re Hutto Family Det. Ctr.*, No. 1:07-cv-164-SS, Dkt. 94 (W.D. Tex. Aug. 29, 2007).

¹⁴ *R.I.L.-R. v. Johnson*, 80 F. Supp. 3d 164, 182 (D.D.C. 2015).

¹⁵ *Flores v. Lynch*, 212 F. Supp. 3d 907 (C.D. Cal. 2015).

Ninth Circuit held that the *Flores* Settlement Agreement applies to all immigrant children in federal custody but ruled that the Agreement did not require the government to release detained parents for the purpose of family reunification.¹⁶

The following year, on June 27, 2017, the U.S. District Court for the Central District of California issued an Order interpreting the *Flores* Settlement Agreement to require that children be provided with “soap, towels, showers, dry clothing, [and] toothbrushes”¹⁷ while in CBP custody. The Order further specifies that children in CBP custody be provided with adequate access to clean drinking water, access to edible food, and “adequate temperature controls at a reasonable and comfortable range.”¹⁸

Over the past year, at the invitation of *Flores* plaintiffs’ counsel, I have participated in inspections of federal immigration detention facilities and interviews with detained immigrant children pursuant to Paragraph 32 of the *Flores* Settlement Agreement. That paragraph entitles Plaintiffs’ counsel in *Flores* to “attorney-client visits with class members,” *i.e.*, children detained in federal immigration custody. In July 2018, I interviewed children detained at Casa Padre, a converted Walmart managed by Southwest Key Programs in Brownsville, Texas, and I participated in a tour and inspection of that facility. In March 2019, I interviewed children detained at the unlicensed influx facility in Homestead, Florida. The Homestead facility is run by Comprehensive Health Services, a subsidiary of Caliburn International, at an average daily cost to taxpayers of about \$750 to \$775 per day per child or \$1.2 million a day.¹⁹ Following both of these site visits, I was concerned about numerous violations of the *Flores* Settlement Agreement. I conveyed my concerns to the *Flores* plaintiffs’ counsel. I did not speak with any journalists about my findings.

Children Were Detained For Days and Weeks in Degrading and Inhumane Conditions at CBP Facilities in Texas in June 2019

During the week of June 17, 2019, I interviewed children detained at the CBP facility in Clint, Texas, pursuant to Paragraph 32 of the *Flores* Settlement Agreement. Our team of interviewers consisted of Dr. Nancy Ewen Wang, M.D., of Stanford University; Professors Warren Binford of Willamette University, Bill Ong Hing of the University of San Francisco, Kathleen O’Gorman of Illinois Wesleyan University; Nicole Austin-Hillery, Michael Bochenek, and Clara Long of Human Rights Watch; Natasha Quiroga of the Lawyers’ Committee for Civil Rights Under Law; Chapman Noam, who worked for years as a paralegal at the Center for Human Rights and Constitutional Law; and Katherine Hagan, a student pursuing her doctorate in psychology, who served as an interpreter.

¹⁶ *Flores v. Lynch*, 828 F.3d 898 (9th Cir. 2016).

¹⁷ Order, *Flores v. Sessions*, No. 2:85-cv-4544, 2017 WL 6060252, at *9 (C.D. Cal. June 27, 2017).

¹⁸ *Id.* at *6–*11.

¹⁹ John Burnett, *Inside the Largest and Most Controversial Shelter for Migrant Children in the U.S.*, NPR (Feb. 13, 2019) (“The average daily cost to care for a child at an influx facility is about \$775 a day, according to Evelyn Stauffer, press secretary at the U.S. Department of Health and Human Services. With nearly 1,600 children at Homestead, that puts the burn rate at over \$1.2 million a day.”); Gabriela Resto-Montero, *Democratic candidates demand closure of for-profit child detention facility*, Vox (June 30, 2019) (“The Homestead facility costs US taxpayers \$1 billion a year to run, which breaks down to roughly \$750 per child per day.”).

Three weeks before our visit, *Flores* plaintiffs' counsel notified the U.S. government that a team would be coming to the El Paso Sector to interview children in detention. CBP staff at Clint received notice of our visit days prior to June 17, 2019.

When my colleagues and I arrived at the Clint facility on the morning of June 17, 2019, CBP counsel Lisa Donaldson provided us with a roster indicating that 351 children were detained at the facility. Matthew Harris, the Chief Agent for CBP at Clint, stated that the facility was designed for 104 or 106 adults. Neither CBP counsel nor CBP officers offered any information or explanation as to how Clint was handling the extra detained children. When we asked for an explanation, Ms. Donaldson instructed Agent Harris not to respond and advised that our questions would not be answered unless they were submitted to her in writing first. The following week, Agent Harris stated that more than 700 children had been detained at Clint at times this year.

Each morning from June 17 to June 20, 2019, CBP counsel gave our team a list of children who were supposedly detained at Clint that day. We quickly learned that these lists did not accurately reflect the children who were available for interviews or who were actually detained in the facility. Each day, when we asked to interview children on the lists, we were informed numerous times by CBP officers that the requested children were not detained at Clint at that time or that they were in the "quarantine" and therefore unavailable to meet with us.

In total, our team requested to meet with more than 100 children at Clint. Of that number, CBP guards actually brought nearly 70 children to meet with us. Our team tried to complete in-person interviews with as many of these children as possible in conference rooms that CBP had designated for our use. We also spoke with several children subjected to quarantine by phone on June 18, 2019. After we completed two phone interviews with quarantined children, CBP banned our subsequent phone access to quarantined children.

From June 17 to 19, 2019, I personally interviewed fifteen children detained at Clint. I met with additional children who could not be interviewed because of their distress. I also observed many of the children being interviewed by my colleagues.

Throughout the week, CBP guards brought us a number of children who were too frightened or traumatized to speak. For example, when I tried to converse with a six-year-old girl detained alone at Clint without any family members, she just repeated over and over and over, "I'm scared. I'm scared. I'm scared." She could not even say her name or her age. I was not able to learn any information about her. I had to return her to the guards. In my more than 12 years of working with immigrants, including traumatized children, I have never before met with anyone—adult or child—who could only repeat that they were afraid.

Based on our meetings with children, I learned that infants, toddlers, children, and teenagers up to the age of 18 were detained at Clint. The youngest child I met with was five months old. These children had been detained in CBP custody for days, weeks, and up to nearly a month. These prolonged detentions took place notwithstanding the TVPRA's requirement that children be transferred out of CBP custody within 72 hours.

I was appalled by what I saw at Clint. I saw and smelled children who were dirty. I saw children who wore clothing that was visibly stained with dirt, nasal mucus, and breastmilk. None of the children I interviewed reported having access to soap to wash their hands. Many children had not showered or bathed for days. Some had not showered or bathed once since crossing the border. Nearly all the children were wearing the same clothing that they had on when they crossed the border into the United States. All reported that they did not have access to clean clothing. Some children had not brushed their teeth once since crossing the border. No child was offered an opportunity to brush their teeth regularly.

Because of the lack of access to basic hygiene, a number of the children smelled terrible. Typically, when I interview children in detention centers, I try to sit near them, in an effort to build rapport and trust as we discuss sensitive and traumatic issues. I tried my best to sit near all the children I interviewed in Clint. Multiple children had a strong stench emanating from them because they were dirty and had not showered.

Children reported being hungry. By my third day of interviewing children at Clint, I could not stand by doing nothing for hungry children any longer. I offered three children bananas and clementines. The children ate them rapidly. After I interviewed these three children, I checked in with a guard to ensure that they could eat lunch, because each child had reported being hungry nearly every day at Clint and waking at night with hunger pangs. The guard took the children away, then returned with them very quickly. When the three children returned to the conference room, I asked whether they had eaten. Given how little time had passed since they left the room, I was incredulous when they each said, "Yes." The guard confirmed: "They ate. They were really hungry."

Children were traumatized. They consistently cried and some wept during our interviews. One six-year-old boy did not seem able to verbalize responses to most of my questions. He could not even tell me his name. I learned from guards and CBP counsel that this little boy did not have any family members detained with him at Clint. I spent nearly an hour with this child, first trying to interview him and then just letting him sit on my lap while I rubbed his back. He wept almost inconsolably for most of the time. At one point, I started tearing up as well. CBP counsel saw us together, and I later pleaded to have this child be appropriately cared for. Eventually a CBP officer gave this child a lollipop as an incentive to bring him back to his cell.

Children expressed fear of the guards at Clint. A fifteen-year-old girl I spoke with was too scared to have her name associated with the declaration that she wanted to share with the Judge overseeing the *Flores* case. She explained that she was scared of retaliation and harm by the guards if they learned her identity. She then cried. Other children reported that, despite their hunger, they were too scared to ask guards for more food.

Children appeared to be sick. Many had nasal mucus dripping out of their noses. Many were coughing. Given the general absence of tissues in the facility, many children wiped their noses on their clothing, hands, and arms. Some children did not bother to wipe their noses at all, so had nasal mucus dripping down their faces. On June 17, 2019, I met with a two-year old girl and her teenage mom. The two-year-old child appeared listless, without any energy, and simply

lay in her mother's arms and eventually fell asleep. She appeared ill. By the following day, both she and her mother were quarantined.

Children at Clint did not have appropriate adult care and supervision. CBP guards required children to take care of babies, toddlers, and other young children unrelated to them. My colleagues Warren Binford and Kathleen O'Gorman met with a girl tasked with caring for a two-year-old boy whom, she said, never spoke. The girl did not think that the little boy needed a diaper, and he was not wearing a diaper. During their interview, the little boy started crying as he peed all over himself and the chair on which he had been sitting.

During my three days at Clint, I witnessed CBP officers dressed in full uniforms with hand guns at their waists. One day, I witnessed a CBP officer wearing a face mask. Another CBP officer told me, "A lot of officers are getting the flu and colds."

During the week of June 10, 2019, my colleagues on the *Flores* team—a pediatrician and lawyers—interviewed children at the CBP facility on Ursula Avenue in McAllen, Texas. Just like our team at Clint, they found children who were dirty, hungry, sick, scared, and detained for prolonged periods of time. They identified five babies at Ursula who needed immediate hospitalization and who were admitted to the neonatal intensive care unit of a local hospital.

During the week of June 17, 2019, my colleagues on the *Flores* team also conducted approximately ten interviews with children detained at the Santa Teresa CPB facility and three interviews with children detained at the El Paso Station CBP facility. Both these facilities are in the El Paso Sector.

