August 25, 2015

The Honorable Barack Obama
President of the United States
The White House
1600 Pennsylvania Avenue
Washington D.C. 20500

The Honorable Jeh Johnson
Secretary
U.S. Department of Homeland Security
Washington D.C. 20528

Dear President Obama and Secretary Johnson:

In light of the US District Court's August 21st ruling in *Flores v. Johnson* and the Administration's continuing review of its policies regarding the detention of refugee families, we write to strongly encourage the Administration, and specifically the Department of Homeland Security (DHS), to end its practice of sending families to detention at the Berks, Karnes and Dilley facilities. Instead, DHS should release families after processing at the border with information and support that will allow them to pursue claims for protection in the United States. Despite the deeply disappointing position the Administration has taken in the *Flores* litigation, we believe that the US Constitution, the Flores Settlement Agreement and international human rights obligations counsel such a release policy for mothers with children. In addition to our concern with the continued practice of family detention, we are troubled by what appears to be the recent large-scale use of electronic monitoring devices and other criminal justice models as alternatives to detention for some refugee families.

Undersigned individuals and organizations have collectively advised and represented thousands of women and children detained at the Artesia, Berks, Karnes and Dilley facilities since they opened. We have heard the stories of trauma and violence and coercion that the detained mothers tell. The Administration's policy changes affecting family detention has not yet led to significant curtailment of family detention. While we welcome the more rapid releases of some refugee families, we object to the continuing practice of imposing unreasonable bond amounts (higher than $2500) and post-release restrictions on mothers in the form of electronic monitors and intensive supervision programs.

**Families should not be detained**

The population that has borne the brunt of the Administration's family detention policies are women and children from Central America who have come to the United States seeking protection. Almost all of the women and children experienced or witnessed violence in their home countries.[1] Many suffered

[1] U.S. Border Patrol, *Southwest Border Sectors:* Family Unit and Unaccompanied Alien Children *(0-17)* apprehensions *FY 14 compared to FY 13*, available at http://www.cbp.gov/sites/default/files/documents/BP%20Southwest%20Border%20Family%20Units%20and%20UAC%20Apps%20FY13%20-%20FY14_0.pdf (showing that the vast majority of apprehended families are from the Northern Triangle of Central America); U.S. Citizenship and Immigration Services, Asylum Division, *Family Facilities Credible/Reasonable Fear*, available at

domestic violence at the hands of their spouses or partners while others withstood targeted attacks by gang members also often involving sexual assaults and other gender-based violence. They are trauma survivors who require a trauma-informed response that is impossible to provide in detention or with restrictive conditions of release. [2] Many of the children are of tender age: a majority have been age six or younger, including breastfeeding infants and toddlers. [3]

The adverse effects of detention on mothers and children in particular is clear. Luis Zayas, Dean of the University of Texas School of Social Work has found that detained mothers at the Karnes facility exhibit high levels of anxiety and depression.[4] He concluded that "even a few weeks of detention has exacerbated the trauma experienced by these families and added a new layer of hardship that, with respect to the children in particular, may be irreversible."[5]

It is our experience that almost all of the families have relatives who are willing to house and support them. Additionally, the vast majority are eligible for some form of immigration relief, such as asylum, which gives a strong incentive to families to appear in court in order to pursue relief.[6]

In considering constitutional principles and the immigration detention system, the Supreme Court has held that liberty is the rule and detention violates the Due Process Clause of the U.S. Constitution unless a special justification outweighs the "individual's constitutionally protected interest in avoiding physical constraint." [7] Similarly, the UN Refugee Convention and the UN High Commission on Refugees prohibit the penalization of asylum-seekers and the restriction of movement of refugees, including through detention, except in particular, limited circumstances where necessary in an individual case.[8] The Inter-

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http://www.uscis.gov/sites/default/files/USCIS/Outreach/PED-CF-RF-familiy-facilities-FY2015Q2.pdf (showing credible fear passage rates of 80%); Elizabeth Kennedy, American Immigration Council, *No Childhood Here: Why Central American Children are Fleeing Their Homes* 1 (July 1, 2014), available at http://www.immigrationpolicy.org/sites/default/files/docs/no_childhood_here_why_central_american_children_are_fleeing_their_homes_final.pdf; *Children in Danger: A Guide to the Humanitarian Challenge at the Border*, AMERICAN IMMIGRATION COUNCIL (July 10, 2014), available at http://www.immigrationpolicy.org/special-reports/children-danger-guide-humanitarian-challenge-border; National Immigrant Justice Center, Stop Detaining Families, available at http://www.immigrantjustice.org/stop-detaining-families (last visited July 27, 2015).

