# COMMISSION ON IMMIGRATION

# FAMILY IMMIGRATION DETENTION:

Why the Past Cannot Be Prologue

**July 31, 2015**

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This report and its recommendations build on the Commission's work directing the ABA's efforts to ensure fair and unbiased treatment and full due process rights for immigrants and refugees within the United States and its longstanding concerns regarding the serious issues raised by family detention, in particular the detention of mothers and children.

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July 31, 2015

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## EXECUTIVE SUMMARY

This report examines the United States Government's response to the increase in arrivals of Central American mothers with young children at our southwestern border during the summer of 2014. Although it touches briefly on the causes of this migration and the resulting claims for protection the families are making, the report concentrates primarily on the decision by the federal government to engage in large-scale detention of parents and their children in prison-like facilities, and the initially-stated rationale of deterrence as support for that action.

The report reviews the history of family detention, acknowledging Native American and Japanese internment and the operation of Ellis and Angel Islands, as well as the development of the Hutto family immigration detention facility in Texas in 2006. The report describes the current use of family detention in Karnes City and Dilley, Texas and Berks County, Pennsylvania. The report demonstrates that periodic migration of families is not new but wholly predictable and that detention of families in penal settings has been rejected previously by both courts and policymakers, as recently as the abandonment of family detention at the Hutto facility in 2009. It concludes that the return to family detention in Artesia, New Mexico, last year and as it exists today in the remaining three "Family Residential Centers" violates applicable laws, standards, and human rights norms.

The report does not focus on current conditions in family detention, which are of grave concern but about which much has been written elsewhere. Rather, this report concentrates on the government's decision as a policy matter to detain women and children fleeing to the United States to seek protection. It concludes that the dramatic build-up of family detention centers and the practice of detaining families in jail-like settings are at odds with the presumption of liberty that should apply and the limited permissible goals of civil detention. Additionally, detention necessarily impinges on the families' due process right to access to counsel for legal information and representation, and in turn negatively impacts their ability to pursue legal relief based on the merits of their claims.

This report concludes by urging the U.S. Government, and the Department of Homeland Security in particular, to carry out the Department's core mission of national emergency planning and preparedness by better anticipating and equipping itself to cope with inevitable migration exigencies whenever they recur without resorting to unnecessary detention. It reminds us that detention should be imposed only as a last resort and under the least restrictive means possible, particularly for vulnerable populations such as families with children most of whom are asylum seekers.

This report recommends that the government undertake several key reforms, including the following: 1) Immediately release families held at the Berks, Dilley, and Karnes family detention facilities, cease expansion of the facilities, and do not renew their contracts for family detention; 2) Permanently abandon deterrence-based detention policies; 3) Adopt a presumption against detention and treat release into the community as the general rule, particularly in the case of families, children, and asylum seekers; 4) When release into the community alone is insufficient, employ an objective risk assessment to identify the least restrictive means of achieving the goals of ensuring appearance at hearings and protection of the community, using electronic monitoring and cash bonds only where demonstrably necessary in individual cases; 5) Establish and adhere to clear standards of care that include unique provisions for families and children that do not follow a penal model; and 6) Ensure meaningful access to legal information and representation for all families subjected to detention at every stage of their immigration proceedings. Full detailed recommendations are found at the end of this report.

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**AMERICAN BAR ASSOCIATION**
**COMMISSION ON IMMIGRATION**

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*On July 24, 2015, as this report was being finalized, the Hon. Dolly Gee of the United States District Court for the Central District of California, ruled that the family immigration detention practices at the facilities located in Karnes City and Dilley, Texas, as well as in Berks County, Pennsylvania, violated the settlement agreement reached in 1997 in the case of Flores v. Meese (described below). The court held that the continued detention of immigrant children was improper and that accompanying mothers should be released to secure the rights of the children to be free from detention, absent a finding that the women posed a danger or a likelihood of fleeing the jurisdiction of the immigration court. Judge Gee ordered the United States Government to show cause why the court's order should not take effect within 90 days, a result that could largely end current family detention practices. The court found government practices, conditions of confinement, and failure to abide by the terms of the 18 year old settlement to be "deplorable." While we note the importance of this late-breaking development, we consider the issues, analysis and recommendations laid out in this report to be as relevant as before Judge Gee's ruling.*

During the summer of 2014, scores of children traveled north from Central America, often with their mothers and often fleeing horrific gang-sponsored and intimate family violence against which their governments had failed to provide protection. As gang-perpetrated murders and violence against women and children proliferated in Central America, thousands of family units came to the southwest border of the United States seeking protection in this country.[1] In

[1] Under U.S. law, most of the families could apply for protection in the form of asylum while others would qualify only to apply for a related form of relief known as "withholding of removal." *See* INA §§ 208, 241(b)(3)(B). In either case, the applicant for relief must meet the international law definition of "refugee" to receive legal recognition of their need for protection and the right to remain in the United States indefinitely. *See* INA §§ 101(a)(42)(A), 208(b)(1), 241(b)(3)(B). The international refugee definition is set forth in the U.N. Convention on the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 (hereinafter "Refugee Convention"), extended by the Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (hereinafter "Refugee Protocol"), which entered into force for the United States on Nov. 1, 1968, through accession to the Refugee Protocol. "Refugee" status requires a showing of persecution on account of race, religion, nationality, political opinion or membership in a particular social group. For purposes of this report, we will refer to individuals seeking asylum or related relief as "asylum-seekers," whether they are technically applying for asylum or withholding of removal, except in the few instances where the distinction between the two forms of relief is relevant. We will also refer to asylum claims and the law of asylum, rather than making distinctions between the various related forms of relief unless specifically relevant. It should be noted that some of the children and/or their parents may qualify for other forms of relief as well, such as U visas for victims of certain crimes committed in the United States and

federal fiscal year 2014 alone, the U.S. Border Patrol apprehended 68,445 children and parents traveling together at the United States-Mexico border.[2]

Dubbing this humanitarian crisis a threat to national security, the U.S. Government responded swiftly and severely against the new entrants. Rather than deliberating on the range of strategies available for addressing the challenges presented, the government hastily adopted a response focused on detention and speedy deportation. Among other measures, the Department of Homeland Security ("DHS") dramatically expanded its practice of family detention, in lockdown facilities, with the explicit goal of sending a "message" that would deter future migration.[3] Almost as swiftly, the legal community, advocates, and others galvanized in an effort to meet the needs of the thousands of women and children now being held in prison-like detention centers, all of them in rural locations and all but one in the southwest United States. Despite these efforts, the legal and humanitarian rights of the detained children and their parents, and their access to legal representation have been compromised by the government's policy and practice of family detention.

This report examines the trajectory of family detention between the summer of 2014 and the summer of 2015. While numerous concerns have been raised about the conditions of detention in the family facilities, including serious deficiencies in the provision of health care and nutrition, as well as harsh and dehumanizing treatment by staff and even sexual abuse,[4] this

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Special Immigrant Juvenile Status for children who have been abandoned, abused, or neglected by a parent. *See* INA §§ 101(a)(15)(U), 101(a)(27)(J).

[2] U.S. Border Patrol, *Southwest Border Sectors: Family Unit and Unaccompanied Alien Children (0-17) Apprehensions FY 14 Compared to FY 13*, http://www.cbp.gov/sites/default/files/documents/BP%20Southwest%20Border%20Family%20Units%20and%20UAC%20Apps%20FY13%20-%20FY14_0.pdf.

[3] U.S. Dep't of Homeland Sec., Statement by Secretary of Homeland Security Jeh Johnson Before the Senate Committee on Appropriations (June 10, 2014) (hereinafter "Johnson Statement"), http://www.dhs.gov/news/2014/07/10/statement-secretary-homeland-security-jeh-johnson-senate-committee-appropriations; *see* Juan Carlos Llorca, *Fed Says They Will Expedite Deportations to 10-15 Days at N.M. Facility*, SEATTLE TIMES (last updated June 27, 2014), http://www.seattletimes.com/nation-world/fed-says-they-will-expedite-deportations-to-10-15-days-at-nm-facility; Julia Preston & Randal C. Archibold, *U.S. Moves to Stop Surge in Illegal Immigration*, N.Y. TIMES, June 21, 2014, at A12, http://www.nytimes.com/2014/06/21/us/us-plans-to-step-up-detention-and-deportation-of-migrants.html?_r=0.

[4] *See, e.g.*, Letter from Ranjana Natarajan to Sylvester Ortega, et al. (Sept. 25, 2014) (on file with the authors); Letter from Sandra G. Hassink, American Academy of Pediatrics to U.S. Dep't of Homeland Sec. Secretary Jeh Johnson (July 24, 2015), https://www.aap.org/en-us/advocacy-and-policy/federal-advocacy/Documents/AAP%20Letter%20to%20Secretary%20Johnson%20Family%20Detention%20Final.pdf; Wil S. Hylton, *The Shame of America's Family Detention Camps*, N.Y. TIMES MAGAZINE, Feb. 4, 2015, http://www.nytimes.com/2015/02/08/magazine/the-shame-of-americas-family-detention-camps.html; Cristina Costanti, '*Drink More Water': Horror Stories from the Medical Ward of a Texas Immigration Detention Center*, FUSION (July 14, 2015), http://fusion.net/story/165837/dilley-detention-center-horror-stories-from-the-medical-ward/; Ed Pilkington, *'Soul-destroying': one migrant mother's story of life at Dilley detention center*, THE GUARDIAN, May 22, 2015, http://www.theguardian.com/us-news/2015/may/22/immigrant-mothers-dilley-family-detention-center-texas; Franco Ordoñez, *Teen Mom Who Attempted Suicide Speaks Out After Deportation*, MCCLATCHY NEWS, June 17, 2015, http://www.mcclatchydc.com/news/immigration/article25186393.html; Ed Pilkington, *Child Immigrant Detainees: "There's an overwhelming sadness among them,"* THE GUARDIAN, May 12, 2015, http://www.theguardian.com/us-news/2015/may/12/immigration-detention-centers-children; CRISTINA PARKER ET AL., GRASSROOTS LEADERSHIP & JUSTICE STRATEGIES, FOR-PROFIT FAMILY DETENTION: MEET THE PRIVATE PRISON CORPORATIONS MAKING MILLIONS BY LOCKING UP REFUGEE FAMILIES (Oct. 2014), http://grassrootsleadership.org/sites/default/files/uploads/For-Profit%20Family%20Detention.pdf; Allie Yee, *Conditions at for-profit immigrant detention facilities*

report does not address the conditions of detention. Instead, the report focuses on the policy and practice of detaining families in secure settings and the consequences of this detention by addressing: (1) the origins of family detention; (2) its expanded use to deal with the 2014 humanitarian crisis; (3) serious concerns about the compatibility of family detention with basic constitutional and international human rights norms as well as ABA standards; (4) the violations of fundamental due process rights of detained women and children implicated in this practice; and (5) the legal community's response,[5] as well as the continued need for additional measures to ensure meaningful access to justice for detained families.

## I. The History of Family Detention

While the government renewed and expanded its use of family detention in response to the 2014 crisis, the policy of detaining children and their parents during the pendency of their immigration proceedings is not new. It is important to understand the history of family detention in the United States to evaluate its current use.

### A. First Family Detention Facilities

The U.S. Government has a long and painful history of detaining families. Examples include the internment of Native American families,[6] the detention of immigrant families on Ellis and Angel Islands,[7] internments of families of U.S. citizens and immigrants during World War I and World War II,[8] and the detention of Cuban and Haitian immigrant families in Florida and Guantánamo Bay.[9]

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*in Texas draw legal action*, FACING SOUTH (The Institute for Southern Studies), http://www.southernstudies.org/2015/02/conditions-at-for-profit-immigrant-detention-facil.html; Ian Gordon, *Inside Obama's Family Deportation Mill*, MOTHER JONES, Dec. 19, 2014, http://www.motherjones.com/politics/2014/12/family-detention-artesia-dilley-immigration-central-america; Maurice Chammah, *Long Shorts and Baggy Shirt*, The Marshall Project (April 2015), https://www.themarshallproject.org/2015/04/17/long-shorts-and-baggy-shirts; U.S. Commission on Civil Rights, Testimony of Marisa Bono, MALDEF Staff Attorney, "PREA and Complaints of Sexual Abuse at ICE Karnes Facility" (Jan. 30, 2015), http://www.usccr.gov/OIG/Marisa_Bono_WrittenStatement_FINAL.pdf.

[5] The report offers only a brief description of the models that developed for delivery of *pro bono* legal services at the facilities, as these efforts are not the focus of this report and are well documented elsewhere. *See, e.g.*, Stephen Manning, Ending Artesia (Jan. 2015), https://innovationlawlab.org/the-artesia-report/.

[6] Native American families were interned in military forts during the removal of 1838-39. The Native American experience is also relevant to the immigrant experience, because many Native Americans were not recognized by the U.S. as citizens until the 1924 Indian Citizenship Act. *See* Exploring the Trail of Tears, http://pages.cs.wisc.edu/~fish/final115%28drip%29.swf; Library of Congress, Indian Citizenship Act, http://memory.loc.gov/ammem/today/jun02.html.

[7] *See* Angel Island: Ellis Island of the West, NPR (Oct. 6, 2010), http://www.npr.org/templates/story/story.php?storyId=130380169 (documenting the detention of families at Angel Island); Immigration and Deportation at Ellis Island, PBS, http://www.pbs.org/wgbh/amex/goldman/peopleevents/e_ellis.html (detailing the detention history of Ellis Island).

[8] *See* Children of the Camps: Internment History, PBS, http://www.pbs.org/childofcamp/history/(detailing the history of WWII internment of Japanese families many of whom were immigrants). Ethnically Japanese residents living in Peru were also arrested and forcibly deported from Peru to the U.S. for internment. Jaime Gonzalez, *The Japanese-Peruvians interned in the US during WW2*, BBC (Feb. 27, 2015), http://www.bbc.com/news/world-latin-america-31295270.

[9] Azadeh Dastyari & Libbey Effeney, *Immigration Detention in Guantánamo Bay (Not Going Anywhere Anytime Soon)*, 6.2 SHIMA: INT'L J. OF RESEARCH INTO ISLAND CULTURES 49 (2012), http://www.shimajournal.org/

The most directly relevant portion of the story of family detention practices in the United States begins in the 1980s during increased refugee flows from Cuba, Haiti and Central America. During this period, the number of unaccompanied and accompanied children from Central America seeking asylum in the United States dramatically increased. The government generally responded by releasing children to a parent or legal guardian and then holding any remaining children in border detention facilities and tent shelters, without access to education, health care, or legal services.[10] For a time, entire families of Central American migrants were housed in large-scale American Red Cross shelters along the Texas-Mexico border while immigration officials prohibited them from leaving the border region, leading to harsh criticism of government policy.[11]

In 1997, the *Flores v. Meese* lawsuit, involving the rights of children in immigration custody, resulted in a settlement stipulating that children waiting for a determination of removal or relief be placed in the "least restrictive setting."[12] This agreement was intended to protect the rights of minors in immigration custody and ensure their well-being.[13] Under the settlement, unaccompanied minors were to be released to the care of their parents or other family members whenever possible, and if not, they were to be placed in foster homes or licensed facilities. These purportedly child-friendly licensed facilities were to be operated in accord with age-appropriate policies and programs.[14] Subsequently, the care of unaccompanied minors was transferred legislatively to the Office of Refugee Resettlement within the Department of Health and Human Services.[15] Following implementation of the settlement, detained family units composed of children and parents were generally released together on their own recognizance, pending a hearing before an immigration judge. These practices were consistent with both the prior practice favoring release of children to their parents and the terms of the *Flores* settlement.[16]

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issues/v6n2/g.%20Dastyari%20and%20Effeney%20Shima%20v6n2%2049-65.pdf; *Louis v. Nelson*, 544 F. Supp. 973, 981 n.24 (S.D. Fla. 1982).