In Their Own Words: Children's Experiences in CBP Custody in June 2019

As part of our *Flores* interviews, our teams asked children whether they would like to tell the Judge overseeing the *Flores* case about their experiences in the United States. Most children chose to do so. Here are some of the children's experiences in their own words:

I started taking care of [a five-year-old girl] in the Ice Box after they separated her from her father. I did not know either of them before that. She was very upset. The workers did nothing to try to comfort her. I tried to comfort her and she has been with me ever since. [This five-year-old girl] sleeps on a mat with me on the concrete floor. We spend all day every day in that room. There are no activities, only crying. (Age 15, female).²⁰

There are little kids here who have no one to take care of them, not even a big brother or sister. Some kids are only two or three years old and they have no one to take care of them. (Age 11, male).²¹

²⁰ Decl. of L-R-C-, Ex. 15, in support of Plaintiffs' Application for Temporary Restraining Order, *Flores v. Sessions*, No. 2:85-cv-4544 (filed June 26, 2019) [hereinafter "*Flores* Plaintiffs' June 2019 TRO"].

²¹ Decl. of K-S-P-P-, Ex. 5, in support of *Flores* Plaintiffs' June 2019 TRO.

I am in a room with dozens of other boys. Some have been as young as 3 or 4 years old. Some cry. Right now, there is a 12-year-old who cries a lot. Others try to comfort him. One of the officers makes fun of those who cry. (Age 17, male).²²

One day I asked a teenager if she was the mother of a young baby girl who was only six meses o [months or] one year old. The teenager said no. She said that she had to take care of the baby because the baby's mother was pregnant and had been taken to the hospital. The baby was here without her mother for eight or nine days. (Age 17, female).²³

A Border Patrol Agent came in our room with a two-year-old boy and asked us, "Who wants to take care of this little boy?" Another girl said she would take care of him, but she lost interest after a few hours and so I started taking care of him yesterday. His bracelet says he is two years old. I feed the 2-year-boy, change his diaper, and play with him. He is sick. He has a cough and a runny nose and scabs on his lips. He was coughing last night so I asked to take him to see the doctor and they told me that the doctor would come to our room, but the doctor never came. The little boy that I am taking care of never speaks. (Age 15, female).²⁴

At Ursula, we are in a metal cage with 20 other teenagers with babies and young children. We have one mat we need to share with each other. It is very cold. We each got a mylar blanket, but it is not enough to warm up. There are benches but we cannot sleep there. Sometimes it is so crowded we cannot find a place to sleep, so they allow a few of us to sleep outside the fenced area. The lights are on all of the time. (Age 16, female).²⁵

I'm hungry here at Clint all the time. I'm so hungry that I have woken up in the middle of the night with hunger. Sometimes I wake up from hunger at 4 a.m., sometimes at other hours. I'm too scared to ask the officials here for any more food, even though there is not enough food here for me. . . . (Age 12, male).²⁶

At Ursula, we have not been able to shower. The toilet is out in the open in the cage, there is no door for any privacy. There is water but no soap to wash our hands. There are no paper towels to dry our hands. We have not been given a toothbrush or toothpaste to brush our teeth. (Age 17, male).²⁷

We slept on mats on the floor and gave us aluminum blankets. They took our baby's diapers, baby formula, and all of our belongings. Our clothes were still wet and we were very cold, so we got sick... I've been in the US for six days and I have never been offered a shower or been able to brush my teeth. There is no soap and our clothes are dirty. They have never been washed. (Age 16, female).²⁸

²² Decl. of U-E-P-F, Ex. 11, in support of *Flores* Plaintiffs' June 2019 TRO.

²³ Decl. of J-V-S-M-, Ex. 53, in support of *Flores* Plaintiffs' June 2019 TRO.

²⁴ Decl. of A-M-O-R-, Ex. 41, in support of *Flores* Plaintiffs' June 2019 TRO.

²⁵ Decl. of E-T-P-E-, Ex. 23, in support of *Flores* Plaintiffs' June 2019 TRO.

²⁶ Decl. of L-G-L-L, Ex. 8, in support of *Flores* Plaintiffs' June 2019 TRO.

²⁷ Decl. of E-J-A-S, Ex. 1, in support of *Flores* Plaintiffs' June 2019 TRO.

²⁸ Decl. of J-O-A-M, Ex. 4, in support of *Flores* Plaintiffs' June 2019 TRO.

[Three] days ago my baby soiled his clothes. I had no place to wash the clothes so I could not put them back on my baby because when he went to the bathroom his poop came out of his diaper and all over his clothing. Since then, my baby of only three months has only been wearing a small little jacket made of t-shirt material. I have nothing else for my son to wear.... I have been told they do not have any clothes here at this place. I just want my baby to be warm enough. I am having to make sure I carry my baby super close to me to keep his little body warm. (Age 17, female).²⁹

Once, I needed clean clothes for my baby because she threw up but when I asked for them I was told they didn't have any available. She is still in the same dirty clothes. (Age 17, female).³⁰

My baby got wet and I had to take his pants off two days ago and I have not been able to get any pants for him. (Age 18, female).³¹

They told us that we could only have one layer of clothing, and they threw away the rest of our clothes in the garbage. (Age 16, male).³²

The day we arrived, my [one-year-old] baby became sick. She [] could not open her eyes and had a fever which got much worse during the day. I asked the guard for help and he told me to "just deal with it." I asked for help again, and was ignored. The third time I asked, I was crying because she was so much worse I was very worried for her. After two days, they took her to the doctor." (Age unknown, female).³³

The bathrooms at Ursula do not have water for handwashing. (Age 16, female).³⁴

There are toilets near the cage but not inside. So we have to ask the guards to use the bathroom and they don't always let us use them. There is no water or soap to wash our hands or the baby. (Age 16, female)³⁵

I have no place to wash the bottle that my baby uses. Every two or three days I try to beg the officers to give me a new one because I am worried about the cleanliness of the bottle. I have been here without bathing for 21 days. . . . Then [the officers] start yelling at us saying things like 'You don't belong here.' 'Go back to where you came from.' 'You are pigs.' 'You came here to ruin my country.' They try to intimidate us. I have seen officers hit other detainees in the stomach There is another child that is in the same cage with my other nephew, M-, that was also hit by an officer. . . . a special needs child [] was here for more than 16 days In 21 days I have not been given a phone call. (Age 14, female)³⁶

²⁹ Decl. of Y-M-M-C-, Ex. 36, in support of *Flores* Plaintiffs' June 2019 TRO.

³⁰ Decl. of C-G-G-P-, Ex. 18, in support of *Flores* Plaintiffs' June 2019 TRO.

³¹ Decl. of S-Y-M-C-, Ex. 34, in support of *Flores* Plaintiffs' June 2019 TRO.

³² Decl. of K-P-T-M-, R-A-T-P, B-D-T-P-, Ex.14, in support of *Flores* Plaintiffs' June 2019 TRO.

³³ Decl. of M-I-R-C-, Ex. 30, in support of *Flores* Plaintiffs' June 2019 TRO.

³⁴ Decl. of K-G-G-Q, Ex. 27, in support of *Flores* Plaintiffs' June 2019 TRO.

³⁵ Decl. of K-J-J-H-, Ex, 25, in support of *Flores* Plaintiffs' June 2019 TRO.

³⁶ Decl. of W-A-C-L-, Ex. 35, in support of *Flores* Plaintiffs' June 2019 TRO.

We have been here for 18 days and they never gave us a shower or bath until yesterday.³⁷

We have only bathed once since being detained. On June 4th, we were taken to an area with about 28 showers. We bathed and brushed our teeth. Since then, however, we have not been able to bathe. I have not been able to wash and clean my baby since June 4th. We do not have toothbrushes or toothpaste or towels in the cages. My daughter's onesie is very dirty. I have not been able to wash it since June 4th. (Age 17, female)³⁸

I was given a blanket and a mattress, but then, at 3:00 a.m., the guards took the blanket and mattress. My baby was left sleeping on the floor. In fact, almost every night, the guards wake us at 3:00 a.m. and take away our sleeping mattresses and blankets. They leave babies, even little babies of two or three months, sleeping on the cold floor. For me, because I am so pregnant, sleeping on the floor is very painful for my back and hips. I think the guards act this way to punish us. . . . The bathrooms near us are very dirty. Sometimes, to punish us, the guards close the bathrooms and do not permit us to use the toilet. I am very pregnant, so I must urinate often. But when the bathrooms are closed, I just have to bear it. (Age 17, female)³⁹

We were put into a three sided cage with the fourth side open to the outside filled with loads of people. Too many to count. Children, pregnant mothers and mothers with babies. There was nowhere to sit there were so many people. We had to wait for someone to stand up and quickly take their place on the ground. My baby was naked outside with no blanket for all four days we were there. We were freezing. My baby couldn't sleep because the ground was cement with rocks, and in some places only rocks, and every time she moved the sharp ground would scratch her. There were many pregnant women who had to sleep on rocks and I felt very badly for them. (Age 16, female)⁴⁰

The day after we arrived here, my baby began vomiting and having diarrhea. I asked to see a doctor and they did not take us. I asked again the next day and the guard said, "She doesn't have the face of a sick baby. She doesn't need to see a doctor." My baby daughter has not had any medicine since we first arrived. She has a very bad cough, fever and continues to vomit and have diarrhea. (Age 16, female)⁴¹

I was held in the second center for about eight days. . . . There were very few bathrooms for the number of people who were there, and there was always a line. Sometimes, little kids could not wait and would urinate or defecate on themselves while waiting in line. (Age 17, female)⁴²

³⁷ Decl. of G-S-C-C-, with F-I-C-C- (an Infant), Ex. 52, in support of *Flores* Plaintiffs' June 2019 TRO.

³⁸ Decl. of A-I-V-F-, Ex. 16, in support of *Flores* Plaintiffs' June 2019 TRO.

³⁹ Decl. of M-G-F-B-, Ex. 31, in support of *Flores* Plaintiffs' June 2019 TRO.

⁴⁰ Decl. of B-P-M-M-, Ex. 17, in support of *Flores* Plaintiffs' June 2019 TRO.

⁴¹ *Id.*

⁴² Decl. of N-C-O-V-, Ex. 39, in support of *Flores* Plaintiffs' June 2019 TRO.

