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STATEMENT OF THE AMERICAN IMMIGRATION COUNCIL AND THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION

SUBMITTED TO THE SENATE COMMITTEE ON
HOMELAND SECURITY & GOVERNMENTAL AFFAIRS

HEARING ON “THE IMPLICATIONS OF THE REINTERPRETATION OF THE FLORES
SETTLEMENT AGREEMENT FOR BORDER SECURITY AND ILLEGAL IMMIGRATION
INCENTIVES”

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The American Immigration Council (“Council”) is a non-profit organization which for over 30 years has been dedicated to increasing public understanding of immigration law and policy and the role of immigration in American society. The American Immigration Lawyers Association (AILA) is the national association of immigration lawyers established to promote justice and advocate for fair and reasonable immigration law and policy. AILA has over 15,000 attorney and law professor members nationwide. We write to share our analysis and research regarding the Flores Settlement Agreement, family detention, and migration of asylum seekers from Central America.

Due to high levels of violence in parts of Central America, migration patterns have shifted in recent years, with fewer economic migrants and more asylum-seeking families and unaccompanied children seeking protection in the United States.¹ This changing face of migration has incorrectly led some administration officials and lawmakers to question whether existing laws and policies that protect children are incentivizing these new flows.² Earlier this month, the Departments of Homeland Security (DHS) and Health and Human Services (HHS) published a joint proposed regulation which

¹ Jonathan T. Hiskey, Ph.D., Abby Córdova, Ph.D., Diana Orcés, Ph.D. and Mary Fran Malone, Ph.D., “Understanding the Central American Refugee Crisis,” February 1, 2016, <https://www.americanimmigrationcouncil.org/research/understanding-central-american-refugee-crisis>.

² “Written testimony of DHS Secretary Kirstjen Nielsen for a Senate Committee on Homeland Security and Governmental Affairs hearing titled ‘Authorities and Resources Needed to Protect and Secure the United States,’” Department of Homeland Security, May 18, 2018, <https://www.dhs.gov/news/2018/05/15/written-testimony-dhs-secretary-nielsen-senate-committee-homeland-security-and>.

would significantly undermine the 1997 Flores Settlement Agreement that established policies to better protect the welfare of immigrant children.³

Among the proposed changes is the intention to detain children with a parent for the duration of their immigration proceedings, which could result in many months, if not years, of detention. From our hands-on work providing legal services to detained families through the Dilley Pro Bono Project, we have seen the physical and psychological harm caused by detaining children. Based on this experience we believed the administration should instead be prioritizing well-established alternatives to detention, which are less costly, more humane, and extremely effective at getting families to appear in immigration court.⁴

Understanding the Central American Refugee Crisis

There is no question that many migrants coming to the United States from the Northern Triangle of Central America are fleeing endemic violence and are seeking safe haven in the United States, where many have family and community who can offer shelter while they seek asylum. Those who draw a causal link between U.S. immigration and asylum policies and this migration flow overlook the push factors of violence that force them to undertake a perilous journey north. The Council's report, [*A Guide to Children Arriving at the Border: Laws, Policies and Responses*](#), provides information about the tens of thousands of children—some traveling with their parents and others alone—who have fled their homes in Central America and arrived at our southern border. It also seeks to explain the basic protections the law affords them, what happens to the children once they are in U.S. custody, and what the government has done in response.⁵

Organized crime, gangs, and violence in places like El Salvador, Honduras, and Guatemala are driving children, families, women, and men out of their hometowns and countries, a situation detailed in the Council's report [*Understanding the Central American Refugee Crisis: Why They are Fleeing and U.S. Policies are Failing to Deter Them*](#) and the report [*No Childhood Here: Why Central American Children Are Fleeing Their Homes*](#).⁶ Of more than 300 children interviewed in the first five months of 2014 for *No Childhood Here*, 59 percent of Salvadoran boys and 61 percent of Salvadoran girls cited gangs, crime, and violence as the reasons for their emigration. Moreover, as described in *Understanding the Central American Refugee Crisis*, a survey of Central Americans considering migration concluded that crime and violence have the most powerful impact on someone's decision to migrate, and awareness of migration risks had no significant impact on this decision. These individuals have limited choices at their disposal, and the United States must adhere to its legal and moral obligations to protect them.

³ "American Immigration Council Condemns Administration's Proposal to Indefinitely Detain Children," American Immigration Council, September 6, 2018, <https://www.americanimmigrationcouncil.org/news/american-immigration-council-condemns-administrations-proposal-indefinitely-detain-children>; AILA Press Statement: [Trump Administration Lines Up End Run Around Protections for Detained Children](#) (September 6, 2018).

⁴ "The Real Alternatives to Detention," American Immigration Lawyers Association et al., June 27, 2017, <https://www.aila.org/infonet/the-real-alternatives-to-detention>.

⁵ "A Guide to Children Arriving at the Border: Laws, Policies and Responses," American Immigration Council, June 26, 2015, <https://www.americanimmigrationcouncil.org/research/guide-children-arriving-border-laws-policies-and-responses>. For more information on barriers to protection, see "[AILA Policy Brief: New Barriers at the Border Impede Due Process and Access to Asylum](#)" (June 1, 2018).