[10] Michael A. Olivas, *Unaccompanied Refugee Children: Detention, Due Process, and Disgrace*, 2 STAN. L. & POL'Y REV. 159 (1990); Paul Weingarten, *Refugee Kids Flocking to Texas – All Alone*, CHI. TRIB., Mar. 12, 1989, http://articles.chicagotribune.com/1989-03-12/news/8903260117_1_refugee-unaccompanied-children-el-salvador. Some parents and children were held together, at least briefly, in a detention facility in Laredo, Texas, operated by the Corrections Corporation of America. *See* CHARLES H. LOGAN, PRIVATE PRISONS: CONS AND PROS 23 (1990).

[11] GRETCHEN BOLTON, REFUGEE POLICY GROUP, RESEARCH PAPER FOR THE U.S. COMMISSION ON IMMIGRATION REFORM: IMMIGRATION EMERGENCIES – LEARNING FROM THE PAST, PLANNING FOR THE FUTURE 30-32 (Feb. 1994), https://www.utexas.edu/lbj/uscir/respapers/ie-feb94.pdf; *Group Claims U.S. Violating Civil Rights*, LODI NEWS-SENTINEL, July 3, 1989, at 9, https://news.google.com/newspapers?nid=2245&dat=19890703&id=84MzAAAAIBAJ&sjid=yzIHAAAAIBAJ&pg=6024,315636&hl=en.

[12] Stipulated Settlement Agreement at 7, *Flores v. Meese*, No. CV 85-4544-RJK (Px) (C.D. Cal. Jan. 17, 1997) (hereinafter "Flores Stipulated Settlement Agreement").

[13] U.S. Dep't of Justice, Office of Inspector Gen., *Unaccompanied Juveniles in INS Custody*, Report No I-2001-009, Exec. Summary (Sept. 28, 2001), https://oig.justice.gov/reports/INS/e0109/exec.htm.

[14] *Id.*

[15] The Homeland Security Act (HSA) of 2002, § 462, Pub. L. 107–296, 116 Stat. 2135, was enacted on November 25, 2002 (codified as amended at 6 U.S.C. §§ 101-613 (2011)).

[16] Flores Stipulated Settlement Agreement, *supra* note 12; *Reno v. Flores*, 507 US 292, 295 (1993); 8 C.F.R. § 1236.3(b)(2).

In 1996, through enactment of the Antiterrorism and Effective Death Penalty Act and the Illegal Immigration Reform and Immigrant Responsibility Act,[17] Congress made significant changes to U.S. immigration law. Among other amendments adversely affecting families, these changes included creation of an "expedited removal" process and expansion of the categories of persons subject to mandatory detention. One measure taken by immigration authorities to increase available detention space under the new legislative framework was to convert a county nursing home in Berks County, Pennsylvania, into the Berks County Family Residential Center ("Berks") in March 2001.[18] The 84-bed facility was intended to temporarily detain migrant families undergoing administrative immigration proceedings and those subject to mandatory detention. The facility is owned and operated by Berks County pursuant to the terms of a contract with the federal government's immigration agencies.

Berks held both parents and their minor children, arguably to encourage parental contact with their children. This objective was undercut by governmental policy that regulated the adults' authority to parent their children while detained and by decision-making regarding releases and the unavailability of legal counsel, which contributed to longer stays. At the same time, the facility also had a number of beneficial attributes for short-term stays, including a physical plant and programs that supported the nutritional, health care, educational, and recreational needs of the residents.[19]

### B. Detention Policy Changes After 9/11

In the aftermath of the September 11, 2001 terrorist attacks, the U.S. Government once again fortified immigration law enforcement, resulting in further changes to family detention policies. Congress passed the Homeland Security Act[20] in 2002, creating the Department of Homeland Security ("DHS") and establishing Immigration and Customs Enforcement ("ICE") as a new entity within DHS charged with immigration enforcement. Expedited removal proceedings were soon expanded to apply to certain asylum-seekers crossing U.S. land borders, among others.[21] In addition, detention became the preferred management strategy. These changes in policies and practices disproportionately impacted families.

The pre-9/11 policy that favored release whenever possible for families who had been apprehended together, or, alternatively, to detain the adults and their children together as a family unit when release was not feasible, was largely abandoned. Increasingly, in its place, parents were separated from their children as well as from one another and detained by ICE. The children, including infants and toddlers, were sent to facilities operated by the Department of Health and Human Services' Office of Refugee Resettlement. The involuntary separation of

[17] Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996).
[18] Berks Family Residential Center, Annual Compliance Review Report (Feb. 2009), http://www.ice.gov/doclib/foia/dfra-ice-dro/compliancereportberksfamilyresidentialcenter0714172008.pdf
[19] Interview with Dora Schriro, based on her field notes as former Senior Advisor to DHS Secretary Napolitano (on file with the authors).
[20] Homeland Security Act, Pub. L. 107–296, 116 Stat. 2135 (2002).
[21] U.S. Dept. of Homeland Sec., "Designating Aliens for Expedited Removal," 69 *Federal Register* 48877, Aug. 11, 2004.

parents from their children had the effect of rendering the children "unaccompanied" for legal purposes.[22]

Ultimately, some in Congress came to focus on these harsh practices. In 2005, the House Appropriations Committee noted the negative impacts and directed DHS to stop separating families, stating:

> The Committee expects DHS to release families or use alternatives to detention such as the Intensive Supervised Appearance Program whenever possible. When detention of family units is necessary, the Committee directs DHS to use appropriate detention space to house them together.[23]

### C. The Berks and Hutto Family Detention Centers

Despite the Congressional directive, DHS did not release more families or increase its use of alternatives to detention. Instead, DHS expanded its secure capacity to detain more families together. In May 2006, ICE opened a second and much larger facility for families, the 512-bed T. Don Hutto Family Residential Center ("Hutto") in Taylor, Texas.[24] The facility held mothers and fathers and their children. Neither its physical plant and programs nor its policies and practices were family-friendly. Movement was limited within the facility and access to the outdoors curtailed. Initially children received only one hour of education a day. Furthermore, there were reoccurring reports of medical and mental health issues, notably sustained weight loss and depression.[25]

Congress quickly concluded that Hutto, a former medium security prison for adult male inmates, had continued to operate like an adult correctional facility, contrary to the House Appropriations Committee's prior instruction. Congress criticized both Berks and Hutto, noting that although Berks was more "homelike" than Hutto, it also failed to afford the least restrictive setting, as required for children by the *Flores* settlement.[26]

In March 2007, the ACLU and other parties challenged ICE's enforcement practices, arguing that the use of the Hutto facility to detain children and families violated the rights of the detained minors. The lawsuit charged that children were being separated impermissibly from

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[22] See WOMEN'S COMMISSION FOR REFUGEE WOMEN & LUTHERAN IMMIGRATION AND REFUGE SERVICE ("WRC & LIRS"), LOCKING UP FAMILY VALUES: THE DETENTION OF IMMIGRANT FAMILIES (Feb. 2007), https://womensrefugeecommission.org/programs/migrant-rights/research-and-resources/150-locking-up-family-values-the-detention-of-immigrant-families/file; WRC & LIRS, LOCKING UP FAMILY VALUES, AGAIN: A REPORT ON THE RENEWED PRACTICE (Oct. 2014), http://lirs.org/wp-content/uploads/2014/11/LIRSWRC_LockingUpFamily ValuesAgain_Report_141114.pdf.

[23] H.R. Rep. 109-79, at 38 (2005).

[24] Hutto operates under an ICE Intergovernmental Service Agreement with Williamson County, Texas. Williamson County contracts with Corrections Corporation of America for the facility's day-to-day operations. U.S. Immigration & Customs Enforcement, T. Don Hutto Residential Center Fact Sheet (Nov. 7, 2011), http://www.ice.gov/factsheets/facilities-hutto.

[25] Compl. for Declaratory and Injunctive Relief, *In re Hutto Family Detention Ctr.*, No. 07-cv-164-SS (W.D. Tex. Mar. 6, 2007), ECF No. 1.

[26] H.R. Rep. 109-476, at 43 (2006).

their parents, detained illegally, and treated as prisoners, contrary to the January 1997 settlement agreement in *Flores v. Meese*.[27] The plaintiffs further alleged that ICE's actions conflicted with Congress's repeated instructions to DHS to: (1) keep immigrant families together whenever possible; and (2) either release the families or use various alternatives to detention. Finally, the action sought to enforce the policy that when detention was absolutely necessary, detained families were to be placed together in normalized settings. In August 2007, ICE entered into a settlement agreement with the plaintiffs.[28] Among a number of measures, ICE agreed to utilize Hutto as a placement of last resort, improve the physical plant and its policies and procedures so it was less like a prison, professionalize the workforce, regularly review detainees' eligibility for reassignment to less restrictive settings, and adopt transparent operating standards.

Late in 2007, ICE promulgated Family Residential Standards for the operation of both the Berks and Hutto facilities.[29] These standards were intended to create uniform guidelines for many aspects of detention, including safety, security, education, staff training and hiring, and medical care. Although these standards were issued after some input from immigration and civil rights advocates, they continued to be based on correctional assumptions.[30] Personal possessions remained limited in number and were kept in communal areas. Movement within the facility and on the grounds remained restricted. ICE did not directly monitor for compliance at Berks and Hutto; instead, ICE contracted for that function as well. The compliance assessments were further impacted by the fact that the standards and scores were subject to manipulation. Critically, the limited protections that ICE put into place through adoption of the standards were advisory only, and there were no penalties for non-compliance.

As advocate, media and congressional attention continued to increase, DHS undertook a comprehensive assessment of detention policy and practices early in 2009, with the goals of reducing reliance on detention and improving the efficiency and effectiveness of ICE.[31] Among the first steps taken was the removal of all families from Hutto. As many as possible were released; the rest were transferred to Berks. After the last of the families were transferred in September 2009, Hutto was re-commissioned as an all-female, adults-only facility.[32]

### D. Reforms to Detention Policy and Practice in 2009

The findings of the system-wide assessment of detention policy and practice were summarized in a report that DHS released in October 2009. The report also included recommendations that laid the groundwork for a number of reforms that DHS announced around the time of its release. These positive reforms were directed to all immigration detainees,

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[27] Compl. for Declaratory and Injunctive Relief at 2-4, *In re Hutto Family Detention Ctr.*, No. 07-cv-164-SS.
[28] Settlement Agreement, *In re Hutto Family Detention Ctr.*, ( Aug. 26, 2007), ECF No. 92-1.
[29] U.S. Immigration and Customs Enforcement, Family Residential Standards, http://www.ice.gov/detention-standards/family-residential.
[30] Press Release, Women's Refugee Comm'n, Women's Refugee Commission Still Concerned about Continued Detention of Families at Berks Facility, https://womensrefugeecommission.org/press-room/826-just-announced-immigration-detention-policies-are-excellent-first-step.
[31] DORA SCHRIRO, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, OFFICE OF DETENTION POLICY & PLANNING, IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS (Oct. 6, 2009), http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf.
[32] *Id.*

including special populations, most notably, women, children, families, asylum-seekers, the aged, ill and infirm, and other vulnerable individuals.[33]

The report's principal findings emphasized the importance of: (1) premising the detention system upon the likelihood of eligibility for relief and a presumption of release into the community as the rule rather than the exception, with objective risk assessment leading to the use of the least restrictive means to achieve compliance with attendance at immigration proceedings in cases where release alone was insufficient; (2) where detention is required, establishing clear standards of care that include unique provisions for special populations, including families, that do not follow a penal model, and with systematic independent monitoring of conditions for compliance; (3) ensuring meaningful access to legal materials and counsel to inform and expedite decision-making; and (4) acknowledging the probability of periodic influxes in migrant families seeking status resulting in a need to develop viable plans and preparedness to accommodate changes by means other than detention or release with stringent supervision requirements.

Through its response to the increased migration of children and families in 2014, as explained below, the government's advancements made in 2009 have been largely eroded. Those who "cannot remember the past are condemned to repeat it."[34]

## II. Challenges Presented by Migrant Families Arriving at the Southwestern U.S. Border in Summer 2014

The significant increase in the number of children and families arriving at the southwest border from Central America in 2014, labeled a "surge" by some in the U.S. Government and the media, garnered national attention and an immediate governmental response.[35] Overall, unlawful crossings at the southwestern border were at an historic low, but the increased number of children and families presented unique challenges. In addition, for the first time since record-keeping began in 1992, less than half of the arrivals were natives of Mexico.[36] Instead, many of the women and children were fleeing violence in Central America's Northern Triangle, consisting of Honduras, Guatemala, and El Salvador, and were seeking safety and protection in the United States.[37]

### A. Reasons for the Increase in Migrants from Central America in Summer 2014

The increase in border crossings by mothers arriving with children, as well as by unaccompanied minors, from the Northern Triangle arose from three major factors: (1) increased gang and other violence; (2) extreme poverty; and (3) a desire for family

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[33] *Id.*

[34] This quote is attributed to George Santayana, who was born in Madrid, Spain in 1863 and died in Rome, Italy in 1952. He was a philosopher, essayist, poet and novelist.

[35] Preston & Archibold, *supra* note 3.

[36] Mariano Castillo, *Immigration: More Central Americans apprehended than Mexicans*, CNN, Dec. 19, 2014, http://www.cnn.com/2014/12/19/us/dhs-immigration-statistics-2014/.