This whole time I have been detained, I have not been allowed a shower, nor has my niece been allowed to shower. I have also not had an opportunity to brush my teeth. I haven't asked to shower or for a toothbrush because I have heard other people ask for a bathroom or toothbrush but officers get angry. They have said many things, including "you're not in your country," and "you're being punished here, not to be asking for things." On Monday morning, my niece had a very high fever of about 39 degrees Celsius (about 102 degrees Fahrenheit). I was worried that being detained in the cell, being crammed with so many people, and the lack of good food is what has also made it worse for my niece. (Age 17, female)⁴³

I am afraid of the guards. On Saturday, I was trying to leave our cell to go to the bathroom and a guard said, "where are you going?" I said, "I'm going to the bathroom." He said, "you don't even say thank you." Then he pushed me in the chest back into the cell and slammed the door. After that, they locked the door to the cell and we have to ask for permission go to the bathroom. I don't want to ask to go to the bathroom because I'm afraid they are going to yell at us. (Age 14, male)⁴⁴

We can see R- [female sibling and cousin] through the fence, and she can see us, but we are never permitted to hug each other or hold hands or even talk with each other. We are not permitted to go near the fence. If any child goes near the fence, the guards yell at us. They scream, "You cannot be here." It is very scary when they yell. One time, when a boy approached the fence to talk with a girl, the guard screamed at him, "The next time you will have a problem." The guard grabbed the boy by the back of the neck and dragged him away. We have never seen this boy again. We do not know what happened to him. It is terrifying to be here. . . . We are hungry and we need to conserve our energy to stay alive here. (R- age 16, female; K- and B- ages 16 and 14, male)⁴⁵

The bathrooms do not have any walls. There is no privacy. Everyone can see me when I am using the toilet which is humiliating. We can wash our hands in the bathroom but there is no soap to use. E- [five-month-old baby] and I have not been allowed to bathe since we were apprehended. We have also not been given toothbrushes or toothpaste. (Age unknown, female)⁴⁶

I am in room 203 with between 10 and 20 girls. . . . Yesterday after lunch a nurse brought the lice comb and hairbrush. A little while later a guard came back and asked for the lice comb and hairbrush, we did not know where they were. We looked at each other to see who had the combs. The guard was angry and asked in a rough voice who had the brushes. The other kids were scared, and so was I. I felt dizzy and started to cry. He said that we had ten minutes to look for the combs, and that if we could not find them, we were going to be without beds and without covers. He gave us ten minutes. All of us were panicked looking for the combs. We looked under the beds. Kids asked each other if they had seen the brushes. He came back and yelled at us, asking if we had found the

⁴³ Decl. of E-R-G-E-, Ex. 38, in support of *Flores* Plaintiffs' June 2019 TRO.

⁴⁴ Decl. of A-F-T-C-, Ex. 43, in support of *Flores* Plaintiffs' June 2019 TRO.

⁴⁵ Decl. of K-P-T-M-, R-A-T-P-, B-D-T-P-, Ex. 14, in support of *Flores* Plaintiffs' June 2019 TRO.

⁴⁶ Decl. of E-Y-F-C-, Mother of E-T-M-F-, Ex. 49, in support of *Flores* Plaintiffs' June 2019 TRO.

combs. We had to tell him that we couldn't find them. When we told him, officers came into the room and started taking everything away. They took pillows and blankets. We had a blanket that we were using to hold up in front of the bathroom because there is not a door. The officer took even that one. He said we were going to sleep in the floor. He said it was punishment for losing the combs. What he said was true. We all slept on the hard tile floor last night. Nobody tried to climb into a bed because the guard said that they were going to take away anybody who tried to get into the bed. They told us that we could not have blankets anymore. (Age 7, female)⁴⁷

The guards at the second facility were mean and scary. They yelled at us. One day the guards demanded to know who had food. 'Whoever has food will go to prison,' they yelled. They wanted to know if anyone had snuck in food in the cell. They found one kid who was 15 or 16 years old who had a burrito, pudding, and juice. The officials handcuffed his wrists. My cousin and I were very shocked and scared. (Age 12, male)⁴⁸

My [six-year-old] sister has been very sick. The doctor told her not to cry because if she cries she will get sicker. (Age 8, female)⁴⁹

In my cage there is a girl in a wheelchair. When she was in Mexico she got cramps and now she can't walk. No one is helping her. She's been here 4 days. An officer came and in front of all of us said it was a total lie that she was sick. Once when we were waiting to go into the shower, women officers came and told us that we got pregnant just to be able to come to the US and that we aren't worth anything. (Age 17, female)⁵⁰

The Administration Obstructed Our Access to the Sickest Children at Clint

Our team requested interviews with ten children who had been quarantined. We only learned that each of these children was in the quarantine after requesting that CBP officers bring them to meet with us.

On June 18, 2019, I repeatedly asked CBP to interview children who were quarantined. I was extremely concerned about the sick children detained there, a number of whom I learned had influenza. When I first asked a CBP guard for physical access to the quarantine, I was immediately told "no." I then explained that I would be happy to sign waivers to address any liability concerns that government officials might have. I was again told no. I then asked for the opportunity to speak with quarantined children by telephone. Again, I was told no. I explained to the CBP officer that the children in the quarantine were welcome to use my cell phone for interviews. The CBP guard again said no, and I asked her to please discuss my request with CBP counsel. Reluctantly, the officer agreed to do so. Eventually, our team was permitted to conduct three telephone interviews of children in the quarantine on June 18, 2019—these children were 16 and 17 years old. Our team completed interviews with two of the three children, who told us that guards were within earshot during the interviews. CBP subsequently banned all phone

⁴⁷ Decl. of G-M-C-B-, Ex. 51, in support of *Flores* Plaintiffs' June 2019 TRO.

⁴⁸ Decl. of L-G-L-L-, Ex. 8, in support of *Flores* Plaintiffs' June 2019 TRO.

⁴⁹ Decl. of M-Z-L-, Ex. 10, in support of *Flores* Plaintiffs' June 2019 TRO.

⁵⁰ Decl. of L-L-M-G-, Ex. 29, in support of *Flores* Plaintiffs' June 2019 TRO.

access for children in the quarantine, leaving us unable to complete the interview with the third child or to interview any additional children. CBP Watch Commander Perales stated that we should never have been allowed to conduct phone interviews with children in the quarantine.⁵¹

No one from our team was able to speak with the babies, toddlers, and young children in the quarantine. Based on our phone interviews, we believe that the quarantine included children as young as two-years-old. Given the CBP phone ban, their young ages, and our sensitive questions, it was impossible to interview them by phone.

On the morning of June 19, 2019, I pleaded with CBP counsel Donaldson for a visit to the children in the quarantine. I explained that we simply could not conduct phone interviews with young children in the quarantine. I further agreed that if I were permitted to interview children in the quarantine, I would leave the facility immediately to limit potential virus exposure to others. Several of my colleagues agreed to abide by the same conditions in order to interview quarantined children. Our requests were denied.

Because CBP blocked our access to the quarantine at Clint, we are left with the children's reports of the conditions there. A 14-year-old girl explained:

I was in the first cell for seven days, sleeping with no mattress. . . . It is hard to sleep when you don't have a mattress. I then came down with the flu. I then went into the flu cell for seven days. When you are in the flu cell, you also sleep on the floor, but you have a mattress. There were 21 other kids in that space with the flu. I had a fever in there and I was shaking. Some of the other kids were vomiting. They all had fevers. No one was taking care of the kids with the flu. . . . We were not allowed to leave the flu cell, ever. It was very boring. I did nothing to entertain myself, nor was anything offered. It was sad, very sad. I felt locked up and closed in. In the other cells, we can go out of the cell to get water one time a day. (Age 14, female)⁵²

An 11-year-old held in Clint custody for 13 days, despite having parents in New Jersey, shared:

About three days ago I got a fever. They moved me alone to a flu cell. There is no one to take care of you there. They just give you pills twice a day. I also am having an allergic reaction all over my skin. My skin is itchy and red and my nose is stuffed up. Two times they gave me a pill for it but not anymore.⁵³

A 16-year old girl detained at Clint for 11 days, despite having an uncle in Virginia, and interviewed by phone while she was in the quarantine, stated:

I'm in an isolation room now because I have the flu. I wasn't sick when I arrived. I think everyone here [in the quarantine] has the flu. . . . They take my temperature 2 times every day. In the morning, they give me 5 pills. I think one is for infection, and the other 4 are

⁵¹ Decl. of Kathleen O'Gorman, Ex. 67, in support of *Flores* Plaintiffs' June 2019 TRO.

⁵² Decl. of M-J-S-, Ex. 59, in support of *Flores* Plaintiffs' June 2019 TRO.

⁵³ Decl. of A-J-E-M-, Ex. 44, in support of *Flores* Plaintiffs' June 2019 TRO.

chewable, but I don't know what they are for. At night they give me a pill to sleep. I feel good now, and the last 3 times they checked me, they said I didn't have a fever. I want to leave this place, but I don't know when I will. They haven't said. There are 7 of us in this room. Two of us are 16, one is 15, one is 17, and the others I'm not sure. There is a baby with its mother. The baby is sick, not the mother. There are 2 younger girls who don't speak Spanish, so I don't know anything about them. One is from Guatemala, but the other I have no idea. They don't talk to each other, so I don't think they speak the same language. I don't know how old they are, but they wear diapers. The older girls try to help take care of the littler girls. I clean them and help them get dressed. Another girl who is in here for the flu changes their diapers. There is 1 bed in the room. The younger children share the bed. The others sleep on the floor. I'm always cold, because the air conditioning bothers me.⁵⁴

CBP Obstructed Our Access to Numerous Other Children in Its Custody

Our team would have been able to meet with more children at Clint if CBP had allowed us to visit children in the quarantine or provided accurate daily lists of detained children. For us, the process of learning that a child was either no longer detained at Clint or was in the quarantine was time-consuming. When we asked to interview a child, one or more CBP officers went to look for that child in the cells and cages. The officer or officers often returned some time later to inform us that the child was no longer detained at Clint or that the child was in the quarantine. We then had to review the list of children once more, request a different child for an interview, and repeat the entire process again. As a result of the inaccuracy of the daily CBP lists and the ban on visiting quarantined children, our *Flores* team lost critical time that we should have spent interviewing detained children. I made multiple requests to CBP counsel Donaldson for accurate, up-to-date lists of children. My colleagues did the same. But we did not receive such lists.

Other seemingly inexplicable delays prevented us from interviewing more children while we were at Clint. For example, on the afternoon of June 18, 2019, our team notified the government of multiple children we wanted to interview the following morning at 8:30 a.m. We respectfully requested that these children be brought to us as promptly as possible on June 19, 2019. But by 9:15 a.m. on June 19, only one of those children had been brought to us for an interview. We were informed that the other children had been released. We quickly requested additional children to interview. But I did not have the opportunity to meet with a child until after 10 a.m. that morning.

CBP Denied Our Requests for a Tour of Clint and Refused Donations

While our *Flores* team was allowed to interview children, we were never allowed a tour of the facility. On June 17, 2019, I observed as my colleague Warren Binford demanded that our *Flores* team be permitted to tour the Clint facility. CBP counsel Donaldson emphatically denied that request. Our team was only permitted to use the conference rooms CBP had designated for our interviews. We were not permitted to see the rest of the facility. Children reported that they had never before been to the part of the facility where our interviews took place.

⁵⁴ Decl. of K-M-C-T-, Ex. 6, in support of *Flores* Plaintiffs' June 2019 TRO.

On June 19, 2019, I observed as my colleague Kathleen O’Gorman asked Ms. Donaldson if CBP would consider accepting donations of basic hygiene items and age-appropriate items, such as books and teddy bears, for children detained at Clint. Ms. Donaldson refused. That same day, I asked Ms. Donaldson if there were any counselors or social workers at Clint. She replied, “I do not know.”