[2] *See* Department of Justice, Office on Violence Against Women, *The Importance of Understanding Trauma-Informed Care and Self-Care for Victim Services Providers* (July 30, 2014) (noting the importance of law enforcement responses to sexual trauma that are "culturally and linguistically competent [and provide] a space for healing based on empowerment and hope").

[3] National Immigrant Justice Center, *The Detention of Immigrant Families* (Mar. 2015), available at http://immigrantjustice.org/sites/immigrantjustice.org/files/Detention_of_Families_Backgrounder_Mar_2015.pdf.

[4] Declaration of Luis H. Zayas, Ph.D. (Dec. 10, 2014), available at https://lofgren.house.gov/uploadedfiles/declaration_of_luis_zayas.pdf ("Children showed signs that detention had caused developmental regression, such as reversion to breastfeeding, and major psychiatric disorders, including suicidal ideation.")

[5] *Id*.

[6] *See* U.S. Citizenship and Immigration Services, Asylum Division, *Family Facilities Credible/Reasonable Fear*, available at http://www.uscis.gov/sites/default/files/USCIS/Outreach/PED-CF-RF-familiy-facilities-FY2015Q2.pdf (showing credible fear passage rates of 80%); Mark Noferi, American Immigration Council, *A Humane Approach Can Work: The Effectiveness of Alternatives to Detention for Asylum Seekers* (July 2015), available at http://immigrationpolicy.org/sites/default/files/docs/a_humane_approach_can_work_the_effectiveness_of_alternatives_to_detention_for_asylum_seekers_final.pdf (citing several studies establishing that asylum-seekers are "predisposed to comply with processes").

[7] *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (quotation marks and citation omitted); *see also Demore v. Kim,* 538 U.S. 510 (2003) (Kennedy, concurring) (detention is permissible only "to facilitate deportation, or to protect against risk of flight or dangerousness"); *Doan v. INS*, 311 F.3d 1160, 1162 (9th Cir. 2002) ("serious questions may arise concerning the reasonableness of the amount of [a] bond if it has the effect of preventing an alien's release").

[8] Refugee Convention, arts. 31(1)-(2); 26. *See, e.g.,* UNHCR DETENTION GUIDELINES: GUIDELINES ON THE APPLICABLE CRITERIA AND STANDARDS RELATING TO THE DETENTION OF ASYLUM-SEEKERS AND ALTERNATIVES TO DETENTION, Guideline 4.1.4 (2012),

American Commission on Human Rights has also directed that the detention of immigrants "must be used only as an exceptional measure, and then only as a last resort and for the shortest period of time possible." [9]

The Flores Settlement Agreement requires that immigrant children be released as quickly as possible to parents, adult relatives or other suitable adult caretakers. The Flores court has ruled that the settlement agreement protects children who arrive in this country with a parent. Thus, a detained parent should be released with his or her child:

> in accordance with applicable laws and regulations unless the parent is subject to mandatory detention under applicable law or after an individualized custody determination the parent is determined to pose a significant flight risk, or a threat to others or the national security, and the flight risk or threat cannot be mitigated by an appropriate bond or conditions of release.[10]

Immigration advocates, medical professional associations, the American Bar Association, the American Immigration Lawyers Association, human rights organizations, faith groups, academics and members of Congress have all called for the end to family detention. [11] In light of US legal obligations, we renew our call to cease detaining refugee families apprehended at the border.