[37] U.S. Border Patrol, *Southwest Border Sectors: Family Unit and Unaccompanied Alien Children (0-17) Apprehensions FY 14 Compared to FY 13*, *supra* note 2.

reunification.[38] Violence seemed the single most important motivation, even for those who also cited one of the other factors.[39] Those who traveled to reunite with family members already in the United States often reported that the growing violence at home influenced their decision to make the journey during that particular year.[40] In interviews with unaccompanied children from El Salvador who were apprehended in Mexico and deported, 61% of boys and 58% of girls cited crime, gang threats, or violence as a reason for leaving home.[41] Notably, there has been no significant pattern of arrivals to the United States of families from Nicaragua, which has not experienced the same level of violence as the countries of the Northern Triangle, despite its geographic proximity to those troubled nations and even higher levels of poverty.[42]

Gangs in the Northern Triangle are known for engaging in forced recruitment, extortion and kidnapping, and sexual violence.[43] Children and adolescents are particularly at risk, as gangs target young boys for involuntary recruitment and young girls to be gang-member "girlfriends," frequently resulting in instances of sexual assault.[44] Thus, many families made the decision to seek safety in the United States when the mothers concluded that they no longer could protect their children at home. Other mothers and their children were fleeing domestic and gender-based persecution, which is common in the Northern Triangle, and often linked to gang and societal violence.[45] In Guatemala, the second most common category of crime is violence against women.[46] Abuse and "femicide," defined as murder for gender-related motives, occurs frequently as a result of misogyny, as part of gang rituals, and within intimate relationships.[47] Homicide rates in the Northern Triangle are among the highest in the world, with Guatemala, El Salvador, and Honduras consistently reporting three of the five highest national murder rates.[48]

Propelled by this horrific violence, families and children left Central America in increasingly larger numbers during 2014. By the end of the federal fiscal year on September 30, 2014, more than 68,000 women and children, traveling as families, had been apprehended by U.S. authorities at the border between the United States and Mexico, not infrequently after

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[38] ELIZABETH KENNEDY, AMERICAN IMMIGRATION COUNCIL, NO CHILDHOOD HERE: WHY CENTRAL AMERICAN CHILDREN ARE FLEEING THEIR HOMES 1 (July 1, 2014), http://www.immigrationpolicy.org/sites/default/files/docs/no_childhood_here_why_central_american_children_are_fleeing_their_homes_final.pdf.
[39] CHILDREN IN DANGER: A GUIDE TO THE HUMANITARIAN CHALLENGE AT THE BORDER, AMERICAN IMMIGRATION COUNCIL (July 10, 2014), http://www.immigrationpolicy.org/sites/default/files/docs/children_in_danger_a_guide_to_the_humanitarian_challenge_at_the_border_final.pdf.
[40] *Id.*
[41] Kennedy, *supra* note 38.
[42] U.S. Border Patrol, *Southwest Border Sectors: Family Unit and Unaccompanied Alien Children (0-17) Apprehensions FY 14 Compared to FY 13*, *supra* note 2; *A Surprising Safe Haven: How Central America's Poorest Country Became one of its Safest*, THE ECONOMIST, Jan. 28, 2012, http://www.economist.com/node/21543492.
[43] Kennedy, *supra* note 38.
[44] *Id*. at 5; U.N. High Comm'r for Refugees, *Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the need for International Protection* 25-27 (Mar. 13, 2014), http://www.unhcrwashington.org/sites/default/files/1_UAC_Children%20on%20the%20Run_Full%20Report.pdf.
[45] CRISTINA EQUIZABAL ET AL., WILSON CENTER, CRIME AND VIOLENCE IN CENTRAL AMERICA'S NORTHERN TRIANGLE: HOW U.S. POLICY RESPONSES ARE HELPING, HURTING, AND CAN BE IMPROVED, 36 (ERIC L. OLSON ED., 2015), http://www.wilsoncenter.org/sites/default/files/FINAL%20PDF_CARSI%20REPORT_0.pdf.
[46] *Id*. at 117.
[47] *Id*.
[48] *Which countries have the world's highest murder rates? Honduras tops the list*, CNN, Apr. 11, 2014, http://www.cnn.com/2014/04/10/world/un-world-murder-rates/.

turning themselves in to the authorities immediately after crossing into the United States.[49] The influx of families slowed after the summer of 2014 and is down 55% in federal fiscal year 2015 as compared with the same time period in 2014.[50] The drop-off in the number of women and children entering the United States through its border with Mexico was likely caused by a number of factors including cyclical trends, a public relations campaign in Central America intended to deter immigration, and an increase in deportations by Mexico of transiting migrants.[51] However, the government has continued to maintain and expand its family detention capacity. Since the summer of 2014, more than five thousand women and children, most with asylum claims, have been detained in family detention centers while awaiting immigration proceedings to determine their right to remain in the country.[52]

### B. The Administration's Response

In the summer of 2014, the White House designated the Federal Emergency Management Agency ("FEMA"), an agency of DHS, to organize and coordinate a federal response to the increase in arrivals of unaccompanied children and families at the U.S.-Mexico border.[53] Because so many of the arriving children and families potentially were entitled to asylum and related protection under U.S. law, the Administration faced the difficult prospect of responding to calls to stop unlawful migration while at the same time addressing the rapidly-unfolding humanitarian crisis on the southwestern border of the United States.

President Barack Obama asked Congress for emergency funds of almost $4 billion to address the situation.[54] The Administration intended to use part of the proposed funding to expedite deportation proceedings by increasing the capacity of the immigration courts to quickly adjudicate claims.[55] In addition, the Administration planned to dedicate a significant portion of

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[49] Alicia A. Caldwell, *US to Close Family Detention Center in New Mexico*, BOSTON GLOBE, Nov. 19, 2014, http://www.bostonglobe.com/news/nation/2014/11/18/close-family-detention-center-new-mexico/OATfFczRA0PzRGRn5i659O/story.html.

[50] U.S. Dep't of Homeland Sec., U.S. Customs and Border Protection, *Southwest Border Unaccompanied Children*, http://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children; Christian von Preysing, *A Look at the Immigration Surge One Year Later*, KGNS.tv, June 14, 2015, http://www.kgns.tv/home/headlines/A-Look-at-the-Immigration-Surge-One-Year-Later-307319761.html.

[51] Press Release, Washington Office on Latin America, Mexico Now Detains More Central American Migrants than the United States (June 11, 2015), http://www.wola.org/news/mexico_now_detains_more_central_american_migrants_than_the_united_states; Bob Ortega, *Flood of border crossings becomes a trickle – for now*, ARIZONA REPUBLIC, Oct 21, 2014, http://www.azcentral.com/story/news/politics/immigration/2014/10/21/flood-border-crossings-becomes-trickle-now/17649589/; Aaron Morrison, *Illegal Immigration 2015: Unaccompanied Minors Are Crossing US Border At Lower Rates*, INT'L BUS. TIMES, May 12, 2015, http://www.ibtimes.com/illegal-immigration-2015-unaccompanied-minors-are-crossing-us-border-lower-rates-1918259.

[52] *Stop Detaining Families*, NAT'L IMMIGRANT JUSTICE CTR., http://www.immigrantjustice.org/stop-detaining-families (last visited July 27, 2015).

[53] Press Release, White House: The Obama Administration's Government-Wide Response to Influx of Central American Migrants at the Southwest Border (Aug. 1, 2014), https://www.whitehouse.gov/the-pressoffice/2014/08/01/ obama-administration-s-government-wide-response-influx-central-american-.

[54] David Rogers, *Obama Requests $3.7 billion for Child* Migrants, POLITICO, July 8, 2014, http://www.politico.com/story/2014/07/barack-obama-congress-child-migrants-108657.html.

[55] Fact Sheet, White House, Emergency Supplemental Request to Address the Increase in Child and Adult Migration from Central America in the Rio Grande Valley Areas of the Southwest Border (July 8, 2014),

the proposed supplemental funding to accommodate increased detention of migrant families. While the Administration did not receive the requested funding, it nonetheless proceeded to implement widespread detention of families of Central American asylum-seekers. Simultaneously, the Vice President of the United States invited more than 50 attorneys from major private law firms, legal services organizations, and advocacy groups to the White House to discuss the legal community's response to the immigration crisis evolving at the United States-Mexico border. As DHS moved quickly toward large-scale detention and swift deportation of Central American families, the Vice President urged the legal community to increase its collective efforts to provide counsel to Central American migrants, focusing particularly on unaccompanied children. Several weeks earlier the Vice President had delivered a similar message in a small meeting at the White House to a group of attorneys from the Association of Pro Bono Counsel ("APBCo"). No government funding or other support was made available to facilitate pro bono representation of Central American families.

*1. Changes at Berks*

As part of the Administration's response—and in a change from the policies in place before the summer of 2014—ICE began to use the existing Berks facility to hold families in detention for prolonged periods. After initially opening in 2001, as described above, the Berks facility was moved to a larger building on the same grounds in 2012, and the capacity was increased from 84 to 96 beds. The building is currently undergoing renovation, and its capacity is scheduled to double to almost 200 beds in fall 2015.[56] It continues to hold children and their parents of either gender.

*2. The Opening and Closing of Artesia*

At the end of June 2014, ICE opened the Artesia Family Detention Center in the southeast corner of New Mexico to supplement the existing family detention capacity at the Berks facility.[57] The Artesia facility was redesigned to house close to 700 family members in repurposed federal law enforcement training barracks on federally-owned land.[58] The facility was managed and operated by the federal government. It held only children and their mothers; no fathers were permitted at Artesia.[59]

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*https://www.whitehouse.gov/the-press-office/2014/07/08/fact-sheet-emergency-supplemental-request-address-increase-child-and-adu.*

[56] Anthony Orozco & Ford Turner, *Berks County Residential Center: 'family friendly' or 'bad'?*, READING EAGLE, June 19, 2015, http://readingeagle.com/news/article/berks-county-residential-center-family-friendly-or-bad

[57] Manning, *supra* note 5.

[58] Fact Sheet, U.S. Dep't of Homeland Sec., Artesia Temporary Facility for Adults with Children in Expedited Removal (June 2014), http://www.dhs.gov/news/2014/06/20/fact-sheet-artesia-temporary-facility-adults-children-expedited-removal; Melinda Henneberger, *When an Immigration Detention Center Comes to a Small Town*, WASH. POST, Oct. 1, 2014, http://www.washingtonpost.com/news/storyline/wp/2014/10/01/when-an-immigration-detention-center-comes-to-a-small-town/; Kathleen McCleery, *Life in a New Mexico Detention Center a Challenge for Mothers and Children*, PBS NewsHour (Aug. 25, 2014), http://www.pbs.org/newshour/rundown/life-new-mexico-detention-center-challenge-mothers-children.

[59] McCleery, *supra note 58.*

According to immigration officials, Artesia was opened with the goal of quickly moving Central American families through the removal process and ensuring deportation if ordered at the end of that process.[60] Within five weeks of opening, more than 200 women and children had been deported back to the Northern Triangle.[61]

Artesia quickly faced an onslaught of criticism.[62] The first pro bono lawyers arriving at Artesia described it as "ground zero for the evisceration of due process."[63] Those attorneys reported that critical government screening interviews, the essential predicate to proceeding with an asylum claim rather than facing immediate deportation, were conducted by government officials at a pace of no fewer than 20 interviews a day, seven days a week.[64] This process was so rapid that the only government-approved on-site provider of legal orientation programs, and the few early-arriving pro bono attorneys, could not present basic legal information quickly and often enough to help the many families who needed that background before going into the government screening interviews.

There were no immigration lawyers in Artesia when the family detention facility opened. The nearest attorneys were a 3.5 hour drive away. Exacerbating the situation, the families had no access to telephone land lines. The handbook furnished to the detained women stated that they "should have access to flip phones held by guards three times a day," but families reported that they were "only allowed one 3-5 minute call each day and that if the children misbehaved, everyone lost access to phones."[65] Attorneys were prohibited from bringing phones into the lone trailer where they could meet with clients, which had no telephone lines either.[66]

Legal volunteers who made it to the facility faced the challenging task of assisting hundreds of families despite the availability of little funding and no infrastructure. Lawyers volunteering at the center voiced concerns that the Administration was manipulating the system to quickly deport every family without regard to eligibility for asylum.[67] They pointed to the passage rate for credible fear screening interviews, which was significantly below the national

[60] John Burnett, *Immigrant Advocates Challenge the Way Mothers are Detained*, NPR (Oct. 15, 2014), http://www.npr.org/2014/10/15/356419939/immigrant-advocates-challenge-way-mothers-are-detained; Llorca, *supra* note 3.
[61] Hylton, *supra* note 4.
[62] Jeremy Redmon, *ICE to close controversial immigration detention center in New Mexico*, ATLANTA J.-CONST., Nov. 18, 2014, http://www.ajc.com/news/news/state-regional-govt-politics/ice-to-close-controversial-immigration-detention-c/nh9T9.
[63] Interview with Christina Fiflis (July 2015) (on file with the authors).
[64] Sharita Gruberg, *Inside a Converted New Mexico Detention Center, 'Swift Process' May Mean Asylum Claims Overlooked* (July 30, 2014), http://thinkprogress.org/immigration/2014/07/30/3465639/inside-a-converted-new-mexico-detention-center-swift-process-may-mean-asylum-claims-overlooked-2/.
[65] *Id.*
[66] Manning, *supra* note 5, at ch. VI.
[67] *Id.* at ch. III.

average.[68] Meanwhile, for those receiving a bond, bond amounts were set at five times the national average.[69] The facility was referred to as a "deportation mill."[70]

Within six months of operation, amidst increasing publicity about serious due process and conditions problems at the facility, Artesia was closed on December 15, 2014.[71] ICE officials stated that the center had been opened on a temporary basis and indicated that, with fewer families entering the country, it was the appropriate time to transition to less isolated and better designed facilities.[72] The families still detained at Artesia at the time of its closure were sent to the facilities in either Karnes City, Texas, or in Dilley, Texas.[73]

*3. The Conversion of Karnes Civil Detention Center to a Family Facility and its Expansion*

At the beginning of August 2014, DHS began to utilize a large immigration detention facility located in Karnes City, Texas, to hold families. The facility previously had been used to detain men in immigration proceedings, usually asylum-seekers.[74] DHS rapidly repurposed the facility to hold families.[75] As with Artesia, the Karnes facility holds only children and their mothers; no fathers are detained there. DHS changed the official name of the facility from Karnes Civil Detention Center to Karnes Residential Center ("Karnes"), but little else changed.