Children Detained in CBP Custody Are Now Facing An Urgent Humanitarian Crisis

Some of the conditions that we witnessed in Clint and Ursula are not aberrational; they reflect CBP facilities as a whole. Since 2014, I have interviewed hundreds of children and families who have been detained in CBP custody. These children and families have consistently reported that CBP facilities are overcrowded, filthy, and do not allow individuals any privacy even while toileting; that there is insufficient and poor quality food; that temperatures are often very cold; that lights are often on for 24 hours; that both children and adults must sleep on concrete floors or mats; that showers are generally unavailable; and that many of those in custody are sick. This is why the *Flores* plaintiffs have challenged detention conditions for children since the mid-1980s.

But children in CBP custody are now facing an urgent humanitarian crisis unlike any we have seen before. Neither I nor my colleagues on the June 2019 inspections have ever witnessed conditions as appalling as those we saw in Clint and Ursula. Never before have we learned of 700 children being detained in a facility built for 104 or 106 adults. Never before have we met with children detained in CBP custody for a week, much less weeks, and nearly a month. Never before have we had to directly intervene to get critically ill babies admitted to the hospital. Seven children have died in the past year in federal immigration custody or just after being released, following a decade of no reported deaths. Just yesterday, on July 9, 2019, news broke about reports prepared by HHS case managers between April 10 and June 12, 2019 detailing allegations of sexual assault of and retaliation against children detained by CBP in Yuma, Arizona.⁵⁵

The ban on basic hygienic measures at CBP facilities represents a cruel policy choice. Just last month, the administration argued before the U.S. Court of Appeals for the Ninth Circuit in the *Flores* case that toothbrushes, soap, and beds are not necessary for children in CBP custody.

The systemic overcrowding in CBP facilities for children and families is a cruel policy choice. According to sworn testimony from a case challenging the detention of a young child and his mother, as of 2015, CBP “did not track the number of individuals detained per cell. Nor did the CBP stations have a maximum occupancy capacity for each cell.”⁵⁶ Just last month, the U.S. Department of Homeland Security (DHS) Office of the Inspector General (OIG) observed

⁵⁵ Jacob Soboroff & Julia Ainsley, *Migrant kids in overcrowded Arizona border station allege sex assault, retaliation from U.S. agents*, NBC News (July 9, 2019).

⁵⁶ Defendant’s Responses to Plaintiffs’ Set of Interrogatories, *Suny Rodriguez Alvarado & A.S.R. v. United States*, 16-cv-5028 (D.N.J. Nov. 30, 2017) (on file with author).

“dangerous overcrowding and prolonged detention of children and adults” in CBP custody in the Rio Grande Valley.⁵⁷

The administration’s recent opposition to having independent doctors triage children’s medical needs at CBP facilities is another cruel policy choice. On June 26, 2019, *Flores* plaintiffs’ counsel demanded that independent doctors have access to CBP facilities in the Rio Grande Valley and El Paso regions to identify the children with the most urgent medical needs.⁵⁸ The following day, the administration argued before the U.S. District Court for the Central District of California that this would be a “coercive remed[y].”⁵⁹ The administration claimed to need more time, “an opportunity to fully review and respond.”⁶⁰ The administration also said that the children’s request for independent doctors goes “beyond simply ordering that [the government] comply with the plain terms of the *Flores* Settlement Agreement”⁶¹—an argument strikingly similar to the administration’s argument before the Ninth Circuit that “safe and sanitary” conditions do not require the government to provide detained children with toothbrushes, soap, and beds.

The Administration Fails To Disclose How Long Children Are Detained In CBP Custody

The administration has failed to share any data with *Flores* plaintiffs’ counsel about the lengths of time that children are detained in CBP custody. Children at Clint were detained in CBP custody for far longer than the 72-hour limit imposed by the TVPRA. Until I got to Clint, I had never heard of children being in CBP custody for weeks and up to nearly a month. On a single day – June 15, 2019 – Dr. Dolly Lucio Sevier, a pediatrician on the *Flores* team, met with 38 children detained at the Ursula CBP facility for times ranging from four days to 24 days.⁶² Among the children we found languishing in CBP custody in June 2019 were a newborn detained for seven days,⁶³ an eight-month-old detained for fifteen days,⁶⁴ a two-year-old boy detained for twenty days,⁶⁵ and an eight-month-old baby⁶⁶ and six-year-old and eight-year-old sisters detained for three weeks.⁶⁷

Limited data subsequently revealed by the OIG corroborates that children are being detained in CBP custody for extended periods of time. According to the OIG, during one day in

⁵⁷ U.S. DEP’T OF HOMELAND SECURITY OFFICE OF INSPECTOR GENERAL, MANAGEMENT ALERT – DHS NEEDS TO ADDRESS DANGEROUS OVERCROWDING AND PROLONGED DETENTION OF CHILDREN AND ADULTS IN THE RIO GRANDE VALLEY (July 2, 2019), at 2 (*available at* https://www.oig.dhs.gov/sites/default/files/assets/2019-07/OIG-19-51-Jul19_.pdf).

⁵⁸ Memorandum of Points and Authorities in Support of Plaintiffs’ Ex Parte Application for Temporary Restraining Order and Order to Show Cause Why a Preliminary Injunction and Contempt Order Should Not Issue, *Flores v. United States*, 85-cv-04544 (C.D.C.A. Jun 26, 2019), at 2–3.

⁵⁹ Response to Plaintiffs’ Request for a Temporary Restraining Order, *Flores v. United States*, 85-cv-04544 (C.D.C.A. Jun 27, 2019), at 4.

⁶⁰ *Id.* at 2.

⁶¹ *Id.*

⁶² Decl. of Dr. Dolly Lucio Sevier, Ex. 13, in support of *Flores* Plaintiffs’ June 2019 TRO.

⁶³ Decl. of K-B-A-J-, Ex. 28, in support of *Flores* Plaintiffs’ June 2019 TRO.

⁶⁴ Decl. B-P-M-M-, Ex. 17, in support of *Flores* Plaintiffs’ June 2019 TRO.

⁶⁵ Decl. of M-G-F-B-, Ex. 31, in support of *Flores* Plaintiffs’ June 2019 TRO.

⁶⁶ Decl. of G-S-C-C-, Ex. 52, in support of *Flores* Plaintiffs’ June 2019 TRO.

⁶⁷ Decl. of M-Z-L-, Ex. 10, in support of *Flores* Plaintiffs’ June 2019 TRO.

June 2019, thirty-one percent of children in CBP custody had been detained for longer than 72 hours, *i.e.*, 826 of the 2,669 children.⁶⁸ The OIG further reported:

[O]f the 1,031 UACs [unaccompanied minors] held at the Centralized Processing Center in McAllen, TX, 806 had already been processed and were awaiting transfer to HHS custody. Of the 806 that were already processed, 165 had been in custody longer than a week. Additionally, there were more than 50 UACs younger than 7 years old, and some of them had been in custody over two weeks while awaiting transfer.⁶⁹

This data snapshot confirms grave concerns about children—even very young children—being detained in CBP custody for prolonged periods of time.

The Administration Detains Children in CBP Custody Even When ORR Has Hundreds of Beds Available

The administration has claimed that it cannot transfer children to ORR custody within 72 hours because ORR does not have sufficient beds. On the morning of June 17, 2019, more than 350 children were detained in CBP custody at Clint, a facility designed for 104 or 106 adults. Many of these children had been in CBP custody far longer than 72 hours. That same day, ORR facilities had 512 available beds.⁷⁰ The following morning, on June 18, 2019, CBP counsel told our team that approximately 100 children had been transferred out of Clint. On June 19, 2019, CBP counsel again stated that approximately 100 children had been moved out of Clint.

During the week of June 17, 2019, upwards of 2,600 children were in CBP custody.⁷¹ Because of an outcry by the American public, the number of children in CBP custody plummeted the following week. By June 25, 2019, fewer than 1,000 children were in CBP custody.⁷² By July 2, 2019, only 300 children remained in CBP custody.⁷³

These numbers raise the obvious question: Why isn't the administration processing children through CBP custody rapidly at all times, as required by both the TVPRA and the *Flores* Settlement Agreement? The administration's failure to do so—until a national outcry—is intentionally cruel, unlawful, and shows callous disregard for children's well-being.

⁶⁸ U.S. DEPARTMENT OF HOMELAND SECURITY OFFICE OF INSPECTOR GENERAL, MANAGEMENT ALERT – DHS NEEDS TO ADDRESS DANGEROUS OVERCROWDING AND PROLONGED DETENTION OF CHILDREN AND ADULTS IN THE RIO GRANDE VALLEY (July 2, 2019), at 5.

⁶⁹ *Id.* at 5–6.

⁷⁰ Nomaan Merchant, *US Had Open Beds As Migrant Kids Languished at Texas Station*, ASSOCIATED PRESS (June 27, 2019), <https://www.apnews.com/79ea61cd27f5419c9b4942344870f9d8>.

⁷¹ Gabe Gutierrez & Adiel Kaplan, *Border Patrol Moves 100 Children to 'Appalling' Texas Facility*, NBC NEWS (June 25, 2019), <https://www.nbcnews.com/politics/immigration/border-patrol-moves-100-children-appalling-texas-facility-n1021481>.

⁷² Julian Aguilar, *Immigrant Children Returned to West Texas Facility Despite Reports of Squalid Conditions*, KERA NEWS (June 25, 2019), <https://www.keranews.org/post/immigrant-children-returned-west-texas-facility-despite-reports-squalid-conditions>.

⁷³ Gutierrez & Kaplan, *supra* note 71; Julia Ainsley, *Number of Migrant Children in Border Patrol Custody Drops Dramatically*, NBC NEWS (July 2, 2019), <https://www.nbcnews.com/politics/immigration/number-migrant-children-border-patrol-custody-drops-dramatically-n1025996>.

The Administration Holds Children in Custody Even When Sponsors Are Available

After children are transferred out of CBP custody, they languish in ORR custody for weeks and months. The *Flores* Settlement Agreement requires children to be released to appropriate sponsors expeditiously. More than 80% of children released from ORR custody have been reunited with family members in the United States. Nearly 100% of children released from ICE custody in the United States are released with their own parent.