⁶ *Understanding the Central American Refugee Crisis: "No Childhood Here: Why Central American Children are Fleeing Their Homes,"* American Immigration Council, July 1, 2014, <https://www.americanimmigrationcouncil.org/research/no-childhood-here-why-central-american-children-are-fleeing-their-homes>.

Flores Settlement Agreement and Family Detention

In place for over two decades, the 1997 Flores Settlement Agreement prescribes national standards for the care, custody, and release of asylum-seeking children, including accompanied minors and unaccompanied minors detained by the Government.⁷ Its purpose is to minimize the unnecessary and harmful practice of detaining children and requires—when release is not possible—that children be kept in the least restrictive setting licensed by a child welfare agency.

In 2014 the Obama administration chose to greatly expand family detention as a result of an influx of Central Americans seeking refuge in the United States.⁸ Currently there are three family detention facilities in Dilley, Texas; in Karnes City, Texas; and in Berks County, Pennsylvania. Together, these three facilities have bed capacity for almost 3,500 parents and children. These facilities operate even though they likely violate the Flores Settlement Agreement. Generally, Flores prohibits the detention of immigrant minors in secure facilities that have not been licensed by a child welfare entity. None of the three existing family detention facilities are licensed by a child welfare entity, and all of them are “secure.”

Further, the conditions in family detention are unacceptable. Over the last few years there has been extensive evidence presented by medical professionals who have testified that many detained families suffer from Post-Traumatic Stress Disorder (PTSD), depression and other cognitive disorders.⁹ The American Immigration Council, AILA, and other organizations have submitted multiple complaints to the Department of Homeland Security (DHS) Office of Inspector General (OIG) and the Office of Civil Rights and Civil Liberties (OCRCL) documenting deplorable medical treatment for children and mothers, including pregnant women.¹⁰ Even DHS’ own Homeland Security Advisory Council called for U.S. Immigration and Customs Enforcement (ICE) to take the position that “detention is generally neither appropriate nor necessary for families- and that detention... [is] never in the best interest of children.”¹¹ The Advisory Council further noted that “[n]umerous studies have documented how detention exacerbates existing mental trauma and is likely to have additional deleterious physical and mental health effects on immigrants—particularly traumatized persons like asylum seekers.”¹²

Instead of looking for ways to expand and indefinitely detain parents and children, the administration should instead be shifting its resources to alternatives to detention (ATDs), which are widely used in the pre-trial criminal justice context.¹³ ATDs are less expensive than detention; they cost an average

⁷ “The Flores Settlement and Family Separation at the Border,” Women’s Refugee Commission, July 25, 2018, <https://www.womensrefugeecommission.org/rights/resources/1647-the-flores-settlement-and-family-separation-at-the-border>.

⁸ Understanding the Central American Refugee Crisis.

⁹ DHS OCRCL and OIG Complaint, “CARA OCRCL Complaint: Ongoing Concerns Regarding the Detention and Fast-Track Removal of Detain Children and Mothers Experiencing Symptoms of Trauma,” March 29, 2016, <https://www.aila.org/advo-media/press-releases/2016/cara-crcl-complaint-concerns-regarding-detention>.

¹⁰ “Increasing Numbers of Pregnant Women Facing Harm in Detention,” American Immigration Council, September 26, 2017, <https://www.americanimmigrationcouncil.org/advocacy/detained-pregnant-women>; “Deplorable Medical Treatment at Family Detention Centers,” American Immigration Council, July 30, 2015, <https://www.americanimmigrationcouncil.org/news/deplorable-medical-treatment-family-detention-centers>.

¹¹ Homeland Security Advisory Council, “Report of the ICE Advisory Committee on Family Residential Centers,” Department of Homeland Security, October 7, 2016, 6, <https://www.ice.gov/sites/default/files/documents/Report/2016/acfrc-report-final-102016.pdf>.

¹² Ibid. 6-7.

¹³ The Real Alternatives to Detention.

of \$4.50 per day compared to \$319.47 per day for family detention.¹⁴ A recent report published by the American Immigration Council, [*Detaining Families: A Study of Asylum Adjudication in Family Detention*](#), analyzed 15 years of government data and demonstrates that these alternatives to detention work well.¹⁵ The report finds that family members who were released from detention had high compliance rates: 86 percent of released family members attended all of their court hearings that occurred during the study period. This rate was even higher among family members applying for asylum: 96 percent of asylum applicants had attended all their immigration court hearings.¹⁶

When family detention expanded in 2014, the Council and AILA warned that detaining families was not the answer and un-American. As a country, we must choose policies in line with our values and end the unconscionable practice of locking up children and parents. Prolonged family detention must not be the answer to family separation. And family unity does not require imprisonment. The United States can maintain control of its borders, but also show compassion towards asylum seeking children and families in need of protection.

¹⁴ Ibid.

¹⁵ Ingrid Eagly, Esq., Steven Shafer, Esq. and Jana Whalley, Esq., “Detained Families: A Study of Asylum Adjudication in Family Detention,” American Immigration Council, August 16, 2018, <https://www.americanimmigrationcouncil.org/research/detaining-families-a-study-of-asylum-adjudication-in-family-detention>.

¹⁶ Ibid.