The facility is a secure lockdown detention center run with a rigid schedule, including set meal times, wake-up and lights-out times, and multiple body counts and room checks during the day and night. The facility is not licensed for the care of children, and the guards are not trained to address either the needs of mothers and children seeking asylum or trauma survivors.[76]

ICE made the arrangements to detain migrants at Karnes, first adults and then families, through a contractual agreement with the Karnes County Commission. The facility is managed

[68] *See* U.S. Citizenship and Immigration Servs., Asylum Division, Family Facilities Credible/Reasonable Fear (hereinafter "July 2014-January 2015 Credible/Reasonable Fear Report"), http://www.uscis.gov/sites/default/files/USCIS/Outreach/PED-CF-RF-family-facilities-Jul2014-Jan2015.pdf.
[69] Juan Carlos Llorca, *Immigrant Detention Center In New Mexico Criticized As 'Deportation Mill'*, HUFFINGTON POST.COM (Oct. 6, 2014), http://www.huffingtonpost.com/2014/10/06/immigrant-detention-center-new-mexico_n_5939596.html.
[70] Burnett, *supra* note 60.
[71] Manning, *supra* note 5, at ch. II.
[72] Redmon, *supra* note 62.
[73] David McCabe, *Administration to close immigration detention center at month's end*, THE HILL.COM (Nov. 18, 2014), http://thehill.com/news/administration/224626-administration-to-close-immigrant-detention-center.
[74] Press Release, U.S. Immigration and Customs Enforcement: ICE Opens its First-Ever Designed and Built Civil Detention Center (Mar. 13, 2012), http://www.ice.gov/news/releases/ice-opens-its-first-ever-designed-and-built-civil-detention-center#.
[75] Press Release, U.S. Immigration and Customs Enforcement, South Texas ICE Detention Facility to House Adults with Children (July 30, 2014), http://www.ice.gov/news/releases/south-texas-ice-detention-facility-house-adults-children.
[76] Mem. in Support of Mot. to Enforce Settlement of Class Action at 14, *Flores v. Johnson*, Case No. 2:85-cv-04544-RJK (C.D. Cal. Feb 2, 2015).

by GEO Group, Inc., the country's second largest private prison corporation, also through a contract with the county.[77]

The Karnes facility had space to detain 532 women and children when it began holding families.[78] In December 2014, after a contentious debate, the Karnes County Commission approved an expansion of the facility by an additional 626 beds, increasing its capacity to 1,158 women and children. Construction currently is underway as of the writing of this report, and the expanded facilities are scheduled to open soon.[79]

#### *4. The Development of Dilley*

In December 2014, in the small Texas town of Dilley, the government opened a third and ultimately even larger detention center, which now has the capacity to hold up to 2,400 mothers and children. Officially named the South Texas Family Residential Center ("Dilley"), the Dilley facility was built to replace Artesia.[80] Like Artesia and Karnes, Dilley holds only children and their mothers; no fathers are detained there. The Administration stated that Dilley would "provide invaluable surge capacity should apprehensions of adults with children once again surge."[81]

Critics point out that the name "Family Residential Center" belies the fact that Dilley is in fact a detention facility. Others have observed that Dilley is reminiscent of Japanese internment camps used during World War II.[82] The facility was built and is operated by the Corrections Corporation of America, the country's largest for-profit prison operator.[83]

### C. Family Detention Custody Policies and the Deterrence Rationale

The opening of the new facilities corresponded to a change in the Administration's policy concerning the detention of women and children awaiting the outcome of the immigration process. In the years immediately prior to the summer of 2014, almost all families arriving at the U.S. border seeking asylum were released to live in the community while their immigration

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[77] Press Release, *supra* note 74.
[78] Press Release, *supra* note 75.
[79] Press Release, The GEO Group, The GEO Group Announces 626-Bed Expansion of the Karnes County Residential Center in Texas (Dec. 19, 2014), http://finance.yahoo.com/news/geo-group-announces-626-bed-133500147.html;_ylt=A0LEViq9uYxV4TUAFiwPxQt.;_ylu=X3oDMTEzZjJhMDZrBHNlYwNzcgRwb3MDMQRjb2xvA2JmMQR2dGlkA0ZGR0UwMl8x.
[80] Press Release, U.S. Immigration and Customs Enforcement, ICE's New Family Detention Center in Dilley, Texas to Open in December (Nov. 17, 2014), https://www.ice.gov/news/releases/ices-new-family-detention-center-dilley-texas-open-december.
[81] *Id*.
[82] Carl Takei, *The 'South Texas Family Residential Center' Is No Haven: It's an Internment Camp*, The Marshall Project (May 21, 2015), https://www.themarshallproject.org/2015/05/21/the-south-texas-family-residential-center-is-no-haven.
[83] *See* Corrections Corporation of America website, https://www.cca.com/facilities/south-texas-family-residential-center; South Texas Family Residential Center, https://www.cca.com/facilities/south-texas-family-residential-center; Press Release, Human Rights First, Human Rights First Tours Dilley Detention Facility, Calls for Administration to End Family Detention (May 12, 2015), http://www.humanrightsfirst.org/press-release/human-rights-first-tours-dilley-detention-facility-calls-administration-end-family.

hearings moved forward to determine whether the families would be granted asylum or related relief allowing them to remain in the United States.[84] In June 2014, however, the Administration implemented a policy of wide-scale detention of mothers and children for the express purpose of deterring other families from seeking asylum in the United States. Concerning this "no-release" policy, Secretary of Homeland Security Jeh Johnson told Congress, "[o]ur message is clear to those who try to illegally cross our borders: you will be sent back home," noting that "[w]e are building additional space to detain these groups and hold them until their expedited removal orders are effectuated."[85] Johnson further described this policy as "an aggressive deterrence strategy focused on the removal and repatriation of recent border crossers."[86]

As a result of this policy, instead of being released, families apprehended at the border and sent to one of the family detention centers were generally put into expedited proceedings.[87] These proceedings can result in quick deportation.[88] Individuals placed in expedited proceedings, however, still must be allowed to bring an asylum claim before an Immigration Judge if they pass a government screening interview, demonstrating that they have a viable chance of success on the merits of their claim, thereby giving them the right to remain in the United States.[89] Those individuals placed into removal proceedings are detained at least until they pass the screening interview, called a "credible fear interview" or "reasonable fear interview," depending on the circumstances.[90] Once they are placed in removal proceedings to pursue their asylum claims, such individuals are eligible for release from detention.[91] The same eligibility for release applies to those families whom DHS never placed into expedited proceedings, which became a relatively common practice in the summer of 2015. For families eligible for release, ICE makes an initial custody determination.[92] Subsequently, most but not all detained families may have a custody redetermination hearing before an Immigration Judge.[93] ICE, and the Immigration Judges where jurisdiction applies, have authority under the law to order: (1) release without requirement of any bond payment; (2) release with payment of a bond;

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[84] Decl. of Barbara Hines ¶ 8, *R.I.L-R v. Johnson*, No. 1:15-cv-0011 (D.D.C.). A few families were held at the Berks facility for short periods of time.

[85] Johnson Statement, *supra* note 3.

[86] *Id.* Declarations of high-ranking immigration officials filed in court proceedings confirmed that implementation of "no bond"or "high bond" policies were intended to reduce the migration of Guatemalans, Hondurans, and Salvadorans to the United States. *See* Department of Homeland Security's Submission of Documentary Evidence, AILA InfoNet Doc. No. 14080799, Aug. 7, 2014, http://www.aila.org/infonet/dhs-blanket-policy-no-release.

[87] Only in the summer of 2015 did the government begin to place some detained families immediately into full-fledged proceedings before the immigration courts immediately rather than placing them into expedited removal.

[88] These proceedings are termed "expedited removal" under Immigration and Nationality Act ("INA") Section 235 and "reinstatement of removal" under INA Section 241 for individuals with prior deportation orders.

[89] INA §§ 235(b)(1), 241(b)(3).

[90] Individuals entering the proceedings without any prior immigration order undergo a credible fear screening interview, and individuals in reinstatement of removal proceedings because of a prior deportation order undergo a reasonable fear interview that, if passed, allows them to apply for withholding of removal only. *See supra* notes 1, 88; INA §§ 235, 241.

[91] *See* INA §§ 236(a), 212(d)(5), 241(a)(3), 241(b)(3); 8 C.F.R. § 1236.1(c)(8); *Matter of X-K-*, 23 I&N Dec. 731 (BIA 2005).

[92] 8 C.F.R. §§ 1236.1(c)(8), 212.5, 241.4.

[93] Individuals in reinstatement of removal do not have the ability to seek redetermination of their custody status before an Immigration Judge under current interpretation of the law. *See* INA 241(a)(2). Also, arriving aliens—individuals who present themselves to officials at a port of entry such as a bridge or airport—do not have the ability to seek review of custody by an Immigration Judge. 8 C.F.R. § 1003.19(h)(2).

or (3) continued detention.[94] If ordering release in its initial custody determination, ICE may also impose non-monetary conditions, such as enrollment in a supervision program.[95]

Relying on its deterrence rationale, DHS insisted on continued detention during proceedings even after families received a favorable decision following the government screening interviews. Between June 2014 and February 2015, ICE denied release to nearly all detained families in its initial custody determination, even those who had passed their screening interviews.[96] When families sought review of the decision to continue detention before the Immigration Judges, ICE attorneys opposed release aggressively and argued that a "no bond" or "high bond" policy was necessary to "significantly reduce the unlawful mass migration of Guatemalans, Hondurans, and Salvadoran[s]."[97] ICE invoked a 2003 ruling of the Attorney General, issued in the aftermath of the September 11, 2001 terrorist attacks, which authorized immigration authorities to consider deterrence considerations in making detention decisions.[98] Notwithstanding ICE's position, for those families fortunate enough to secure counsel and proceed to a full bond hearing in court, Immigration Judges often ordered that bond be set at a level that would enable families to achieve release. However, the ICE policy of detaining for deterrence led to additional weeks and months of detention for families—even after they established viable asylum claims—while they sought review of their custody in the face of ICE's insistence on detention.[99]

In December 2014, the ACLU and the University of Texas Law School Immigration Clinic, with pro bono co-counsel from the law firm of Covington & Burling LLP, brought class-action litigation challenging the categorical detention of asylum-seeking families for the purpose of deterring future migrants.[100] On February 20, 2015, Judge Boasberg of the United States District Court for the District of Columbia issued a preliminary injunction prohibiting DHS from using deterrence as a rationale for detaining families or as a factor in custody determinations.[101] The court reaffirmed the long-standing constitutional mandate that immigration detention is civil in nature and so must be justified by some legitimate government interest other than punishment. The judge held that depriving a family of liberty so as to deter another potential migrant likely was an impermissible use of detention. Nor, the court held, was deterrence likely to be effective at addressing any national security threat.

Shortly after the decision, DHS announced that it would abide by the preliminary injunction and would engage in individualized custody determination decisions rather than using

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[94] INA § 236(a); 8 C.F.R. §§ 1236.1(c)(8), 212.5, 241.4.
[95] 8 C.F.R. § 1236.1(d).
[96] *R.I.L-R v. Johnson*, No. 1:15-cv-00011, 2015 U.S. Dist. LEXIS 20441, at *11–12 (D.D.C. Feb. 20, 2015).
[97] *See* Immigration Court Declaration of Philip T. Miller, ICE Assistant Director of Field Operations for Enforcement and Removal Operations ("Miller Decl.") at ¶ 9 (Aug. 7, 2014), http://www.aila.org/ content /default.aspx?docid=49910; Immigration Court Declaration of Traci A. Lembke, ICE Assistant Director over Investigation Programs for HSI and ICE ("Lembke Decl.") at ¶ 20 (Aug. 7, 2014) (stating "[i]mplementing a 'no bond' or 'high bond' policy would help. . . by deterring further mass migration.").
[98] *Matter of D-J-*, 23 I&N Dec. 572 (A.G. 2003).
[99] First Amended Compl. for Injunctive and Declaratory Relief at ¶ 5, *R.I.L-R v. Johnson*, No. 1:15-cv-0011 (D.D.C Jan. 6, 2015), https://www.aclu.org/cases/rilr-v-johnson.
[100] *Id*.
[101] *See R.I.L-R v. Johnson*, No. 1:15-cv-00011, 2015 U.S. Dist. LEXIS 20441 (D.D.C. Feb. 20, 2015).

across-the-board deterrence rationales for detention. Several months later, the agency made a formal announcement that, consistent with the preliminary injunction, it would not invoke a deterrence rationale in making detention decisions.[102] The Administration has nonetheless continued to maintain that DHS should have the legal authority to detain for deterrence purposes in the future.[103] In addition, as described in the attached chart, ICE continued to detain most families after their favorable screening interviews for at least some period of time and sometimes throughout their case. The agency did so by imposing high bonds as a condition for release throughout most of the last year and by refusing release altogether to certain families who were not entitled to seek review of their custody before the immigration courts. As a result, the length of detention remained significant for many families. Furthermore, the expansive buildup of family detention facilities carried out to effectuate the deterrence policy has not been dismantled.[104]

### D. Demographics of the Family Detention Population

The family detention facilities opened by DHS beginning in the summer of 2014 were large-scale immigration detention facilities. They succeeded in increasing total nationwide capacity for detention of families from under 100 beds to approximately 3,000 beds, with additional plans to expand further.[105] As noted above, since June 2014, approximately 5,000 children and mothers have been held together in U.S. immigration detention centers for families.[106] Since the summer of 2014, most women and children were held for at least a month and some were held for a year or more.[107] During federal fiscal year 2014, more than half the children in family detention were six years old or younger.[108] Some have been breastfeeding infants, while many others have been toddlers.[109]

The majority of the family detention population has consisted of women and children asylum-seekers fleeing recent violence in El Salvador, Guatemala, and Honduras who have

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[102] Press Release, U.S. Immigration and Customs Enforcement, ICE Announces Enhanced Oversight for Family Residential Centers (May 13, 2015), https://www.ice.gov/news/releases/ice-announces-enhanced-oversight-family-residential-centers.

[103] *Id.*

[104] Press Release, U.S. Dep't of Homeland Sec., South Texas ICE Detention Facility to House Adults with Children (July 31, 2014), http://www.dhs.gov/news/2014/07/31/south-texas-ice-detention-facility-house-adults-children (stating that repurposing of Karnes to house families was part of "'DHS' sustained and aggressive campaign to stem the tide of illegal migration from Central America'"); Press Release, U.S. Immigration and Customs Enforcement, ICE's New Family Detention Center in Dilley, Texas to Open in December (Nov. 17, 2014), https://www.ice.gov news/releases/ices-new-family-detention-center-dilley-texas-open-december (stating that the Dilley facility was part of a policy aimed at "deterring others from taking the dangerous journey and illegally crossing into the United States").

[105] *Stop Detaining Families*, *supra* note 52; *see also supra* Part II.B.

[106] *Id*.

[107] ELEANOR ACER & OLGA BYRNE, HUMAN RIGHTS FIRST, U.S. DETENTION OF FAMILIES SEEKING ASYLUM: A ONE YEAR UPDATE at 1 (June 2015), http://www.humanrightsfirst.org/sites/default/files/hrf-one-yr-family-detention-report.pdf (noting that some women and children were held for nearly a year); *see also* Hylton, *supra* note 4 ("refugees who surrender this spring may spend more than a year at Dilley before their asylum hearings can be scheduled"); Bus Station Exit Interview Field Notes (July 4, 2015) (on file with the authors).

[108] The Detention of Immigrant Families, NAT'L IMMIGRANT JUSTICE CTR.(Mar. 2015), http://immigrantjustice.org/sites/immigrantjustice.org/files/Detention_of_Families_Backgrounder_Mar_2015.pdf.

[109] Hylton, *supra* note 4 (reporting on refugee accounts of detained mothers and infants).

viable asylum claims.[110] According to the latest data from the U.S. Citizenship and Immigration Services Asylum Division, 88% of the families detained across the government's three family detention facilities are found to have established a "significant possibility" of success on their asylum claims.[111]

Most of these detained women and children asylum-seekers have family ties in the United States.[112] They have no criminal history and instead have often fled violent crime. As such, they present no threat to the United States and have strong incentives for appearing at their immigration hearings in order to pursue asylum status in the United States.[113] In fact, the limited available data suggests that released families are appearing at high rates for subsequent proceedings in their cases.[114]

### E. Family Detention: Changes from 2014 to 2015

The following chart summarizes the changes in the detention and treatment of detained migrant families from just prior to the summer of 2014 to July 2015.