**Families should be released**

The Department of Homeland Security should revert to its practice of releasing women and children on their own recognizance without conditions, which was the policy that was in place immediately prior to the expansion of family detention and implementation of the discredited blanket "no-bond" policy in the summer of 2014. The prior practice was a humane, legal and sound one, which allowed women and children to pursue protection claims in the community with the support of family or friends and with access to counsel, service providers and schools. It is also the most effective for low-risk populations, according to the US Department of Justice. [12]

We further encourage DHS to provide families with immediate access to the courts, without the need for any period of mandatory detention, by initiating removal proceedings pursuant to Section 240 of the Immigration and Nationality Act (INA). DHS has the authority to refer families directly into removal

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http://www.unhcr.org/505b10ee9.html (hereinafter "UNHCR Guidelines") ("Furthermore, detention is not permitted as a punitive – for example, criminal – measure or a disciplinary sanction for irregular entry or presence in the country").

[9] Inter-American Commission on Human Rights, Press Release, "IACHR Wraps Up Visit to the United States of America" (October 2, 2014), available at http://www.oas.org/en/iachr/media_center/PReleases/2014/110.asp (specifically stating that families with children should not be placed in immigration detention).

[10] *See Flores v. Johnson*, U.S. District Court, C.D. of Cal. (August 21, 2014), available at http://files.ctctcdn.com/baccf499301/f4641503-ab89-4820-98ad-6d3eccbe0e04.pdf.

[11] *See, e.g.*, NGO sign-on letter (September 25, 2014), available at http://www.aila.org/advo-media/aila-correspondence/2014/letter-to-obama-opposing-family-detention; Letter from the American Academy of Pediatrics (July 24, 2015), available at https://www.aap.org/en-us/advocacy-and-policy/federal-advocacy/Documents/AAP%20Letter%20to%20Secretary%20Johnson%20Family%20Detention%20Final.pdf; Letter from the American Bar Association (March 26, 2015), available at http://www.americanbar.org/content/dam/aba/administrative/immigration/FamilyDetentionLetter2015.authcheckdam.pdf; Letter from Members of Congress (May 27, 2015), available at https://lofgren.house.gov/uploadedfiles/family_detention.pdf.

[12] DOJ, Office of the Federal Detention Trustee, *Pre-Trial Risk Assessment in the Federal Court* 38 (2009) ("[P]opulations most suited for pretrial release – both programmatically and economically – with conditions of alternatives to detention are [high-risk] defendants…. [Low-risk] defendants generally do better if released without ATD conditions.")

proceedings to pursue their claims for relief.[13] Even where DHS elects to place families in expedited removal, DHS may release families without conditions while awaiting credible or reasonable fear interviews.[14]

**Electronic monitoring devices and other control-based alternatives to detention should not be the default**

We are particularly concerned with DHS's decision to impose electronic monitoring as a condition for release for hundreds of mothers detained at the Karnes, Berks and Dilley jails and its stated intention to use such monitoring devices for families whenever available. Such monitoring should never be used as a default program for families. We are equally troubled by the coercive practices involved in the use of these intrusive devices that the American Immigration Lawyers Association, Refugee and Immigrant Center for Education and Legal Services (RAICES) and others identified in their July 27, 2015 letter to ICE Director Sarah Saldaña.[15]

In recent years, DHS has dramatically increased its use of alternatives to detention (ATD) characterized by intensive supervision programs and electronic monitoring. Over the past year, DHS has been enrolling refugee families into these programs. The ATD program as currently implemented adopts a control-based framework from the criminal justice sector. We strongly suggest revision of the program to focus on truly supporting the means to access legal services and facilitate engagement with the court.

In its recent review of DHS's current alternatives to detention program including intensive supervision and electronic monitoring, DHS's Inspector General (IG) was unable to assess its effectiveness.[16] While ICE claims that the program is effective because the vast majority of participants comply with reporting and court obligations, the program group was not compared to a control group not under supervision. Importantly, the IG also found problems with ICE's risk assessment tool, including that it is "not effective in determining which aliens to release or under what conditions."[17] Rutgers Law School and the American Friends Service Committee also found problems with DHS's ATD program, including lack of implementation guidelines and an absence of information for the participant.[18] Without evidence supporting the current effectiveness of its alternatives program, the Administration should reduce rather than increase use of supervision and electronic monitoring.