Over the past year, the administration's own policies have caused the number of children in federal immigration custody to swell. In April 2018, the administration adopted a new policy toward potential sponsors: it began sharing the fingerprints of potential sponsors—and all members of their households—with ICE, resulting in the arrest of some sponsors who were unauthorized immigrants. In June 2018, ORR began fingerprint checks of all sponsors and their household members. By December 2018, 170 potential sponsors had been arrested, 109 of whom had no criminal record.⁷⁴

A chilling effect ensued, and offers of sponsorship dropped. In addition, the delays associated with ORR's new policy requiring fingerprints from all sponsors and household members added substantial time to the custody of children; ORR was simply unprepared to take and process the fingerprints of so many people. According to data from the U.S. Department of Health and Human Services, by November 20, 2018, the average length of detention for children discharged from ORR custody was 93 days, while the average length of detention for children who remained in ORR custody was 82 days,⁷⁵ up from the 34 days on average that children spent in ORR custody in Fiscal Year 2015.⁷⁶

In December 2018, ORR announced it would no longer fingerprint all adults in the household of potential sponsors. In doing so, the administration admitted, "ORR has determined the additional steps required to fingerprint all household members has had an impact on the timely release of UAC without demonstrated benefit to the safety of children after their release from ORR care."⁷⁷ In a February 2019 appropriations bill, Congress conditioned that no funds be used to detain, remove, or begin removal proceedings against any sponsor based on information ICE received from ORR. By April 2019, the average time children spent in ORR custody dropped to 48 days.⁷⁸ This is a notable improvement in release times over a five-month period. But further improvements are necessary. Children should not be detained in federal immigration custody for weeks and longer than a month when the overwhelming number of them have available sponsors.

⁷⁴ Muzaffar Chishti, Sarah Pierce & HERRICA TELUS, *Spike in Unaccompanied Child Arrivals at U.S.-Mexico Border Proves Enduring Challenge*, MIGRATION POLICY INSTITUTE (June 27, 2019), <https://www.migrationpolicy.org/article/spike-unaccompanied-child-arrivals-proves-enduring-challenge>.

⁷⁵ *Latest UAC Data – FY2019*, DEP'T OF HEALTH AND HUMAN SERVS., <https://www.hhs.gov/programs/social-services/unaccompanied-alien-children/latest-uac-data-fy2019/index.html>.

⁷⁶ Farida Jhabvala Romero, *Wait Times for Migrant Children in U.S. Custody Spiked in Recent Years, Records Show*, KQED NEWS (May 11, 2019), <https://www.kqed.org/news/11746399/thousands-of-unaccompanied-migrant-kids-held-u-s-custody>.

⁷⁷ Ray Sanchez & Dianne Gallagher, *All Migrant Children Transferred from Controversial Texas Tent Camp*, CNN (Jan. 11, 2019), <https://www.cnn.com/2019/01/11/us/tornillo-shelter-migrant-children/index.html>.

⁷⁸ *Id.*

The Administration Continues to Separate Children From Their Families Every Day

This administration continues to separate families at the border every day. During my days at Clint, I interviewed children who informed me that CBP officers had separated them from their parent or other adult family members. Three sisters—ages 4, 8, and 12—told me that after crossing the border, they were detained in a CBP facility with their dear grandmother. When they were sent into a cage, the girls huddled close to their grandmother on the cement floor for warmth. There were no beds or mats available, and the lights remained on. At 3 a.m., CBP officers forcibly separated these young girls from their grandmother, even though she showed the officers a document signed by their parents saying that she had been entrusted to care for them.⁷⁹ Days later, when I met them, the sisters still cried for their grandmother. They did not know if they would ever see her again. I could not promise them that they ever would.

Other children shared equally traumatic experiences of separation. A five-year-old boy said he had been separated from his father.⁸⁰ A six-year-old girl shared that she had been separated from her father; she did not know where she was from or where she was supposed to go.⁸¹ A teenage girl teared up in describing her forced separation from her 20-year-old sister.⁸² A teenage boy, whose separation from his mother was confirmed by CBP counsel, worried whether she was alive.⁸³ Across the southern border, every single day, children continue to be forcibly separated from their parents and other family members by CBP officers.⁸⁴

Here are the children's experiences in their own words:

[T]hey came and took our daughter and me out of the cell and separated my fiancé from us. We were all very upset. Our baby was crying. I was crying. My fiancé was crying. We asked the guards why they were taking our family apart and they yelled at us. They were very ugly and mean to us. They yelled at him in front of everyone to sit down and stop asking questions. We have not seen him since. (Age 16, female)⁸⁵

There are children who are very young here, only two or three years old, and their mother is not with them. They cry for their mothers all the time. Other children who are older try to take care of the little ones. It is an incredibly sad situation. (Age 16, female)⁸⁶

⁷⁹ See Decl. of M-F-M-O, Ex. 9, in support of *Flores* Plaintiffs' June 2019 TRO.

⁸⁰ Decl. J-I-L-Z, Ex. 3, in support of *Flores* Plaintiffs' June 2019 TRO.

⁸¹ Decl. M-F-M-O, Ex. 9, in support of *Flores* Plaintiffs' June 2019 TRO.

⁸² Decl. E-Y-F-C, Ex. 49, in support of *Flores* Plaintiffs' June 2019 TRO.

⁸³ Decl. M-J-R-R, Ex. 58, in support of *Flores* Plaintiffs' June 2019 TRO.

⁸⁴ Rick Jervis & Alan Gomez, *Trump Administration Has Separated Hundreds of Children From Their Migrant Families Since 2018*, (May 2, 2019), <https://www.usatoday.com/story/news/nation/2019/05/02/border-family-separations-trump-administration-border-patrol/3563990002/>; Meredith Hoffman, *Trump Is Still Separating Families in Possible Violation of a Court Order*, SLATE (Apr. 4, 2019), <https://slate.com/news-and-politics/2019/04/trump-family-separation-border-threats-sabraw-aclu.html>; Molly O'Toole, *Family Separations a Year Later: The Fallout — And the Separations — Continue*, L.A. TIMES (Apr. 12, 2019), <https://www.latimes.com/politics/la-na-pol-family-separation-trump-year-later-20190412-story.html>.

⁸⁵ Decl. of J-O-A-M, Ex. 4, in support of *Flores* Plaintiffs' June 2019 TRO.

⁸⁶ Decl. of E-Y-F-C, Ex. 49, in support of *Flores* Plaintiffs' June 2019 TRO.

Although the *Ms. L* injunction prohibits the government from separating children from parents absent a determination that they are unfit or present dangers to their children,⁸⁷ reports indicate that the government continues to separate children from parents. The government first reported in February 2019 that it had separated approximately 245 parents from children after the June 27, 2018 court order requiring separations to stop.⁸⁸ More recent reports indicate that this number has risen to over 700.⁸⁹

The government frequently separates families that would otherwise be protected by the *Ms. L* case by claiming that a parent's criminal history justifies separation; that the parent is an alleged gang member; or that the parent is not caring appropriately for her child. But the government's allegations are frequently riddled with flaws⁹⁰ or separations are justified based on minor crimes including nonviolent offenses.⁹¹

The *Ms. L* Litigation Seeks to Reunite Children Separated From Their Parents But Does Not Currently Require Reunification of Children Separated From Other Family Members

The *Ms. L* litigation pending in the U.S. District Court for the Southern District of California challenges the administration's policy and practice of separating immigrant children from their parents. Children as young as my four-month old client Baby Constantin were separated from a parent last year. His father was detained for months, then deported without his infant. In the initial phases of the *Ms. L* litigation, the U.S. government admitted to separating more than 2,800 children from their parents after they crossed the Southwestern U.S. border.⁹²

⁸⁷ Order at 24, *Ms. L. v. Immigration and Customs Enforcement*, No. 18-cv-428 (S.D. Cal. June 26, 2018).

⁸⁸ Joint Status Report at 12, *Ms. L. v. Immigration and Customs Enforcement*, No. 18-cv-428, (S.D. Cal. Feb. 20, 2019) ("Defendants have identified 245 new separations of children and parents that occurred between June 27, 2018 and January 31, 2019, and four cases which require more time to assess.")

⁸⁹ Michelle Goldberg, *The Terrible Things Trump is Doing in Our Name*, N.Y. TIMES (June 21, 2019), <https://www.nytimes.com/2019/06/21/opinion/family-separation-trump-migrants.html>; Nina Bala & Arthur Rizer, *Trump's Family Separation Policy Never Really Ended*, NBC NEWS (July 1, 2019), <https://www.nbcnews.com/think/opinion/trump-s-family-separation-policy-never-really-ended-why-ncna1025376>.

⁹⁰ Melissa del Bosque, *Immigration Officials Use Secretive Gang Databases to Deny Migrant Asylum Claims*, PROPUBLICA (July 8, 2019), <https://www.propublica.org/article/immigration-officials-use-secretive-gang-databases-to-deny-migrant-asylum-claims> (describing multiple children being separated from their parents based on gang member allegations that appear to be unfounded); Ginger Thompson, *Families Are Still Being Separated at the Border, Months After "Zero Tolerance" Was Reversed*, PROPUBLICA (Nov. 27, 2018), <https://www.propublica.org/article/border-patrol-families-still-being-separated-at-border-after-zero-tolerance-immigration-policy-reversed> (describing how CBP's allegation that Julio, a father separated from his 4-year-old son, was a gang member "was confounding because at the same time CBP had deemed him a gang member, another agency within DHS had found that his asylum petition, in which Julio claims he was a victim of gang violence, was persuasive enough to be heard by an immigration judge."); Laura Pena & Efrén C. Olivares, *The Real National Emergency: Zero Tolerance & the Continuing Horrors of Family Separation at the Border* at 6 & n.19, TEXAS CIVIL RIGHTS PROJECT (Feb. 14, 2019), <https://texascivilrightsproject.org/wp-content/uploads/2019/02/FamilySeparations-Report-Final.pdf> (citing U.S. DEPARTMENT OF HOMELAND SECURITY, POLICY OPTIONS TO RESPOND TO BORDER SURGE OF ILLEGAL IMMIGRATION at 2 (Dec. 16, 2017), <https://www.documentcloud.org/documents/5688664-Merkleydocs2.html#document/p2>).

⁹¹ See Bala & Rizer, *supra* note 89.

⁹² Joint Status Report at 9, *Ms. L. v. Immigration and Customs Enforcement*, No. 18-cv-428, (S.D. Cal. Dec. 12, 2018); see also HHS OIG REPORT, *supra* note 11, at 11; Order at 2, *Ms. L. v. Immigration and Customs Enforcement*, No. 18-cv-428, (S.D. Cal. Mar. 8, 2019) ("Pursuant to the Court's Orders, 2,816 children were identified as having been separated from their parents at the border . . ."). On March 8, 2019, the Court overseeing

Recent reports, resulting from government investigations and the expansion of the *Ms. L* class, indicate that the number of these separations may be much higher.⁹³ And as stated above, the government continues to separate families based on flawed or impermissible criteria.