[110] *Stop Detaining Families*, *supra* note 52; *see, e.g.*, *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014) (establishing viability of domestic violence asylum claims); *Matter of M-E-V-G-*, 26 I&N Dec. 227, 251 (BIA 2014) (noting that gang-based claims may be viable on a case-by-case analysis); *Crespin-Valladares v. Holder*, 632 F.3d 117, 120 (4th Cir. 2011) (recognizing asylum based on gang violence directed at a family who had provided testimony against gang activities).

[111] 8 C.F.R. § 208.30(e)(2); U.S. Citizenship and Immigration Servs., Asylum Division, Family Facilities Credible/Reasonable Fear, http://www.uscis.gov/sites/default/files/USCIS/Outreach/PED-CF-RF-family-facilities-FY2015Q2.pdf (finding that 87.9% of reporting families established fear of persecution during FY2015 2nd quarter). *See also* Letter from the United States Senate to the Honorable Jeh Johnson, Secretary of the Department of Homeland Security. (June 1, 2015), http://immigrantjustice.org/ sites/immigrantjustice.org/files/Senate_ FamilyDetentionLtr_DHS_2015_06_01.pdf.

[112] The Detention of Immigrant Families, *supra* note 108.

[113] *See, e.g.*, MARK NOFERI, AMERICAN IMMIGRATION COUNCIL, A HUMANE APPROACH CAN WORK: THE EFFECTIVENESS OF ALTERNATIVES TO DETENTION FOR ASYLUM SEEKERS (July 2015), 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").

[114] HUMAN RIGHTS FIRST, Myth vs. Fact: Immigrant Families' Appearance Rates in Immigration Court (July 2015), http://www.humanrightsfirst.org/sites/default/files/MythvFact-Immigrant-Families.pdf; Miriam Jordan, *Most Migrants Make Their Court Date: Vast Majority Show Up to Deportation Hearings, U.S. Agency Says*, WALL ST, J., Oct. 7, 2014, http://online.wsj.com/articles/most-migrants-make-their-court-date-1412715818; *see also Taking Attendance: New Data Finds Majority of Children Appear in Immigration Court*, IMMIGRATION POLICY CENTER (July 29, 2014), http://www.immigrationpolicy.org/just-facts/taking-attendance-new-data-finds-majority-children-appear-immigration-court.

| **Family Detention Changes 2014-2015** | | | | | |
|---|---|---|---|---|---|
| | **Pre-2014** | **June 2014** | **February 2015** | **May/June 2015** | **July 2015** |
| **Expedited Removal?** | No; families generally not placed in expedited removal. | Yes; female-headed families often placed in expedited removal; some families still released after brief Customs and Border Protection (CPB) detention without placement in expedited removal | Yes; female-headed families often placed in expedited removal; smaller numbers released after brief CBP detention, without placement in expedited removal | Yes; female-headed families often placed in expedited removal; smaller numbers released after brief CBP detention, without placement in expedited removal – fewer families arriving and greater detention capacity | Yes but less frequent; some female-headed families placed in expedited removal while others are placed directly into immigration court proceedings to pursue asylum claims but are nonetheless detained for some period; a few families still released immediately after brief CBP detention without placement in expedited removal |
| **Mandatory Detention?** | No; release after brief CBP detention | Yes; if expedited removal, mandatory detention until favorable screening (Credible Fear Interview (CFI) or Reasonable Fear Interview (RFI)) | Yes; if expedited removal, mandatory detention until favorable screening (CFI or RFI) | Yes; if expedited removal, mandatory detention until favorable screening (CFI or RFI) | Yes but for fewer; if expedited removal, mandatory detention until favorable screening (CFI or RFI) |
| **ICE Custody Decision Resulting in Release (after any period of mandatory detention)?** | Reside in community with family during proceedings | Generally no; after favorable CFI or RFI, ICE ordered continued detention ("no bond") in all cases | Generally no; after favorable CFI or RFI, ICE custody determination –<br>• D.C. District Court prohibited ICE from considering deterrence in making determination<br>• ICE imposed high and often categorical bonds leading to continued detention for most ($7,500 and up; $7,500 or $10,000 specifically at Karnes) | Yes in some cases; after favorable CFI or RFI, ICE custody determination –<br>• ICE imposes variable bonds but they often appear arbitrary and many are still high (usually $4,000 and up)<br>• Some families obtain release by paying ICE bond; others remain detained because of inability to pay<br>• ICE release of some arriving and withholding-only families after extended detention periods | Yes in most cases; after favorable CFI or RFI or for those not placed in expedited removal, ICE custody determination results in release–<br>• Recent announcement by DHS allows for many families to be released<br>• Many women are not required to pay bond but are required to wear electronic monitoring devices<br>• Some women still required to pay bond if no placement of an electronic monitoring device |

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|---|---|---|---|---|---|
| **Immigration Judges (IJs) Custody Review Results in Release?** | Generally no role for IJs in custody determination in most cases since no detention or very short detention. | • IJ custody review for eligible cases – release on bond allowed (often high amounts initially)<br>• No IJ review or release for RFI cases (prior deportation order)<br>• No IJ review or release for "arriving aliens" (presenting at a port of entry | • Release on bond generally allowed once IJ intervened in cases eligible for review – usually $2500 to $8000; some released by IJ on recognizance<br>• No IJ review or release for RFI cases (prior deportation order)<br>• No IJ review or release for "arriving aliens" (presenting at a port of entry | • In cases eligible for IJ review, IJs set reasonable bonds – from recognizance to $5000 in most cases<br>• No IJ review for RFI cases (prior deportation order)<br>• No IJ review for "arriving aliens" (presenting at a port of entry | • IJ custody review less common even where eligible, because DHS custody determination often results in release<br>• Where DHS sets a high bond, IJs continue to lower bonds in many cases<br>• No IJ review for RFI cases (prior deportation order)<br>• No IJ review for "arriving aliens" (presenting at a port of entry |
| **Detention Centers** | Very little family detention after 2006-2009; small facility in PA only with fewer than 100 beds | Artesia, New Mexico opened as large family detention facility and length of detention at Berks increased; then opening of Karnes (August 2014) and Dilley (December 2014) | Dilley expanding rapidly; Karnes and Berks scheduled to expand and construction underway; Artesia closed in December 2014 | Detention of approximately 3000 mothers and children with additional expansion underway | Detention centers at lower capacity but no announcement regarding planned expansions of Berks and Karnes which are nearing completion |

## III. Fundamental Incompatibility of Large-Scale Family Detention with Constitutional Principles and ABA and Human Rights Standards

DHS's widespread use of detention for women and children seeking asylum in privately-run secure facilities is fundamentally incompatible with constitutional principles, basic international human rights protections,[115] the ABA Civil Immigration Detention Standards[116] ("the ABA Standards"), and other ABA guidelines. Since the summer of 2014, continued detention of families after apprehension was the norm for those sent to family detention centers rather than an exceptional circumstance, and it was applied for deterrence purposes rather than to meet legitimate governmental goals after consideration of other alternatives. The manner of detention is evocative of criminal detention, which is unjustified for civil detainees. And the detention of families offers inadequate recognition of the special protections due to vulnerable populations, including women, children, and asylum-seekers, who have made up a majority of the detained family population.

### A. Presumption Against Detention

The Supreme Court has held that civil detention should be an exception to the general principle of liberty and has established that such detention is therefore legitimate only where shown to be necessary in an individual case.[117] In *Zadvydas v. Davis*, the Supreme Court confirmed that immigration detention must be understood to be civil detention and managed as such, because it is a deprivation of liberty that does not result from a criminal conviction.[118] The Supreme Court has thus held that liberty is the rule and government detention of immigrants violates the Due Process Clause of the U.S. Constitution unless a special justification, usually prevention of flight risk or danger, outweighs the "individual's constitutionally protected interest in avoiding physical constraint."[119] Detention must also bear a close relation to that special purpose based on an individualized determination. Under these same principles, the *Flores* settlement also imposes a binding obligation on the government to prioritize the possibility for release from detention where children are involved.[120] DHS's own standards incorporate a presumption of release from detention for at least some asylum-seekers unless there is an individualized concern of flight risk or danger that requires detention.[121] Deterrence has not

[115] The United States has ratified the relevant treaties that establish these standards and so has accepted binding legal obligations under international human rights law. *See* LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION (2d ed. 1996). International human rights law norms also have moral force, particularly given the United States' leadership in promoting human rights norms worldwide.

[116] ABA COMM'N ON IMMIGRATION, 2012 ABA CIVIL IMMIGRATION DETENTION STANDARDS, as amended in 2014, http://www.americanbar.org/content/dam/aba/administrative/immigration/abaimmdetstds.authcheckdam.pdf.

[117] *See, e.g., U.S. v. Salerno*, 481 U.S. 739, 748-49 (1987); *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).

[118] *Zadvydas*, 533 U.S. 678.

[119] *Zadvydas*, 533 U.S. at 690 (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) ("[S]erious questions may arise concerning the reasonableness of the amount of [a] bond if it has the effect of preventing an alien's release.").

[120] Flores Stipulated Settlement Agreement, *supra* note 12.

[121] U.S. Immigration & Customs Enforcement, ICE Directive on Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture (Dec. 8, 2009), http://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole_of_arriving_aliens_found_credible_ fear.pdf.

been accepted as a valid governmental purpose that could overcome the presumption of liberty to justify immigration or other civil detention.[122]

The U.S. presumption against detention is consistent with prevailing international human rights and refugee standards, which also require a presumption against detention of migrants, particularly asylum-seekers, and permit detention only where necessary in an individual case to meet legitimate non-punitive governmental objectives.[123] The United Nations Refugee Convention prohibits nations from penalizing asylum-seekers and unnecessarily restricting their movement, including through the use of immigration detention.[124] The International Covenant on Civil and Political Rights also prohibits arbitrary detention, as does the American Declaration of the Rights and Duties of Man.[125]

The Executive Committee of the United Nations High Commissioner for Refugees (UNHCR) has explicitly concluded that detention of asylum-seekers should "normally be avoided."[126] UNHCR has also promulgated Detention Guidelines, which further specifically state that "detention is an exceptional measure and can only be justified for a legitimate purpose," such as to protect public order, public health, or national security.[127] The Guidelines additionally direct that "detention is not permitted as a punitive – for example, criminal – measure or a disciplinary sanction" and admonish against the "use of prisons, jails, and facilities designed or operated as prisons or jails."[128] Finally, the UNHCR Detention Guidelines specifically establish that "detention policies aimed at deterrence are generally unlawful under international human rights law."[129]

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[122] *See R.I.L-R*, 2015 U.S. Dist. LEXIS 20441.

[123] *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) (hereinafter "UNHCR Guidelines"), http://www.unhcr.org/505b10ee9.html ("Furthermore, detention is not permitted as a punitive – for example, criminal – measure or a disciplinary sanction for irregular entry or presence in the country"); Inter-American Comm'n on Human Rights, *Report on Immigration in the United States: Detention and Due Process*, OEA/Ser.L/V/II., Doc.78/10, ¶ 38 (Dec. 30, 2010) ("In the case of immigration detention, the standard for the exceptionality of pre-trial detention must be even higher because immigration violations ought not to be construed as criminal offenses.").

[124] Refugee Convention, *supra* note 1, at arts. 31(1)-(2), 26.

[125] *See* Int'l Covenant on Civ. and Political Rights, art. 9(1), Dec. 16, 1966, 999 U.N.T.S. 171, ratified by the United States in 1992 ("Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention."); Organization of American States ("OAS"), American Declaration of the Rights and Duties of Man, OAS Res. XXX, art. I, OEA/Serv.L.V./II.23 (May 12, 1948) ("Every human being has the right to . . . liberty."); *id.* at art. XXV (entitling section "Right of protection from arbitrary arrest."). Through its membership in the OAS and ratification of the legally binding OAS Charter, the United States accepted obligations to protect the human rights set forth in the American Declaration. *See* OAS Charter (as amended through 1993), art. 3(1), Apr. 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 3., ratified by the United States in 1951; *Workman v. United States*, Case 12.261, Inter-Am. Comm'n H.R., Report No. 33/06, OEA/Ser.L/V/II.127 Doc. 4 rev. ¶ 70 (2007).

[126] U.N. High Comm'r for Refugees, *Detention of Refugees and Asylum-Seekers*, Conclusion No. 44 (Oct. 13, 1986). The UNHCR's Executive Committee is its governing body and is made up of members, largely representatives of U.N. member states including the United States.

[127] UNHCR Guidelines, *supra* note 123, at Guideline 4.1.

[128] *Id.* at Guidelines 4.1.4, 8.

[129] *Id.* at Guideline 7.

The Inter-American Commission on Human Rights[130] similarly maintains that "pre-trial detention is an exceptional measure" that is appropriate only if there is no other means to "ensure the purposes of the process and when it has been demonstrated that less damaging measures would be unsuccessful to such purposes."[131] The United Nations Human Rights Committee also has held that immigration detention "could be considered arbitrary if it is not necessary in all circumstances of the case, for example to prevent flight or interference with evidence."[132]

The ABA, too, has long opposed civil immigration detention except in extraordinary circumstances.[133] It has additionally adopted policies specifically recommending against detention of asylum-seekers. Where release alone is not possible, the ABA supports alternatives to detention, such as release on reasonable bond or supervised release.[134]

Consistent with these views, the ABA has developed standards for civil immigration detention that include the presumption against detention.[135] The ABA Standards, adopted in August 2012 and amended in 2014, were developed by the ABA Commission on Immigration with assistance from various experts, including a former INS Commissioner, the Commissioner of the New York City Department of Correction, as well as leading authorities from the corrections, medical, academic, and other related fields.[136] The ABA Standards are grounded in the ABA's experience in advocacy and monitoring of civil immigration detention over many years.[137]

Because immigration detention is civil and must not be punitive, a guiding principle of the ABA Standards is that a "noncitizen should only be detained based upon an objective

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[130] The Inter-American Commission on Human Rights is an independent organ of the Organization of American States. The Organization of American States is an association of all 35 independent countries of the Americas and has the goal of promoting democracy, human rights, security, and development. *See What is the IACHR?*, Inter-American Comm'n on Human Rights (last viewed July 9, 2015), http://www.oas.org/en/iachr /mandate/what.asp.

[131] *See* Inter-American Comm'n on Human Rights, *Report on Immigration in the United States: Detention and Due Process*, *supra* note 123, at ¶ 34 (2010) ("Pre-trial detention is an exceptional measure"), ¶ 51 ("The principle of exceptionality governing deprivation of liberty in general and deprivation of liberty for immigration violations, carries even more weight when children are involved.").

[132] *A v. Australia*, U.N. Human Rights Comm., Commc'n No. 560/1993, at ¶ 9.2, U.N. Doc. CCPR/C/59/D/560/1993 (Apr. 30, 1997).