The imposition of electronic monitoring devices penalizes victims of violence and trauma survivors who have simply asked for protection.[19] The embarrassment and stigma of wearing an ankle monitor[20] will stymie the ability of mothers to engage in the community, with their children's schools and places of worship – all things that the Administration should be encouraging. These considerations suggest that

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[13] Designating Aliens for Expedited Removal, 69 FR 48877 (Aug. 11, 2004).

[14] In El Paso, DHS has released families to a local non-profit shelter where they would stay pending credible fear interviews. Families were also released to relatives in other states, such as New Jersey, to await credible fear interviews while reporting to the local ICE office.

[15] Available at http://www.aila.org/advo-media/aila-correspondence/letter-to-ice-recent-practices-dilley.

[16] DHS Office of Inspector General, US Immigration and Customs Enforcement's Alternatives to Detention (Revised), OIG-15-22 (Feb. 4, 2015), available at https://www.oig.dhs.gov/assets/Mgmt/2015/OIG_15-22_Feb15.pdf.

[17] *Id*.

[18] Rutgers Law School, *Freed but Not Free* (2012), available at http://www.law.newark.rutgers.edu/files/FreedbutnotFree.pdf.

[19] Maria Sacchetti, *Asylum seekers often monitored more strictly than criminals*, THE BOSTON GLOBE (July 3, 2015).

[20] *See* Seth Robbins, *Lawyers: immigrant mothers coerced to wear ankle monitors*, THE WASHINGTON POST (July 27, 2015) ("'When people see me, the first thing they see is this (ankle monitor) and they think I am a criminal.'")

the categorical imposition of electronic monitoring devices on families, without any case-by-case consideration, may be punitive. As such, the practice is likely impermissible under the law.[21]

Finally, electronic monitors present significant logistical challenges and health consequences. The monitors currently being used require a minimum of two hours of charging per day, which involves being physically attached to an outlet. Many of the women being released are being temporarily housed in shelters and are traveling to relatives in other parts of the country. Shelters have difficulty sustaining so many individuals with needs to access outlet use. It is also often impossible to "plug in" while in transit. Women have also complained about skin irritation, swelling and abrasions while wearing the monitors.[22]

Of additional concern is the role of for-profit corporations that appears to be driving policy decisions on detention and the imposition of conditions on release. DHS began its blanket use of electronic monitoring while releasing women and children from the Dilley and Karnes jails just days after the issuance of the initial *Flores* decision on July 24, 2015. The decision to use electronic monitors maintained the flow of taxpayer dollars to the GEO Group, which owns and operates the Karnes facility and also owns BI Incorporated, the provider of the ankle monitors.

Any alternatives to detention program should focus on supporting families to facilitate access to counsel and court engagement rather than adopting the control framework from the criminal justice sector, which is inappropriate for the civil immigration process, particularly in connection with refugee families.

**Supporting Families**

In returning to a release policy consistent with the Flores Settlement Agreement and human rights obligations, we do recommend some improvements toward ensuring access to court and refugee protection mechanisms, which will also encourage continued court appearance. The following measures should be instituted:

- *Basic information on Immigration and Customs Enforcement (ICE) and court obligations in the adult's native language*. Currently, most apprehension related paperwork including reporting and hearing notices are provided only in English. Absent translation, refugee families have no means to understand their future obligations. Any notices regarding reporting appointments with ICE or court hearing notices should be provided in the adult's native language. In addition, written information describing the Executive Office for Immigration Review's information line and instructions should be provided so that families have independent means to keep advised of upcoming hearing dates. Finally, the immigration courts and DHS must develop a method to receive changes of address in the time between release and the case being filed with the court.

- *Filing the Notice to Appear (NTA) in the appropriate venue*. DHS needs to ensure that the Immigration Court hearings will be in the place where the family will reside upon release. Given the current lack of access to counsel and the absence of pro se materials facilitating changes of venue, DHS should file NTAs in the venue of the release address. If the NTA has already been filed with the court closest to the location of apprehension or initial detention, DHS should seek

[21] *See Zadvydas v. Davis*, 533 U.S. 678, 694-95 (2001) (finding that government can only detain for non-punitive reasons); *see also*, *United States v Torres*, 566 F. Supp. 2d (W.D. Tex. 2008) (requiring individualized assessment of need to manage flight risk in order to restrain a liberty interest through non-custodial means).