As matters currently stand, the *Ms. L* litigation does not necessarily cover all families crossing the border. The government currently takes the position that children can be separated from their non-parent family members. The primary caregiver for a young child may not be a parent, but rather can be her grandmother, aunt, sibling, or other family member over the age of 18. On a daily basis, CBP forcibly separates children crossing the border from these family members. We do not know how many children have been torn apart from a family member at the border. We do not know if the government keeps track of such data. Given the DHS's abysmal failure to record separations of parent-child units, it is reasonable to presume that DHS has not recorded and does not record the separation of children from other family members.

No Law or Regulation Requires The Administration To Separate Children From Their Families

Families belong together. The right to family integrity is protected by the U.S. Constitution. Family unity is a fundamental human right and a central principle of U.S. immigration policy and international law.⁹⁴

In rare circumstances, where a child is at risk of imminent harm caused by a family member, a decision to separate a family can be made with the best interests of the child in mind. There is no law or regulation requiring CBP to separate children from their grandmothers, sisters, aunts, siblings, or other adult family members. The TVPRA requires the government to designate a child as an unaccompanied minor when he or she crosses the border without a parent. Under the TVPRA, that child must then be transferred to the custody of the U.S. Department of Health and Human Services, Office of Refugee Resettlement (ORR) within 72 hours. The TVPRA does not require family separations.

Ms. L. v. ICE issued an order expanding the protected class to include families who entered the United States on or after July 1, 2017. Order at 14, *Ms. L. v. Immigration and Customs Enforcement*, No. 18-cv-428 (S.D. Cal. Mar. 8, 2019).

⁹³ See Joint Status Report at 8, *Ms. L. v. Immigration and Customs Enforcement*, No. 18-cv-428, (S.D. Cal. June 6, 2019) (“HHS has determined the correct number of cases to be reviewed was 32,972” to identify potential additional children who were separated from parents); HHS OIG REPORT, *supra* note 11, at 1, 6, 13 (reporting that “thousands of children may have been separated during an influx that began in 2017, before the accounting required by [the court in *Ms. L. v. Immigration and Customs Enforcement*], and HHS has faced challenges in identifying separated children”); Joint Status Report at 11, *Ms. L. v. Immigration and Customs Enforcement*, No. 18-cv-428, (S.D. Cal. Feb. 20, 2019) (“Defendants have identified 245 new separations of children and parents that occurred between June 27, 2018 and January 31, 2019, and four cases which require more time to assess.”); Catherine E. Shoichet, *At Least 1,712 More Kids May Have Been Separated From Their Parents at the Border*, CNN (May 17, 2019), <https://www.cnn.com/2019/05/17/politics/family-separation-lawsuit/index.html>.

⁹⁴ See U.N. International Covenant on Civil and Political Rights, art. 23, Dec. 16, 1966, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171; U.N. Convention on the Rights of the Child, art. 9, Nov. 20, 1989, 1577 U.N.T.S. 3. See also WILLIAM KANDEL, U.S. FAMILY-BASED IMMIGRATION POLICY, CONGRESSIONAL RESEARCH SERV. 2 (2014) (available at <https://trac.syr.edu/immigration/library/P9368.pdf>).

Within the initial 72-hour period, children who cross the border with an adult family member should generally be permitted to remain with that family member. The TEDS states: “A juvenile may temporarily remain with a non-parental adult family member where: 1) the family relationship has been vetted to the extent feasible, and 2) the CBP supervisor determines that remaining with the non-parental adult family member is appropriate, under the totality of the circumstances.” § 5.6. Then, pursuant to federal regulations, DHS should determine whether the child and the accompanying family member can be released from detention together.⁹⁵ The *Flores* Settlement Agreement similarly requires DHS to evaluate release options for children in DHS custody.⁹⁶ Where there is a potential concern about child trafficking or a question about whether a bona fide familial relationship exists, a screening should be conducted by a state-licensed child welfare professional, as provided for in the Child Trafficking Victims Protection and Welfare Act.

After the 72-hour period, children designated as unaccompanied minors should be transferred to ORR custody. No law or regulation prohibits a child in ORR custody from having contact with an adult family member. The *Flores* Settlement Agreement requires that the federal government “segregate unaccompanied minors from unrelated adults.” See Agreement §12. But a child in ORR custody should be allowed to hug her grandmother or share a prayer with an adult sibling. The routine separation of families is a cruel policy choice enforced by CBP every day. This policy choice leaves babies, toddlers, and children detained in federal custody without their adult family members for days, weeks, or months on end.

The Administration Separates Children From Their Families For Deterrence Purposes

The extraordinary trauma inflicted on separated children is not an incidental byproduct of the administration’s family separation policy—it is the very point. The federal government seeks to inflict so much distress on children seeking asylum that other families would be deterred from trying to seek refuge in this country. Indeed, while serving as DHS Secretary John Kelly stated that he “would do almost anything to deter the people from Central America” from migrating to the United States, including separating children from their parents.⁹⁷

Curbing asylum has been a central focus of the Trump Administration’s immigration policy.⁹⁸ On April 6, 2018, President Trump issued a memo entitled “Ending ‘Catch and

⁹⁵ 8 C.F.R. § 236.3(b)(2) (“If an individual specified . . . in this section cannot be located to accept custody of a juvenile, and the juvenile has identified a parent, legal guardian, or adult relative in [immigration] detention, simultaneous release of the juvenile and the parent, legal guardian, or adult relative shall be evaluated on a discretionary case-by-case basis.”).

⁹⁶ See, e.g., Brief for Appellees, *Flores v. Sessions*, No. 17-56297 (9th Cir. filed Mar. 21, 2018), at 21-24.

⁹⁷ Philip Bump, *Here Are the Administration Officials Who Have Said That Family Separation Is Meant as a Deterrent*, WASH. 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/>.

⁹⁸ See, e.g., *US Judge Bars Trump administration From Enforcing Asylum Ban*, CNBC (Nov. 20, 2018), <https://www.cnbc.com/2018/11/20/immigration-policy-judge-bars-us-from-enforcing-trump-asylum-ban.html>; Shaw Drake & Edgar Saldivar, *Trump Administration Is Illegally Turning Away Asylum Seekers*, ACLU (Oct. 30, 2018), <https://www.aclu.org/blog/immigrants-rights/trump-administration-illegally-turning-away-asylum-seekers>; Emma Platoff, Alexa Ura, Jolie McCullough & Darla Cameron, *While Migrant Families Seek Shelter From Violence, Trump Administration Narrows Path to Asylum*, TEX. TRIB. (July 10, 2018), <https://www.texastribune.org/2018/07/10/migrant-families-separated-border-crisis-asylum-seekers-donald-trump/>;

Release’ at the Border of the United States and Directing Other Enhancements to Immigration Enforcement.”⁹⁹ The memo, among other things, directs the Secretary of Homeland Security, the Secretary of Defense, the Attorney General, and the Secretary of Health and Human Services to submit a report to the President that details all of the measures their respective departments have pursued or are pursuing to end “‘catch and release’ practices.”¹⁰⁰ “Catch and Release” refers to a federal policy that allows people who are seeking asylum to wait for their hearings in the community, not in government custody.¹⁰¹

On the same day that President Trump issued his directive, then-Attorney General Jeff Sessions announced that the government would institute a “Zero Tolerance” policy, mandating the prosecution of all persons who cross the United States border between ports of entry. The purpose of the “Zero Tolerance” policy was to deter Central Americans from seeking asylum or otherwise coming to the United States.¹⁰² Through this policy, the United States intentionally inflicted trauma on immigrant parents and their children who crossed the border, by separating the children from their parents in violation of the United States Constitution.¹⁰³

Administration officials at the highest levels knew well before implementing the policy of separating children from their parents that it would devastate the people it affected.¹⁰⁴ Yet, once the separations began to generate public outrage and condemnation, administration officials changed their tune. They insisted that their hardline stance on prosecuting border crossings was not intended to discourage immigration, and, shockingly, even denied the existence of a family separation policy.¹⁰⁵ The administration, however, could not expunge the numerous statements made by high-level officials confirming that family separation was the express policy and that its purpose was deterrence.

In a December 16, 2017 memorandum exchanged between senior officials at DOJ and

Glenn Thrush, *U.S. To Begin Blocking Asylum Seekers From Entering Over Mexican Border*, N.Y. TIMES (Jan. 24, 2019), <https://www.nytimes.com/2019/01/24/us/politics/migrants-blocked-asylum-trump.html>; Yeganeh Torbati & Kristina Cooke, *Trump Administration Moves to Curb Migrants’ Asylum Claims*, REUTERS (Nov. 8, 2018), <https://www.reuters.com/article/us-usa-immigration-asylum/trump-administration-moves-to-curb-migrants-asylum-claims-idUSKCN1ND35K>.

⁹⁹ 83 Fed. Reg. 16,179 (Apr. 13, 2018).

¹⁰⁰ *Id.*

¹⁰¹ Stacy Sullivan, *We Shouldn’t Take the Bait On ‘Catch and Release’*, ACLU (July 20, 2018), <https://www.aclu.org/blog/immigrants-rights/immigrants-rights-and-detention/we-shouldnt-take-bait-catch-and-release>.

¹⁰² *60 Minutes: Chaos on the Border, Robots to the Rescue, To Kill a Mockingbird* (CBS television broadcast Nov. 25, 2018) (revealing an un-redacted copy of the memo implementing the “Zero Tolerance” policy that stated that the policy’s purpose was deterrence).

¹⁰³ *See Ms. L. v. U.S. Immigration and Customs Enforcement*, 302 F. Supp. 3d 1149, 1162–67 (S.D. Cal. 2018); *Ms. L. v. U.S. Immigration and Customs Enforcement*, 310 F. Supp. 3d 1133, 1142–46 (S.D. Cal. 2018).

¹⁰⁴ Jeremy Stahl, *The Trump Administration Was Warned Separation Would Be Horrific for Children, Did It Anyway*, SLATE (July 31, 2018), <https://slate.com/news-and-politics/2018/07/the-trump-administration-was-warned-separation-would-be-horrific-for-children.html>. Commander Jonathan White, a former HHS senior official, testified before Congress that he had warned the administration that implementing a family separation policy would involve a significant risk of harm to children. *Id.* The policy was launched a few weeks after he raised his concerns. *Id.*

¹⁰⁵ Christina Wilkie, *White House Denies Separating Families Is ‘Policy,’ But Insists It Is Needed ‘To Protect Children,’* CNBC (June 18, 2018), <https://www.cnbc.com/2018/06/18/white-house-denies-separating-families-is-policy.html>.