[133] *See, e.g.*, ABA Resolution, Report No. 131, (Feb. 12–13, 1990), http://www.americanbar.org/content/dam/aba/ directories/policy/1990_my_131.authcheckdam.pdf; ABA Resolution, Report No. 115B (Aug. 12–13, 2002), http://www.americanbar.org/content/dam/aba/directories/policy/2002_AM_115B. authcheckdam.pdf; ABA Resolution, Report No. 107E (Feb. 13, 2006), http://www.americanbar.org/ content/dam/aba /directories/policy/2006_my_107e.authcheckdam.pdf. *See also* ABA Standards for the Custody, Placement and Care; Legal Representation; and Adjudication of Unaccompanied Migrant Children in the United States (2010) (hereinafter "UAC Standards"), http://www.americanbar.org/content/dam/aba/migrated/Immigration/ PublicDocuments/Immigrant_ Standards.authcheckdam.pdf ("[A] Child is entitled to a presumption against detention and in favor of family reunification or release into the Custody of another appropriate individual or entity.").

[134] ABA Resolution, Report No. 131, *supra* note 133.

[135] ABA CIVIL IMMIGRATION DETENTION STANDARDS, *supra* note 116, at 4.

[136] *Id.* at vii.

[137] While there are no strict criteria governing when the ABA will adopt formal standards, they are generally enacted as a distinct form of policy closer to codes of conduct or regulatory provisions than general principles embodied in other policy resolutions.

determination that he or she presents a threat to national security or public safety or a substantial flight risk that cannot be mitigated through parole, bond, or a less restrictive form of custody or supervision."[138] Even when detention is appropriate, the ABA Standards call for regular review of decisions to begin or continue detention so as to ensure that civil detention is not used as punishment and is used only to further DHS/ICE's goals of ensuring the migrants appear in immigration court or are removed after a final deportation decision.[139] The ABA Standards thus do not recognize deterrence as a permissible justification for detention. Furthermore, "any restrictions or conditions placed on noncitizens . . . should be the least restrictive, non-punitive means necessary to further these goals."[140] Because they recognize that immigration detention is non-punitive and civil in nature, the ABA Standards reject the use of a criminal detention model.[141]

### B. Special Standards for Vulnerable Populations

U.S. law and DHS's own standards establish further special considerations regarding the detention of mothers, children, and other vulnerable migrants. The *Flores* settlement contains legal obligations requiring the U.S. to ensure special treatment of children.[142] In addition, DHS policy requires heightened consideration of custody cases involving women who are caregivers or who are nursing their very young children.[143]

International human rights law and ABA policy also call for heightened protections for women, children, and other vulnerable groups, recognizing that such groups have special needs and are more likely to suffer trauma as a result of detention.[144] The ABA Standards start from the premise that "minors and pregnant or nursing women should not be detained."[145] The ABA Standards also provide that ICE should not detain children except as a last resort.[146]

The ABA Standards are consistent with U.N. standards for the treatment of women and children asylum-seekers. The UNHCR Guidelines proscribe detention for pregnant women and

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[138] ABA CIVIL IMMIGRATION DETENTION STANDARDS, *supra* note 116, at 4.
[139] *Id.*
[140] *Id.*
[141] *Id.*
[142] *See* Flores Stipulated Settlement Agreement, *supra* note 12.
[143] U.S. Dep't of Homeland Sec., Memorandum of Jeh Johnson, Policies for the Apprehension, Detention and Removal of Undocumented Immigrants (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_ prosecutorial_discretion.pdf.
[144] HUMAN RIGHTS FIRST, U.S. DETENTION OF FAMILIES SEEKING ASYLUM: A ONE YEAR UPDATE, *supra* note 107, at 9-10 (discussing several medical and mental health studies that concluded that "immigration detention is harmful to asylum seekers and in particular to children and families, even over relatively short periods of time").
[145] ABA CIVIL IMMIGRATION DETENTION STANDARDS, *supra* note 116, at 4.
[146] *Id*. Other ABA standards also recommend special care for children. For example, the UAC Standards emphasize the importance of treating children "with dignity, respect and special concern" for their particular vulnerabilities. UAC Standards, *supra* note 133, at 9. The UAC Standards require custodial agencies and all other immigration enforcement agencies to hold as their primary concern the best interests of the child in all actions and decisions concerning the child and to treat children with dignity and respect. *Id*. at 12. Where detention is warranted, the UAC Standards recommend that immigration enforcement agencies keep children and their family members "together as a unit and place them in the least restrictive setting appropriate to families." *Id*. at 44.

nursing mothers.[147] Instead, the Guidelines recommend alternatives to detention that "take into account the particular needs of women, including safeguards against sexual and gender-based violence and exploitation."[148] If women must be detained, the facilities and materials should meet women's specific hygiene needs and promote the use of female guards and wardens.[149] The UNHCR Guidelines further state that children "should in principle not be detained at all" and establish that detention of children should only be used as a last resort.[150] The Guidelines also mandate that "the best interests of the child shall be a primary consideration in all actions affecting children, including asylum-seeking . . . children," even where some restriction on liberty becomes necessary.[151]

### C. Compatibility of DHS Family Detention Practices with Civil Detention Principles

DHS's current family detention practices do not comport with ABA policy or basic constitutional and international human rights principles. The dramatic build-up of a large-scale detention system for families over the last year, based on a deterrence rationale, stands in fundamental contradiction to the principles consistently prohibiting deterrence as a justification for detention and requiring that any use of detention for immigration purposes hew closely to a legitimate non-punitive governmental objective. Even more generally, the widespread and vastly expanded use of detention for families over the last year runs directly counter to a presumption of liberty and the use of detention only in exceptional limited circumstances determined on an individual basis.

As has been repeatedly demonstrated, since the expansion of family detention in 2014, DHS policy has treated detention of families as the norm, rather than the exception.[152] This policy was initially based on an impermissible deterrence rationale. Even once it disavowed that deterrence rationale, the government has not made individual objective determinations in these cases that the families in detention presented a flight risk, or constituted a danger, before they were detained.[153] Once a family was placed in detention, until only recently, ICE did not consider the possibility of prompt release but instead insisted on continued detention for at least some period, by denying bond altogether or imposing a high or arbitrary bond.[154] Beginning in

[147] UNHCR Guidelines, *supra* note 123, at Guideline 9.3.
[148] *Id.*
[149] *Id.*
[150] *Id.* at Guideline 9.2.
[151] *Id.; see also* Inter-American Comm'n on Human Rights, *Report on Immigration in the United States: Detention and Due Process*, *supra* note 123, at ¶ 15 (explaining that "the Inter-American Court adopted the principle of the 'best interests of the child'").
[152] Moreover, DHS regulations suggest a presumption in favor of detention by placing the evidentiary burden on the detainee to demonstrate to officers that their release "would not pose a danger to property or persons and that the [detainee] is likely to appear for any future proceeding." 8 C.F.R. § 236.1(c)(8).
[153] *See R.I.L-R*, 2015 U.S. Dist. LEXIS 20441, at *11; *see also* Human Rights First, U.S. DETENTION OF FAMILIES SEEKING ASYLUM: A ONE YEAR UPDATE, *supra* note 107 at 13 (discussing deficiencies in screening processes); WRC & LIRS, LOCKING UP FAMILY VALUES, AGAIN, *supra* note 22, at 2.
[154] *Lawyers: Detained Immigrant Families in Texas Offered Bonds*, N.Y. TIMES, Feb. 27, 2015, http://www.nytimes.com/aponline/2015/02/27/us/ap-us-immigration-overload-bonds.html?_r=0 (reporting that most bonds were set by ICE at $7500 or higher). One estimate suggests that the mean bond for women released from the

the summer of 2015, ICE has permitted release without payment of bond in some cases but usually only when intrusive electronic monitoring is imposed. The imposition of electronic monitoring has not been based on individualized determinations that such restriction is necessary or that no other less-restrictive alternatives are available.[155] The government's practices also continue to ignore the call to give special consideration before detaining women, children, and asylum-seekers, imposing detention only as an exceptional last resort.

The government additionally has failed to engage in individualized consideration of the necessity of detention given the likelihood that a majority of families would appear for further proceedings.[156] Most families could be released without any supervision given the incentives they have to appear. Where release alone is insufficient, family detention policies also have failed adequately to consider less restrictive alternatives to detention.[157] Community-based case management and reporting systems have been shown to serve as highly effective alternatives to detention, and the Government Accountability Office reported that more than 99% of aliens in ICE's formal "Alternative to Detention" (ATD) monitoring program appeared at their scheduled immigration court hearings.[158] Yet, immigration officials have only recently considered release of families from detention through such alternative programs and still have failed to consider the full range of available alternatives, instead using cumbersome and unnecessary electronic monitoring devices for virtually all families released by ICE without payment of bond when other less restrictive alternatives would be sufficient if assessed and applied on an individual basis.

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now-closed Artesia facility was $17,000. John Washington, *The U.S. is Locking Up Immigrant Children in Private Prisons Under Inhuman Conditions*, In These Times (July 6, 2015), http://inthesetimes.com/article/18140/locking-up-immigrant-kids.

[155] *See* U.S. Dep't of Homeland Sec., U.S. Immigration and Customs Enforcement's Alternatives to Detention 3, OIG-15-22 (Feb. 4, 2015), https://www.oig.dhs.gov/assets/Mgmt/2015/OIG_15-22_Feb15.pdf (explaining that ICE uses the Intensive Supervision Appearance Program II ("ISAP II"), which involves technology and case management, "in conjunction with the less restrictive release conditions associated with payment of a bond, or having to report periodically to an ERO field office").

[156] Notably, data from the Executive Office for Immigration Review shows that a large majority of noncitizen adults with children—approximately two-thirds— appear for their initial hearings. *See* Jordan, *supra* note 114. Moreover, research has shown that when aliens are represented by counsel, they are even more likely to return for future proceedings. *Id.;* IMMIGRATION POLICY CENTER, *supra* note 114 (finding that in 2014, 54.1% of non-represented children and 99.8% of represented children appeared for immigration proceedings).

[157] It is notable that such alternatives could also be much more cost-effective since alternative programs cost an average of $10.55 per day. *See* UNITED STATES CONFERENCE OF CATHOLIC BISHOPS AND THE CENTER FOR MIGRATION STUDIES, UNLOCKING HUMAN DIGNITY: A PLAN TO TRANSFORM THE U.S. IMMIGRANT DETENTION SYSTEM 29, (2015), http://www.usccb.org/about/migration-and-refugee-services/upload/unlocking-human-dignity-report.pdf. Detention at Dilley costs an estimated $296 per day per person. Julia Preston, *Detention Center Presented as Deterrent to Border Crossings*, N.Y. TIMES, Dec. 15, 2014, http://www.nytimes.com/2014/12/16/us/homeland-security-chief-opens-largest-immigration-detention-center-in-us.html?_r=0.

[158] U.S. GOVT. ACCOUNTABILITY OFFICE, ALTERNATIVES TO DETENTION: IMPROVED DATA COLLECTION AND ANALYSES NEEDED TO BETTER ASSESS PROGRAM EFFECTIVENESS 30 (Nov. 2014), http://www.gao.gov/assets/670/666911.pdf. Data from the Executive Office for Immigration Review further shows that a large majority of noncitizen adults with children—approximately two-thirds—appear for their initial hearings. Jordan, *supra* note 114. Moreover, research has shown that when aliens are represented by counsel, they are more likely to return for future proceedings. *Id.; see also* IMMIGRATION POLICY CENTER, *supra* note 114 (finding that in 2014, 54.1% of non-represented children and 99.8% of represented children appeared for immigration proceedings).

In addition, for those who require detention, the Standards "presume use of the least restrictive means available to prevent flight and otherwise to meet the limited underlying purpose of detention."[159] Yet, the conditions at the detention centers are not minimally restrictive. Indeed, ICE's own Family Residential Standards adopted in 2007 are based on a criminal detention model and are not enforced adequately where they provide some minimal protections.[160]

Adding to the prison-like atmosphere of the detention centers, the government contracts for the use and operation of many of the facilities with the same for-profit companies that operate private prisons. The Corrections Corporation of America manages DHS's detention center in Dilley, Texas, and the GEO Group, Inc. manages DHS's detention center in Karnes County, Texas.[161] It is unsurprising, then, that residents of those facilities live in prison-like conditions. In the Karnes facility, the walls are painted cinderblocks and the families are held behind heavy locked doors. Upon entrance visitors must pass through x-rays and security protocols and non-lawyers are allowed only very limited visitation time.[162] Guards give disciplinary write-ups to families for infractions of rigid institutional rules and conduct several body counts each day.[163] Karnes, Dilley, and Berks are all large secure facilities that do not permit families to leave and re-enter.[164]

The centers also fail to provide appropriate protections to women and children asylum-seekers. The conditions are not adequate for the care of young children and their mothers, some of whom are nursing, [165] and there have been incidents of sexual abuse within the facilities.[166]

Given their unique needs and higher likelihood of suffering abuse and trauma as a result of prolonged detention, women and children asylum-seekers are considered vulnerable groups that should be afforded heightened legal protections against detention.[167] Thus, the current

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[159] ABA CIVIL IMMIGRATION DETENTION STANDARDS, *supra* note 116, at 7.

[160] Press Release, Women's Refugee Comm'n, Just-Unveiled Immigration Detention Policies Are Excellent First Step, https://womensrefugee commission.org/news/press-releases-and-statements/826-just-announced-immigration-detention-policies-are-excellent-first-step ("The family residential standards implemented by ICE in 2008 are based on adult criminal standards and fail to ensure a suitable environment for families with young children.").

[161] *See* Corrections Corporation of America website, https://www.cca.com/facilities/south-texas-family-residential-center; GEO website, http://www.geogroup.com/maps/locationdetails/24.

[162] *See* UNIV. OF TEXAS LAW SCHOOL IMMIGRATION CLINIC & UNIV. OF TEXAS LAW SCHOOL CIVIL RIGHTS CLINIC, REPORT REGARDING GRAVE RIGHTS VIOLATIONS IMPLICATED IN FAMILY IMMIGRATION DETENTION AT THE KARNES COUNTY DETENTION CENTER 11 (2014), https://www.aclu.org/files/assets/iachr_-_human_rights_situation_of_ migrant _and_refugee _children_and_families_in_the_united_states-v2.pdf#page=146.

[163] *See id.*

[164] *See* MICAH BUMP & ELZBIETA GOZDZIAK, PROTECTING CHILDREN, THE CARE OF UNACCOMPANIED, UNDOCUMENTED CHILDREN IN FEDERAL CUSTODY: ISSUES AND OPTIONS, 22 PROTECTING CHILDREN 78 (2007), http://www.americanhumane.org/assets/pdfs/children/protecting-children-journal/pc-22-2.pdf (describing research that shows that large institutional facilities are harmful to children)

[165] *See* REPORT REGARDING GRAVE RIGHTS VIOLATIONS IMPLICATED IN FAMILY IMMIGRATION DETENTION AT THE KARNES COUNTY DETENTION CENTER, *supra* note 162, at 11.

[166] *See* Testimony of Marisa Bono, *supra* note 4; *Long Shorts and Baggy Shirt, supra* note 4.