[22] Molly Hennessy-Fiske*, Immigrants object to growing use of ankle monitors after detention*, LOS ANGELES TIMES (Aug. 2, 2015).

a change of venue on its own motion or the Immigration Court should *sua sponte* change venue to the location of the new address.

- *Access to counsel*. Having an attorney is one of the most critical factors in facilitating an immigrant's continuing engagement with the court system. Recent data suggests that provision of counsel will result in high appearance rates. In fact, immigrant families with representation have a 98% appearance rate.[23] For immigrant children with attorneys, the appearance rate at court hearings was 92.5%.[24] That rate increased to 95.1% where children with attorneys were living with a parent or guardian.[25] Increasing access to counsel including the expansion of government-funded representation programs[26] for indigent immigrant respondents will ensure that families have meaningful access to asylum and other relief options, understand their rights and responsibilities, and comply with court obligations. Shy of an appointed counsel system, we encourage DHS and DOJ to use their resources to fund legal service providers and pro bono projects for indigent immigrants and to increase the capacity of legal services on par with the increased enforcement that has taken place

- *Reminders*. DHS and the Department of Justice can take the simple step of sending timely reminders of upcoming reporting dates or court hearings to families to ensure appearance. The Department of Justice itself has found that "[r]eminding defendants of their court dates either by phone, mail, e-mail, or during face-to-face contacts has been proven through research to reduce the incidence of failure to appear."[27]

A policy favoring the immediate release of refugee families would be the most cost efficient for the Administration. The simple improvements in notification we recommend are a judicious use of resources that will ensure that families can pursue relief options in court while accessing community support.

In conclusion, we ask that family detention cease and that both currently detained women and children and newly arriving family units be released immediately. Such a release policy will bring the Administration in line with its obligations under *Flores* and human rights law.

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[23] Human Rights First, *Myth vs. Fact: Immigrant Families' Appearance Rates in Immigration Court* (July 2015), available at http://www.humanrightsfirst.org/sites/default/files/MythvFact-Immigrant-Families.pdf.

[24] Immigration Policy Center, *Taking Attendance: New Data Finds Majority of Children Appear in Immigration Court* (July 29, 2014), available at http://www.immigrationpolicy.org/print/just-facts/taking-attendance-new-data-finds-majority-children-appear-immigration-court.

[25] *Id*.

[26] The US Department of Justice currently funds the National Qualified Representative Program providing counsel for detained immigrants found to be incompetent in immigration proceedings due to mental illness or impairment (USDOJ, Department of Justice and the Department of Homeland Security Announce Safeguards for Unrepresented Immigration Detainees with Serious Mental Disorders or Conditions (April 22, 2013), available at http://www.justice.gov/eoir/pr/department-justice-and-department-homeland-security-announce-safeguards-unrepresented), and legal services for immigrant children. *See* Alan Gomez, *Obama to provide legal aid to border-crossing children*, USA TODAY (June 6, 2014). The US Department of Health and Human Services also supports limited funding of counsel who represent unaccompanied immigrant children in immigration courts. Stephan Dinan, *Feds to spend $9 million to provide attorneys to illegal border children*, THE WASHINGTON TIMES (Sept. 30, 2014).

[27] DOJ, National Institute of Corrections, *Legal and Evidence-Based Practices: Applications of Legal Principles, Laws, and Research to the Field of Pre-Trial Services* 22 (April 2007).

Thank you in advance for your consideration.

Sincerely,

**Organizations**

American Civil Liberties Union
Catholic Charities of the East Bay
Center for Gender & Refugee Studies
Community Legal Services in East Palo Alto
Detention Watch Network
Immigrant Justice Corps
Las Americas Immigrant Advocacy Center
Lutheran Immigration and Refugee Service
National Immigrant Justice Center
Pennsylvania Immigration Resource Center (PIRC)
Refugee and Immigrant Center for Education and Legal Services (RAICES)

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