DHS, the officials proposed a “Policy Option” of “Increased Prosecution of Family Unit Parents.”¹⁰⁶ Under the proposal, “parents would be prosecuted for illegal entry . . . and the minors present with them would be placed in HHS custody as [unaccompanied alien children].”¹⁰⁷ The memorandum asserted that “the increase in prosecutions would be reported by media and it would have substantial deterrent effect.”¹⁰⁸

When asked about the policy by NPR on May 11, 2018, then-John Kelly, President Trump’s Chief of Staff, responded that “a big name of the game is deterrence . . . It could be a tough deterrent—would be a tough deterrent.”¹⁰⁹ As for the children affected, he said: “[t]he children will be taken care of—put into foster care *or whatever*.”¹¹⁰

On June 19, 2018, on Fox News’ “The Ingraham Angle,” host Laura Ingraham asked then-Attorney General Jeff Sessions, “[I]s this policy in part used as a deterrent? Are you trying to deter people from bringing children or minors across this dangerous journey? Is that part of what the separation is about?”¹¹¹ Sessions replied, “I see that the fact that no one was being prosecuted for this was a factor in a fivefold increase in four years in this kind of illegal immigration. So, yes, hopefully people will get the message and come through the border at the port of entry and not break across the border unlawfully.”¹¹²

And President Trump himself has indicated that deterrence was the motivation behind his Justice Department’s “Zero Tolerance” policy. When speaking with reporters at the White House on October 13, 2018, he said, “If they feel there will be separation, they don’t come.”¹¹³ On December 16, 2018, the President tweeted, “[I]f you don’t separate, FAR more people will come.”¹¹⁴

Thus, the trauma inflicted by the policy of separating children from their parents was entirely intentional and premeditated. This point cannot be overstated: the most senior members of the U.S. government intentionally chose to cause parents and small children extraordinary pain and suffering in order to accomplish their policy objectives. The unspeakable pain and suffering experienced by parents and small children was seen as a useful device by the most

¹⁰⁶ *Policy Options to Respond to Border Surge of Illegal Immigration*, (Dec. 16, 2017) (unpublished memorandum from the Dept. Homeland Sec.), <https://www.documentcloud.org/documents/5688664-Merkleydocs2.html>.

¹⁰⁷ *Id.* at 1.

¹⁰⁸ *Id.*

¹⁰⁹ *Transcript: White House Chief Of Staff John Kelly’s Interview With NPR*, NPR (May 11, 2018, 11:36 AM), <https://www.npr.org/2018/05/11/610116389/transcript-white-house-chief-of-staff-john-kellys-interview-with-npr>.

¹¹⁰ *Id.* (emphasis added).

¹¹¹ Philip Bump, *Here Are the Administration Officials Who Have Said That Family Separation Is Meant As A Deterrent*, <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/>.

¹¹² *Id.*

¹¹³ David Shepardson, *Trump Says Family Separations Deter Illegal Immigration*, REUTERS (Oct. 13, 2018), <https://www.reuters.com/article/us-usa-immigration-trump/trump-says-family-separations-deter-illegal-immigration-idUSKCN1MO00C>; *see also Sessions Admits Policy Is a Deterrent*, CNN (June 19, 2018), <https://www.cnn.com/videos/politics/2018/06/19/sessions-defends-controversial-immigration-policy-deterrent-sot.cnn>.

¹¹⁴ Donald Trump (@realDonaldTrump), TWITTER (Dec. 16, 2018, 8:25 AM), <https://twitter.com/realDonaldTrump/status/1074339834351759363> (emphasis in original).

senior members of the U.S. government to accomplish their policy objective of deterring Central Americans from seeking asylum in the United States.

Once the policy was implemented and immigration officers separated children from their parents, DHS deemed separated children to be unaccompanied and transferred them to the HHS Office of Refugee Resettlement (ORR), which is responsible for the long-term custodial care and placement of “unaccompanied [noncitizen] children.”¹¹⁵ But DHS failed to take even the most basic steps to record which children belonged to which parents, highlighting the government’s utter indifference to the dire consequences of the policy on the separated families. The DHS Office of Inspector General (DHS OIG) noted that the “lack of integration between CBP’s, ICE’s and HHS’ respective information technology systems hindered efforts to identify, track, and reunify parents and children separated under the Zero Tolerance policy” and that “[a]s a result, DHS has struggled to provide accurate, complete, reliable data in family separations and reunifications, raising concerns about the accuracy of its reporting.”¹¹⁶

Generally, CBP officers—the first to encounter individuals entering the United States—were the officers who separated parents and children. Following the separation, CBP transferred many of the parents into ICE custody.¹¹⁷ When the “Zero Tolerance” policy went into effect, ICE’s system “did not display data from CBP’s systems that would have indicated whether a detainee had been separated from a child.”¹¹⁸ As a result, when ICE was processing detained individuals for removal, “no additional effort was made to identify and reunite families prior to removal.”¹¹⁹ Even more alarming, in order to keep track of the children, ICE manually entered the child’s identifying information into a Microsoft Word document, which was then e-mailed as an attachment to HHS, a process described by the DHS OIG as particularly “vulnerable to human error,” and one which “increas[ed] the risk that a child could become lost in the system.”¹²⁰

As emphasized by Judge Sabraw in *Ms. L. v. Immigration and Customs Enforcement*, the agencies’ failure to coordinate tracking of separated families was a “startling reality” given that:

[t]he government readily keeps track of personal property of detainees in criminal and immigration proceedings. Money, important documents, and automobiles, to name a few, are routinely catalogued, stored, tracked and produced upon a detainee’s release, at all levels—state and federal, citizen and alien. Yet, the government has no system in place to keep track of, provide effective communication with, and promptly produce alien children. The unfortunate reality is that under the present system migrant children are not accounted for with the same efficiency and accuracy as property. Certainly, that cannot

¹¹⁵ OFFICE OF THE INSPECTOR GENERAL, U.S. DEP’T OF HOMELAND SECURITY, OIG-18-84, SPECIAL REVIEW – INITIAL OBSERVATIONS REGARDING FAMILY SEPARATION ISSUES UNDER THE ZERO TOLERANCE POLICY 2-3 (Sept. 27, 2018) [hereinafter DHS OIG REPORT].

¹¹⁶ *Id.* at 9–10 (noting, among other things, that agencies’ incompatible computer systems erased data that connected children with their families); *see also* HHS OIG REPORT, *supra* note 11, at 2, 13 (reporting that the lack of an integrated data system to track separated families across HHS and DHS added to the difficulty in HHS’s identification of separated children).

¹¹⁷ DHS OIG Report, *supra* note 115, at 2.

¹¹⁸ *Id.* at 9–10.

¹¹⁹ *Id.* at 10.

¹²⁰ *Id.*

satisfy the requirements of due process.¹²¹

The government's inhumane treatment of separated families described by Judge Sabraw was not merely the result of indifference or incompetence. Commander Jonathan White, a former senior HHS official, testified before Congress that he repeatedly warned those devising the policy that separating children from their parents would have harmful effects on the children, including "significant potential for traumatic psychological injury to the child."¹²² But those in charge willfully disregarded Commander White's warnings. Imposing trauma on children was their very goal.

Only after the family separation policy garnered widespread condemnation and became bad politics did President Trump, on June 20, 2018, sign an executive order purporting to end it. The Executive Order states 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."¹²³ The Executive Order, however, did not explain whether or how the federal government would reunify children who had been previously separated. In fact, on June 22, 2018, the government admitted that it had no reunification procedure in place.¹²⁴

It was not until a federal court ordered the government on June 26, 2018 to reunify families that the government began taking steps to do so.¹²⁵ What followed was chaos. DHS claimed that DHS and HHS had created a centralized database containing all relevant information regarding parents separated from their children; however, the DHS OIG found "no evidence that such a database exists."¹²⁶ According to the DHS OIG, whatever data was collected was incomplete, contradictory, and unreliable.¹²⁷ Because no single database with reliable information existed, the Government Accountability Office found that agencies were left to resort to a variety of inefficient and ineffective methods to determine which children were subject to Judge Sabraw's injunction.¹²⁸ These methods included officers hand-sifting through

¹²¹ *Ms. L.*, 310 F. Supp. 3d at 1144.

¹²² Stahl, *supra* note 104.

¹²³ Affording Congress an Opportunity to Address Family Separation, Exec. Order No. 13,841, 83 Fed. Reg. 29,435 § 1 (June 20, 2018).

¹²⁴ See *Ms. L.*, 310 F. Supp. 3d at 1140–41; see also U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-163, UNACCOMPANIED CHILDREN: AGENCY EFFORTS TO REUNIFY CHILDREN SEPARATED FROM PARENTS AT THE BORDER 21 (2018) [hereinafter GAO REPORT] ("HHS officials told [the GAO] that there were no specific procedures to reunite children with parents from whom they were separated at the border prior to the June 2018 court order."). The only procedure in place capable of reuniting children with their parents was the procedure developed to place unaccompanied children with sponsors in compliance with the Trafficking Victims Protection Reauthorization Act. Under this procedure, however, a parent could only be reunited with his or her child if the government deemed them eligible to be a sponsor. *Id.* Judge Sabraw noted that this procedure was inadequate because it was created to address "a different situation, namely what to do with alien children who were apprehended without their parents at the border or otherwise," and further, that the procedure was not developed to address situations such as this one where family units were separated by government officials after they crossed the border together. *Id.* at 27 (quoting Order Following Status Conference, *Ms. L. v. Immigration and Customs Enforcement*, No. 18-0428-DMS-MDD (S.D. Cal. July 10, 2018)).

¹²⁵ *Ms. L.*, 310 F. Supp. 3d at 1149–50.

¹²⁶ DHS OIG REPORT, *supra* note 115, at 10.

¹²⁷ *Id.* at 11–12.

¹²⁸ GAO REPORT, *supra* note 124, at 23–25.

agency data looking for any indication that a child in HHS custody had been separated from his or her parent¹²⁹ and calling in the Office of the Assistant Secretary for Preparedness and Responses, an HHS agency whose normal prerogative involves response to hurricanes and other disasters, to review data provided by CBP, ICE, and ORR.¹³⁰ The method for determining which family units required reunification changed frequently, sometimes more than once a day, with staff at one ORR shelter reporting that “there were times when [they] would be following one process in the morning but a different one in the afternoon.”¹³¹ Judge Sabraw criticized the agencies for their lack of preparation and coordination at a status conference proceeding on July 27, 2018: “[W]hat was lost in the process was the family. The parents didn’t know where the children were, and the children didn’t know where the parents were. And the government didn’t know, either.”¹³²

The government’s cruel policy of separating children from their parents, and its failure to track the children once they were separated, violates the constitutional right to family integrity.¹³³ The government instituted and implemented this policy intentionally to inflict emotional distress on the parents and children who were separated. It succeeded, with devastating consequences for thousands of parents and children. Similar devastating consequences are experienced daily by unknown numbers of children who are forcibly separated from their grandmothers, aunts, siblings, and other family members.

Separating Children From Their Families For Deterrence Purposes Does Not Work

Separating families for deterrence purposes does not work. The administration tried to argue otherwise in federal court, but the court found the deterrence logic “dubious” and “unconvincing.”¹³⁴ In fact, when the zero tolerance policy was piloted in July and August 2017, U.S. Border Patrol’s apprehensions of families only increased.¹³⁵

¹²⁹ *Id.* at 24.