[167] *See, e.g.*, Decl. of Luis Zayas, *R.I.L-R v. Johnson*, No. 1:15-cv-0011 (D.D.C Dec. 14, 2014) ("Detention has had serious and long-lasting impacts on the psychological health and wellbeing of the families I interviewed at

practice of engaging in widespread detention of those groups in large secure facilities is incompatible with domestic law standards as well as ABA and international human rights norms.

## IV. Due Process and Fundamental Fairness Concerns

Current policies and practices regarding the detention of families are also inconsistent with the basic due process and access to asylum principles set out in the United States Constitution, the ABA Civil Immigration Detention Standards and human rights norms.[168] The rights implicated include the right to access counsel and the right to a fair proceeding.

### A. Impact of Detention on Right to Due Process and Access to Asylum

Violations of the right to due process and access to asylum proceedings are implicated by the government's family detention policies, in part because detention makes it exceedingly difficult for a family to prepare an asylum case. It is undeniable that the release of a family from detention before a final hearing greatly affects the chances of establishing the merits of an asylum claim, as release allows for more time to prepare the claim and better and more frequent access to lawyers, witnesses, experts, and translators who can help prepare and document the case.[169] It also offers the possibility for the traumatized family to heal sufficiently in order to recall and recount their experiences in a manner that will best support an asylum claim through written and oral testimony. Families cannot engage in this process adequately in a restrictive detention setting. Indeed, one study found that even for represented detainees, the success rate of obtaining relief was 18%, compared with a 74% success rate for those immigrants who are represented but not detained.[170] Accordingly, policies that result in the continued detention of asylum-seeking families significantly threaten their ability to prepare their cases and thus place at significant risk their due process right to have the case fairly and adequately heard.

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Karnes…. The impacts of detention are exacerbated by the fact that families have already experienced serious trauma in their home countries and in the course of their journey to the United States.").

[168] *See Zadvydas*, 533 U.S. at 693 (holding that constitutional due process applies to all persons within the United States, including migrants, regardless of lawful status); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) ("[A]liens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law."); *see also Plyler v. Doe*, 457 U.S. 202, 210 (1982); *Mathews v. Diaz*, 426 U.S. 67, 77 (1976); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596–598 & n. 5 (1953); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

[169] *See* Robert A. Katzmann, *Bench, Bar and Immigrant Representation: Meeting an Urgent Need*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 585, 593 (2012) (reporting comprehensive study results which show detention to be one of the two most important variables determining success in immigration court, with representation being the other variable); Andrew I. Schoenholtz & Hamutal Bernstein, *Improving Immigration Adjudications Through Competent Counsel*, 21 GEO. J. LEGAL ETHICS 55, 55-56 (2008) (pointing out that detainees are more limited than non-detained migrants in obtaining counsel and representation is the "single most important non-merit factor" determining outcomes in immigration proceedings).

[170] *See* Symposium, *Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings*, 33 CARDOZO L. REV., 357, 363 (2011).

### B. Access to Counsel

Another primary due process right compromised by family detention practices is the right of access to counsel. Restrictions on access to legal representation are particularly concerning, because they undermine a family's right to meaningfully access the complicated asylum process. Access to counsel is particularly crucial in the detention setting where unrepresented asylum-seeking families face virtually insurmountable limitations on their ability effectively to pursue their claims for release from detention and relief on the merits.

Legal representation is often a deciding factor in whether a detained asylum-seeker passes a credible or reasonable fear interview and ultimately obtains asylum.[171] A recent study conducted in the New York immigration courts found that 74% of immigrants who are represented and not detained have successful outcomes. However, only 3% of those who are unrepresented and remain in detention have successful outcomes.[172] Data collected at the Karnes facility clearly shows that detained mothers are more likely to pass their credible and reasonable fear interviews when first given the opportunity to consult with legal counsel. For example, from August through December 2014, prior to the expansion of pro bono attorney programs focused on preparing families for credible fear interviews, the average rate at which asylum-seekers at Karnes were found to have a credible fear (the "fear found rate") was 71%.[173] In contrast, from January through March 2015, after access to counsel became more widely available for these early interviews through pro bono programs, that average rate increased dramatically to 91%.[174] Similarly, the passage rate in reasonable fear interviews at Karnes increased from an average 62% between August and December, 2014, to an average 81% from January through March, 2015.[175] A comparable, notable increase in passage rates for the screening interviews occurred at Artesia as pro bono attorneys arrived at the facility in greater numbers.[176]

The numbers make plain that having representation and securing release pending a final determination can inalterably change the lives of affected families. The role of counsel has also been crucial in obtaining release from detention for detained families and in obtaining asylum and related relief on the merits.[177] Yet only approximately 30% of families who were detained

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[171] One study found that legal representation is "the single most important factor affecting the outcome of [an asylum-seeker's] case." Jaya Ramji-Nogales, Andrew I. Schoenholtz, & Phillip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 340 (2007).
[172] *See* TRAC Immigration Report, *Representation is Key in Immigration Proceedings Involving Women with Children* (Feb. 18, 2015), http://trac.syr.edu/immigration/reports/377/.
[173] *See* July 2014-January 2015 Credible/Reasonable Fear Report, *supra* note 68.
[174] *See* U.S. Citizenship and Immigration Services, Asylum Division, Family Facilities Credible/Reasonable Fear (hereinafter "2015 Credible/Reasonable Fear Report"), http://www.uscis.gov/sites/default/files/USCIS/Outreach/PED-CF-RF-familiy-facilities-FY2015Q2.pdf.
[175] *See* July 2014-January 2015 Credible/Reasonable Fear Report, *supra* note 68; 2015 Credible/Reasonable Fear Report, *supra* note 174.
[176] *See* July 2014-January 2015 Credible/Reasonable Fear Report, *supra* note 68 (showing an increase in approval rates for credible fear interviews from 40.6% in July 2014 to a high of 86.7% in October 2014).
[177] *See generally, Symposium, Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings, supra* note 170, at 363–64.

for any length of time have been able to secure legal representation, and the percentage is likely lower for those who have remained detained.[178]

The relevant legal standards establish that the detained families have a right to counsel even if counsel is not provided at government expense.[179] At a minimum, courts have recognized that basic due process principles require that the government not impede access to counsel and meaningful representation for immigration detainees.[180] In line with these norms, international human rights law also establishes the importance of ensuring that immigration detainees have effective means of accessing and communicating with counsel.[181] The ABA has similarly recommended that detainees be afforded "meaningful and timely access to legal personnel" and has opposed restrictions that have been placed on counsel at detention facilities, such as prohibitions on laptop computers and cellphones, and the imposition of lengthy wait times before meetings because of the negative impact on counsel's preparation of a case.[182]

### *1. Systemic Difficulties with Access to Counsel for Detained Families*

Despite the importance of access to counsel and the right to be represented by counsel, families at the Karnes, Dilley, and Berks detention centers have faced numerous challenges in obtaining adequate legal services. As an initial matter, the size and location of the family detention centers has made it very difficult for families to secure the paid or pro bono legal services to which they are entitled. Attorneys and other legal volunteers must drive over an hour to reach Karnes from San Antonio and two hours from Austin, those cities being the nearest metropolitan centers.[183] Similarly, Dilley is more than 70 miles and over an hour driving time

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[178] *See* TRAC Immigration Report, *supra* note 172.

[179] *See* INA §§ 292, 240(b)(4); 8 C.F.R. § 235.3; *see also Orantes-Hernandez v. Smith*, 541 F. Supp. 351, 376 (C.D. Cal. 1982) (order to show cause instituting deportation proceedings "brings with it the procedural protections of the right to counsel and the right to remain silent."); *cf.* Partial J. and Permanent Inj. ¶¶ 2, 6, *Franco-Gonzalez v. Holder*, No. CV 10-02211 DMF (DTBx), (C.D. Cal., Apr. 23, 2013) (providing for counsel for individuals with mental competency issues); Press Release, U.S. Dep't of Justice, Department of Justice and the Department of Homeland Security Announce Safeguards for Unrepresented Immigration Detainees with Serious Mental Disorders or Conditions (Apr. 22, 2013), http://www.justice.gov/eoir/press/2013/SafeguardsUnrepresentedImmigration Detainees.html (same); Complaint, *J.E.F.M. v. Holder*, Case No. 2:14-cv-01026 (W.D. Wash. July 9, 2014) (asserting legal right to appointed counsel for certain minors).

[180] In *Haitian Centers Council, Inc. v. Sale*, a New York district court found that "screened in" refugees—those who had passed the credible fear test—had a due process right to counsel (but not public counsel) under the Fifth Amendment. 823 F. Supp. 1028, 1042 (E.D.N.Y. 1993). Similarly, in *Orantes-Hernandez v. Smith*, the court enjoined the government practice of coercing asylum-seekers to sign voluntary departure agreements without notifying them of their right to effective assistance of counsel and right to file an asylum application. 541 F. Supp. at 380-81.

[181] UNHCR Guidelines, *supra* note 123, at Guideline 7 ("Lawyers need to have access to their client, to records held on their client, and be able to meet with their client in a secure, private setting."); Inter-American Comm'n on Human Rights, *Report on Immigration in the United States: Detention and Due Process*, *supra* note 123, at ¶ 436(c), (d) (recommending that detention facilities "provide adequate space for confidential meetings with attorneys and mental health practitioners, so that these meetings can happen in an efficient and timely manner" and that immigration detainees should be permitted "to have confidential phone conversations with their attorneys").

[182] ABA CIVIL IMMIGRATION DETENTION STANDARDS, *supra* note 116.

[183] Google Maps, http://www.googlemaps.com (directions from Karnes County Residential Center to San Antonio and Austin).

from San Antonio, and more than 150 miles and two-and-a-half hours from Austin.[184] These remote locations make it very difficult for the detained women and children to meet in person with their legal representatives on any regular basis, which in turn significantly impedes their ability to prepare for their credible or reasonable fear interviews and their court hearings. The need to engage in time-consuming travel and logistics to provide representation means that attorneys must accept fewer cases for consultation and representation, limiting the number of families that will obtain counsel.

In addition, the sheer number of individuals at the facilities, combined with the minimal number of attorneys in close enough proximity to work with them, presents an insurmountable problem. Despite very serious efforts, it is simply impossible for the legal community to provide representation to all detained families who require legal assistance to present their claims effectively in rapidly-moving, complicated proceedings. As a result, many families are forced to face immigration proceedings without legal assistance.[185]

### *2. Specific Difficulties in Providing Legal Representation*

Further specific impediments to legal representation exist even when counsel is willing to take on representation. These barriers fall into two categories: impediments to paid and pro bono counsel (together with supporting professionals such as interpreters and paralegals) accessing their clients, and the inability of counsel to adequately prepare for their clients' immigration proceedings due to seemingly arbitrary and unnecessary restrictions placed on counsel's activities at detention centers. Each of these constraints threatens the families' due process rights to legal representation.

The family detention facilities have adopted informal, often non-transparent and inconsistently-enforced policies that have made attorney-client communications and consultations difficult and time consuming. The constantly changing conditions for visitation violate the ICE Family Detention Standards requirement that each facility "provide notification of the rules and hours for legal visitation."[186] For example, ICE employees have insisted that law students entering Karnes and Dilley obtain security clearance[187] even though ICE's own Family Residential Standards do not require such clearance.[188] Similarly, legal personnel at both facilities have, at times, been denied access when they do not provide 24-hour advance notice of the specific detainees they would like to meet.[189] Berks also now requires advance notice of the

[184] *Id.* (directions from South Texas Family Residential Center in Dilley, Texas to San Antonio and Austin).
[185] WRC & LIRS, LOCKING UP FAMILY VALUES, AGAIN, *supra* note 22, at 14-15.
[186] ICE Family Residential Standards, *supra* note 29, at Visitation, ¶ 10(b).
[187] *See, e.g.*, Barbara Hines, *Notes on Access to Counsel* at 2 ("hereinafter Hines Notes") (on file with the authors); Letter from S. Schulman to S. Saldaña, "Re: Access for Pro Bono Volunteers at Karnes, Dilley and Berks Family Detention Centers," at 2 (Apr. 20, 2015) (hereinafter "Schulman Letter") (on file with the authors).
[188] *See generally* ICE Family Residential Standards, *supra* note 29, at Visitation, ¶ 10; *see also* U.S. Immigration and Customs Enforcement, Performance-Based National Detention Standards 2011, Sec. 5.7, http://www.ice.gov/doclib/detention-standards/2011/pbnds2011.pdf.
[189] *See* Schulman Letter, *supra* note 187, at 2-3.

exact time of a planned visit and the specific detainee(s) that the attorney will meet.[190] The ICE Family Detention Standards do not require such advance notice.[191] In another instance, law students working with and supervised by attorneys were informed that they could not enter Karnes without a supervising attorney present, even though they had previously been approved for entry and, in many cases, had previously entered without a supervising attorney being present.[192] Attorneys, students, and legal assistants cannot adequately prepare for visitation with detainees when the "rules" for such visitation are subject to such frequent, unexplained change and unreasonably stringent, inconsistent protocol.

Telephonic communications cannot effectively substitute for in-person meetings. Face-to-face interaction is far more productive, particularly considering language barriers. But even this less effective telephonic option is not always available. Legal representatives at Karnes and Dilley have faced difficulties setting up telephone conferences with their clients, even though such conferences are available in theory.[193]

Even when legal personnel are given physical access, arbitrary conditions imposed by facility management make it very difficult for attorneys and other legal representatives to have productive meetings with their clients. For example, on one occasion at Karnes, the GEO staff refused to allow a team of pro bono attorneys from Elon University Law School to have any food or water in the visitor room and then further stated that if the team left to get food, they would not be permitted to re-enter that day. The team spent 11 hours without food or water in order to finish their work with the detainees.[194] In a similar situation, University of Texas law students were denied the option to eat during a prolonged client interview when they were told they would not be allowed to return the same day if they left the facility even briefly.[195] In another case at Karnes, the staff refused to allow a detainee to use the bathroom in the visitor room even though the bathroom was very clearly designated for detainee use. Instead, the detainee was forced to leave the area, return to her quarters to use the bathroom, and then return to the visitor area, thereby wasting valuable, limited time.[196] At Dilley, the volunteers meet with their clients in a small "visitation trailer." The CCA personnel at the facility insist, without any basis in the fire code or the facility contract, that the trailer can only accommodate 60 people at a time, including guards, family members or other visitors, detained women and children, and any legal volunteers.[197] And at Berks, attorneys recount that the meeting rooms are insufficiently private and quiet as the walls are thin, which allows noise such as music to travel into the room and for

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[190] *See* Notes, National Stakeholder Coordination Call on Border Child & Family Cases, June 5, 2015, at 1-2 (hereinafter "National Stakeholder Coordination Call Notes") (on file with the authors) .

[191] *See generally* ICE Family Residential Standards, *supra* note 29, at Visitation, ¶ 10; *see also* ICE Performance-Based National Detention Standards 2011, *supra* note 188, at Sec. 5.7.