¹³⁰ *Id.* at 23.

¹³¹ *Id.* at 27.

¹³² Transcript of Joint Status Report at 58, *Ms. L. v. Immigration and Customs Enforcement*, No. 18-cv-00428 DMS MDD (S.D. Cal. July 27, 2018).

¹³³ See *Ms. L.*, 302 F. Supp. 3d at 1161–67 (finding that plaintiffs had stated a legally cognizable claim for a violation of their substantive due process rights to family integrity under the Fifth Amendment to the United States Constitution based on their allegations that the government had separated them from their minor children while they were held in immigration detention and without a showing that they were unfit parents or otherwise presented a danger to their children); *Ms. L.*, 310 F. Supp. 3d at 1142–46 (finding that plaintiffs were likely to succeed on their substantive due process claim when assessing their motion for a preliminary injunction). See also *Smith v. Organization of Foster Families*, 431 U.S. 816, 845 (1977) (liberty interest in family relationships has its source in “intrinsic human rights”).

¹³⁴ Order at 2, *Flores v. Sessions*, No. 2:85-cv-4544, 2018 WL 4945000 (C.D. Cal. July 9, 2018) (“Defendants’ [deterrence] reasoning suffers from the logical fallacy of *post hoc, ergo propter hoc* . . . literally, after this, therefore because of this. Any number of other factors could have caused the increase in illegal border crossings, including civil strife, economic degradation, and fear of death in the migrants’ home countries.”) (internal quotations and citations omitted); see also Tom K. Wong, *Do Family Separation and Detention Deter Immigration?* at 2, CENTER FOR AMERICAN PROGRESS (Jul. 24, 2018) (citing then White House Chief of Staff John Kelly’s March 2017 statement that “in order to deter more movement,” the Trump administration was planning a family separation policy and finding that “the administration’s family separation policy has not had its intended [deterrent] effect”).

¹³⁵ Wong, *supra* note 134, at 3, 9.

The administration is also incorrect to suggest that the June 2018 court order seeking to end the separations of children from their parents in the *Ms. L* case triggered a spike in family crossings.¹³⁶ CBP's own data show that family unit apprehensions had been steadily rising since the beginning of 2018.¹³⁷ Another complication for the administration's argument: family apprehensions *dropped* in July 2018, the month following the June 2018 injunction.¹³⁸ While family apprehensions have risen since,¹³⁹ they have done so amid the continuation of family separation practices despite the injunction.¹⁴⁰

The cruelty of family separation does not deter asylum seekers who are escaping far worse. Many of the children coming to the United States are fleeing for their lives. Many are asylum seekers or children who have been abused, abandoned, or neglected, such that they may be eligible for Special Immigrant Juvenile Status. This is why, despite this administration's cruel policy choices that separate family units across the southern border on a daily basis, there has not been a drop in the number of children fleeing to the United States over the past year.

Detaining Children and Families Is Not Necessary To Have Them Appear In Court

The administration tries to justify detaining asylum-seeking families by pointing to statistics about *in absentia* removal orders, *i.e.*, removal orders given to those who do not show up to an immigration hearing. Most recently, on June 11, 2019, Acting Homeland Security Secretary Kevin McAleenan testified before the Senate Judiciary Committee that depending on the immigration court, DHS "see[s] too many cases where people are not showing up," referring to families who came to the U.S.-Mexico border seeking asylum.¹⁴¹ The Acting Secretary asserted that 90% of the 7,000 asylum-seeking families who were released from detention and placed in an expedited processing pilot program failed to attend their first immigration court hearing.¹⁴² The Acting Secretary's statistics are misleading and do not accurately portray what is actually happening.

The vast majority of asylum-seeking families attend their immigration court hearings, as confirmed by the government's own data. For those who are represented by counsel, 99 percent of asylum-seeking families had appeared at every hearing.¹⁴³ Once it is an attorney's

¹³⁶ Kimberly Kindy et al., *Trump Says Ending Family Separation Practice Was a 'Disaster' That Led to Surge in Border Crossings*, WASH. POST (Apr. 28, 2019), https://www.washingtonpost.com/politics/trump-says-ending-family-separation-practice-was-a-disaster-that-led-to-surge-in-border-crossings/2019/04/28/73e9da14-69c8-11e9-a66d-a82d3f3d96d5_story.html?utm_term=.ca0aa6bf346e.

¹³⁷ *Southwest Border Migration FY 2019*, CUSTOMS AND BORDER PATROL, <https://www.cbp.gov/newsroom/stats/sw-border-migration> (last updated July 3, 2019).

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ Pena & Olivares, *supra* note 90, at 3.

¹⁴¹ See Salvador Rizzo, *How Many Migrants Show up for Immigration Court Hearings?* WASH. POST (June 26, 2019) https://www.washingtonpost.com/politics/2019/06/26/how-many-migrants-show-up-immigration-court-hearings/?utm_term=.8630b6c03841.

¹⁴² *See id.*

¹⁴³ *See Most Families Attend Immigration Court Hearings*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (TRAC) (June 18, 2019), <https://trac.syr.edu/immigration/reports/562/> (compiling data from cases for asylum-seeking family units from September 2018 to May 2019). TRAC at Syracuse University obtains data on various

responsibility to check in with an immigration court and monitor when his or her clients' hearings are, virtually no families fail to attend their hearings. Even families who do not have legal representation overwhelmingly attend their hearings: 81.6% of unrepresented families attended their initial hearing and 76% of unrepresented families attended all their hearings.¹⁴⁴ These statistics are based on data tracking 65,691 adults and children identified by the government as family cases from September 2018 to May 2019, as government tracking of these family cases began in September 2018.¹⁴⁵

An independent study analyzing 18,000 immigration court proceedings for families from 2001 to 2016 found 86 percent of released families attended all court hearings those years.¹⁴⁶ That number rose to 96 percent for families that had filed asylum applications.¹⁴⁷

Children designated as unaccompanied minors who have attorneys also show up to court and continue to attend court hearings to case completion in 95% of cases. This statistic is based on government data from 2005 to 2018.¹⁴⁸

When a family seeking asylum does not show up in court, it does not necessarily mean that they had intend to “skip” their hearing.¹⁴⁹ Some families do not receive notification of their hearing. Others may have received a written notice in English, a language they cannot read. Many hearing notices fail to include the date, time, and location of their hearing. As the U.S. Supreme Court found, “the Department of Homeland Security, at least in recent years, almost always serves noncitizens with notices that fail to specify the time, place, or date of initial removal hearings whenever the agency deems it impracticable to include such information.”¹⁵⁰ Indeed, the administration has admitted that “almost 100 percent” of “notices to appear omit the time and date of the proceeding over the last three years.”¹⁵¹ Because the government’s own bureaucratic ineptitude contributes to asylum seeking families missing their hearings,¹⁵² it is inappropriate for the government to cite those missed hearings as a basis for justifying detention.

aspects of the immigration court process from the U.S. Department of Justice Executive Office of Immigration Review (EOIR).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ Ingrid Eagley, Steven Shafer, and Jana Whalley, *Detaining families: A Study of Asylum Adjudication in Family Detention*, AMERICAN IMMIGRATION COUNCIL 1, 2 (Aug. 2018), https://www.americanimmigrationcouncil.org/sites/default/files/research/detaining_families_a_study_of_asylum_adjudication_in_family_detention_final.pdf.

¹⁴⁷ *Id.*

¹⁴⁸ See Transactional Records Access Clearinghouse (TRAC) at Syracuse University, *Juveniles – Immigration Court Deportation Proceedings*.

¹⁴⁹ See *Most Families Attend Immigration Court Hearings*, *supra* note 143.

¹⁵⁰ *Pereira v. Sessions*, 138 S. Ct. 2105, 2111 (2018).

¹⁵¹ *Id.* (internal quotations omitted).

¹⁵² See Asylum Seeker Advocacy Project (ASAP) and the Catholic Legal Immigration Network, Inc. (CLINIC), *Denied a Day in Court: The Government’s Use of In Absentia Removal Orders Against Families Seeking Asylum 29* (2018), <https://cliniclegal.org/sites/default/files/Denied-a-Day-in-Court.pdf> (showcasing 46 asylum seekers with *in absentia* removal orders at 15 different immigration courts who were unable to attend immigration hearings due to lack of notice, incorrect government information, serious medical problems, language barriers, and severe trauma or disabilities).

Solutions

Congressional oversight is urgently needed to protect children in federal immigration custody. The fundamental principles established by the *Flores* Settlement Agreement and TVPRA are critical to providing basic protections for detained immigrant children and must be defended. Congress has the ability to intervene and protect these vulnerable children by taking the following action:

1. Minimize the time that children are held in CBP custody and ensure that children are not detained in CBP custody for any longer than 72 hours under any circumstances.
2. Release children from custody to family members and sponsors as expeditiously as possible. Use congressional oversight authority to ensure that policies and practices do not interfere with timely release of children from custody.
3. Use congressional oversight to ensure that the federal government provides “safe and sanitary” conditions for all children in its custody, including soap, toothbrushes, beds, adequate food, water, blankets, diapers, access to proper hygiene, and medical care.
4. Demand transparency about the length of time and conditions for children in federal immigration custody. Require DHS to publicly release monthly reports with data detailing how long children have been detained in CBP and ICE custody. Require HHS to publicly release monthly reports with data detailing how long children have been in ORR custody.
5. Keep families together. Require CBP to maintain records reflecting when an adult or child in its custody claims relation to another migrant. This should include any parents, siblings, grandparents, or other relations. This documentation should be included in both the child’s and the family members’ files and in such a manner that both ORR and ICE receive the information.
6. Require CBP facilities to have state-licensed child welfare professionals to care for children and evaluate children’s needs.
7. Ban CBP from separating children from their families unless it is in the best interest of the child. Separations should take place only when state-licensed child welfare professionals have identified a risk of trafficking by the adult family member, imminent harm to the child unrelated to the family’s migration journey, or a reasonable basis to believe the accompanying adult is not a family member and requires additional investigation. Separations must be overseen by state-licensed child welfare professionals. Systems must be developed to ensure appropriate documentation, tracking, and follow up on separations, including informing separated family members of how to contact their children, how to rebut the asserted reason(s) for the separation, and how to seek reunification with their children.

8. Require CBP to provide independent medical professionals access to its facilities for the purpose of assessing and triaging children's emergency medical needs.
9. Appoint a public health expert to inspect all CBP facilities and with the authority to mandate improvements.
10. Ensure that any new CBP processing facilities are child-friendly and humane. These facilities must provide for appropriate care of children and families.

Conclusion

Chairman Cummings, Ranking Member Jordan, and distinguished Members of the Committee, thank you again for the opportunity to testify today. I look forward to your questions.