[192] *See, e.g.,* Memorandum from E. Alvarez to D. Gilman, "Re: Memorandum Concerning Issues at Karnes," at 6 (Apr. 26, 2015) ("hereinafter Alvarez Memorandum") (on file with the authors); Hines Notes, *supra* note 187, at 2.

[193] *See, e.g.,* Alvarez Memorandum, *supra* note 192, at 5; WRC & LIRS, LOCKING UP FAMILY VALUES, AGAIN, *supra* note 22, at 14.

[194] *See* Alvarez Memorandum, *supra* note 192, at 5-6.

[195] *See, e.g.,* Email from D. Gilman to D. Achim, "clinic student access to Karnes for representation" (Mar. 27, 2015) (on file with the authors) (hereinafter "Gilman Email"); Alvarez Memorandum, *supra* note 192, at 5.

[196] *See* Alvarez Memorandum, *supra* note 192, at 7.

[197] *See* Laura Lichter, *Life or Death Consequences: Part 2,* AILA LEADERSHIP BLOG, June 3, 2015, 11:42 AM, http://www.ailaleadershipblog.org/category/familydetention/.

conversations potentially to be heard outside, thereby jeopardizing the attorney-client privilege.[198]

In certain cases at Karnes, ICE and facility management have gone as far as banning particular legal services providers without reasonable justification. In March 2015, a paralegal working for an Austin-based immigration attorney was denied access to Karnes after writing an article for the Texas Observer magazine titled "Seeking Asylum in Karnes City." Although she was told that she was banned because she had improperly entered the facility in January 2015 as a paralegal when her initial access had been granted as an interpreter, the timing of her denial and other comments suggest that the paralegal was banned due to her publicizing the conditions at the facility, rather than the stated alleged technical violation.[199]

In another case from March 2015, a legal assistant with the Refugee and Immigrant Center for Education and Legal Services (RAICES) was banned from entering Karnes. She was responsible for conducting intakes for pro bono referrals and for visiting detainees in order to obtain their signatures on necessary forms on behalf of pro bono attorneys living too far away to visit the facility with any frequency. The legal assistant had been visiting families at Karnes for this purpose since the summer of 2014 without issue, until ICE suddenly accused the legal assistant of helping the detained mothers coordinate a hunger strike. There was no evidence that ICE completed any investigation into the matter before banning the legal assistant, and the assistant denied such involvement in a sworn statement. Her exclusion created major logistical issues for pro bono attorneys, many of whom are located across the state and relied on the assistant to interact in-person with clients on their behalf.[200]

In addition to the described physical difficulties in accessing counsel and other legal representatives, detained families' due process rights are threatened by policies that make it unnecessarily difficult for legal personnel to help them prepare for their immigration proceedings. These policies include restrictions on technology use, access to experts and interpreters, access to various records, and interference with the attorney-client relationship.

With respect to technology, ICE and/or facility management have placed arbitrary, often-changing restrictions on the devices that legal personnel can bring into the facilities. Cell phones are vitally important for developing a detainee's case because they allow the detainee to communicate with an interpreter as well as with family members, friends, and other witnesses who can help establish the detainee's fear of persecution.[201] Likewise laptops and Wi-Fi hotspots enable legal service providers to conduct on-the-spot research and communication, and

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[198] *See* National Stakeholder Coordination Call Notes, *supra* note 190, at 2.
[199] Decl. of Victoria Rossi, *Flores v. Holder*, No. 2:85-cv-04544 (C.D. Cal. Apr. 22, 2015); *see also* Brad Tyer, *Paralegal Blocked from Karnes Detention Center After Observer Story*, TEXAS OBSERVER, March 27, 2015, http://www.texasobserver.org/paralegal-denied-access-to-karnes/.
[200] Decl. of Johana G. De Leon-Amendarez, *Flores v. Holder*, No. 2:85-cv-04544 (C.D. Cal. Apr. 21, 2015); *see also* Letter from Michael W. Macleod-Ball, Acting Director, ACLU Washington Legislative Office, to Sarah R. Saldana, Director, U.S. Immigration and Customs Enforcement (Apr. 17, 2015), http://endfamilydetention.com/wp-content/uploads/2015/04/15-4-17_Letter-to-ICE-re-Karnes-family-detention-facility-developments.pdf.
[201] *See* Schulman Letter, *supra* note 187, at 3

keep electronic notes of their meetings with each client.[202] Although cellphones, laptops, and Wi-Fi hotspot devices are critical to case preparation and are not restricted under the ICE Family Residential Standards, legal personnel often are told that they are prohibited from bringing these items into the centers. These arbitrary policies deny detainees the benefits of the full scope of available services that are available to non-detained clients of the same attorneys.

In Karnes, volunteer legal representatives were given oral permission by the facility director to bring cell phones and laptops into the center, but facility staff sometimes deny law students and attorneys entry with this equipment.[203] As with the restrictions on access, the rules pertaining to technology change for every visit: sometimes legal representatives are allowed in with laptops, sometimes they are not; other times, only one legal representative in a group is allowed to bring a lap top.[204] The same is true for Wi-Fi hotspot devices.[205] Due to these widespread inconsistencies, legal volunteers find it difficult to comply with restrictions, thereby making access to needed technology so inconsistent as to be a hurdle to adequate representation.

Detainees at Dilley and Berks have faced similar problems. Those facilities have banned the use of cell phones, making it impossible for attorneys and clients to communicate and for the detainees to contact potential witnesses in some cases.[206]

Families and their legal counsel have also had difficulty accessing interpreters, which makes it very difficult for counsel to communicate with their clients and thus to adequately prepare the clients for their asylum cases. Not only do the restrictions on technology make accessing interpreters more difficult, but there are also conflicting standards on the clearance requirements for interpreters who can physically visit the centers. Notably, in-person meetings with interpreters are strongly preferred to virtual ones, as all parties communicate better when the interpreter is in the same room with the clients. Unfortunately, in some cases, interpreters are told that they need to be cleared prior to every visit, which is time-consuming, while others have been advised that a clearance determination is good for six months.[207] These inconsistent requirements make it difficult for attorneys to comply with requirements for interpreter access and therefore often result in interpreters being denied physical access to the facilities.

Legal representatives are further impeded in their work by their inability to obtain various records. These records, including initial interviews with detainees after they are detained, identity documents, and medical records, are all critical in helping establish a case for asylum, but in many cases access to the documents is restricted for no apparent reason. For example, in one instance at Karnes, facility management refused to provide a detainee with a copy of a psychological evaluation she received when she was first admitted. In response to requests by a pro bono attorney, the facility agreed to release the information if certain paper work was filed

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[202] *Id.*
[203] *See, e.g.*, Hines Notes, *supra* note 187, at 2-3.
[204] *Id.; see also* Gilman Email, *supra* note 195; Alvarez Memorandum, *supra* note 192, at 5; Schulman Letter, *supra* note 187, at 3.
[205] *See, e.g.*, Hines Notes, *supra* note 187, at 2-3; Alvarez Memorandum, *supra* note 192, at 6; Schulman Letter, *supra* note 187, at 3.
[206] *See* Schulman Letter, *supra* note 187, at 3; National Stakeholder Coordination Call Notes, *supra* note 190, at 1-2.
[207] Hines Notes, *supra* note 187, at 3.

but then required the detainee to sign three different forms, each time stating that the wrong form had been submitted. The facility then asserted that the records could not be released without verbal confirmation from the detained mother, but the medical records manager refused to set a date and time to speak with the detainee about the matter.[208] In other instances, ICE has confiscated identity documents upon apprehension and refused to provide the families or their attorneys with these documents.[209] These burdensome paperwork requirements resulted in increased bond amounts, delayed or denied release, and limited travel upon release.[210]

Finally, ICE personnel and facility staff at the family detention centers have interfered with attorney-client relationships in other ways, including by improperly offering legal advice to detained families. For example, an ICE official at Karnes incorrectly indicated to a detained mother that her legal representatives had made a "mistake" in the manner in which her release from detention was requested. The officer's statement to the mother about the proper legal strategy constituted improper legal advice and damaged her relationship with her legal counsel.[211] In other cases, officials at Berks and Karnes have claimed knowledge about and influence over the immigration court proceedings and have told detained families that disciplinary problems at the facilities will affect their cases before the courts.[212] At Dilley, ICE officials have discouraged families from consulting with counsel during the custody determination process, insisting that the families will be in the best position if they accept the ICE custody determination without review.[213] ICE officials have also inquired, on several occasions, about the purpose of visits by certain pro bono legal representatives and organizations.[214] This practice is not permitted by the Family Residential Standards and hinders the confidentiality and efficacy of the attorney-client relationship.

In sum, the unwarranted restrictions and bureaucratic hurdles impede the ability of attorneys and other legal volunteers to help the families prepare their asylum cases. By denying access to needed technology, language assistance, and relevant documents, and by interfering with attorney-client relationships in other ways, ICE and facility management hinder meaningful representation and may even prevent success on the merits for valid asylum or protection claims.

### C. Fairness of Proceedings and Access to Asylum

Due process also requires that the immigration proceedings themselves provide individuals a "full and fair hearing of [their] claims and a reasonable opportunity to present

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[208] *See* Alvarez Memorandum, *supra* note 192, at 4; Schulman Letter, *supra* note 187, at 5.
[209] *See, e.g.,* Schulman Letter, *supra* note 187, at 4.
[210] *Id.*
[211] *See* Schulman Letter, *supra* note 187.
[212] *Id.*
[213] CARA Family Detention Pro Bono Project Letter to ICE Director Sarah Saldana (July 27, 2015), http://aila.org/advo-media/aila-correspondence/letter-to-ice-recent-practices-dilley.
[214] *See* E-mail Communication from ICE San Antonio Field Office to NYU Immigration Clinic (April 8, 2015) (on file with the authors).

evidence on [their] behalf."[215] This right is echoed in the statute and regulations governing immigration proceedings, which provide that the respondent in a removal proceeding shall be advised of her right to representation, of the availability of free legal services, and of the right to a reasonable opportunity to examine and object to the evidence against her, present evidence on her own behalf, and cross-examine the government's witnesses.[216] International human rights law and ABA policy similarly emphasize the importance of the ability of individuals to present a claim, particularly an asylum claim.[217]

Unfortunately, the families currently in detention centers have faced a variety of unfair practices from the moment they are apprehended, many of which threaten basic due process rights and their ability to present an asylum claim. These practices exacerbate the many hurdles to meaningful participation in legal proceedings that the families already face as a result of their detention and the previously described limitations on access to counsel.

Families are often forced to participate in the various stages of asylum proceedings without adequate interpretation services, even though such services are legally required and the Office of the United Nations High Commissioner for Refugees has characterized "the services of a competent interpreter" as a fundamental requirement.[218] The problems with translation and interpretation begin at the very first stage of the proceedings, during the initial interviews conducted by the inspections officers who apprehend the families. Even though regulations require adequate interpretation services to be provided, some women are not provided with access to such services, particularly those women who speak indigenous languages.[219] This problem repeats itself during the next stage of the proceedings, the credible or reasonable fear interviews, when the women frequently do not receive the adequate interpretation services to which they are legally entitled.[220]

Besides violating their legal rights, these language barriers make it significantly more difficult for the women to establish their fear of persecution in order to meet the requirements for an asylum claim and avoid deportation. As one court has recognized, "[i]t is difficult to imagine

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[215] *Colmenar v. INS*, 210 F.3d 967, 971 (9th Cir.2000); *see also Flores v. Reno*, 507 U.S. 292, 307 (1993); *Matter of Toro*, 17 I&N Dec. 340 (BIA 1980); *Mbang v. Mukasey*, 269 F. App'x 135, 136 (2d Cir. 2008) (removal proceedings must comport with due process); Flores Stipulated Settlement Agreement, *supra* note 12.

[216] *See* INA § 240(b)(4); 8 C.F.R. § 1240.10.

[217] *See* UNHCR Guidelines, *supra* note 123, at Guideline 1 (emphasizing the right to seek asylum, regardless of manner of entry, without undue impediment as a result of detention); *Haitian Ctr. for Human Rights et al. v. United States*, Case 10.675, Inter-Am. Comm'n H.R., Report No. 51/96, OEA/Ser.L/V/II.95, Doc. 7 (March 13, 1997), http://www.cidh.org/annualrep/96eng/USA10675.html; U.N. High Comm'r for Refugees, Submission by the United Nations High Commissioner for Refugees For the Office of the High Commissioner for Human Rights for the Periodic Review: UNITED STATES OF AMERICA (Oct. 2014), http://www.refworld.org/docid/55474c1b4.html (noting impediments to the right to seek asylum caused by detention in the United States); ABA Resolution, Report No. 131, *supra* note 133; ABA Resolution, Report No. 107F (Feb. 13, 2006), http://apps.americanbar.org/intlaw/policy/humanrights/immigration2.06107F.pdf.

[218] Office of the U.N. High Comm'rfor Refugees, Handbook on Procedures and Criteria for Determining Refugee Status.

[219] 8 C.F.R. § 235.3(b)(2).

[220] 8 C.F.R. § 208.30(d)(5); *see, e.g.*, Washington, *supra* note 154, at 4 (recounting the difficulties of telephonic communication with an interpreter for a credible fear interview, during which the interpreter and interviewee repeatedly had difficulty hearing each other and the interpreter misinterpreted the testimony on several occasions).

how any bona fide refugee, with little or no knowledge of English, could ever spontaneously convey a 'well-founded fear of persecution' to an asylum officer."[221] Not only do the women have difficulty communicating the persecution they face if inadequate interpretation services are the only available means of communication, but allegedly "conflicting" or false information given to the inspection officers and/or credible fear interviewers is often used against the women in later proceedings before the immigration courts, even though such discrepancies often are attributable to language barriers.[222] For those women who speak indigenous languages, immigration authorities frequently skip the credible fear interview altogether, moving directly to the merits determination. But without a positive credible fear determination, judges are hesitant to grant release pending conclusion of the proceedings, thereby further prolonging detention.[223]

This type of procedural unfairness continues throughout the proceedings in the immigration courts, even after the women pass their credible or reasonable fear interviews, because the families must attend their hearings virtually through video-conferencing. As a result, the interpreter is often not in the same location as either the asylum-seeker or the judge, significantly impeding the ability of the interpreter to understand the detainee and increasing the probability of inaccurate communication that affects procedural due process rights.[224]

The virtual hearings present further fairness problems. The distance between the judge and the asylum-seeking family creates difficulties when presenting the merits of the asylum claims. The immigration judge adjudicating the claim cannot observe the women in person as they tell their stories. That separation makes it more difficult for the judge to assess the asylum applicant's credibility and the extent of the persecution she faced in her home country.[225] Emotional testimony and visible scars or other indicia of injury may not be observable on video despite their importance in the adjudication of the asylum claim. Similarly, due to the remote location of the detention centers, often the attorney is not in the same location as the detainee, making it unduly difficult for the attorney to act as an intermediary and adequately represent a detained family during the proceedings.[226]

The logistics created by long-distance hearings seriously complicate effective representation as well. The difficulties are particularly notable with families held at the Dilley facility. Judges sitting in the Denver and Miami Immigration Courts have heard the cases from

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[221] *Marincas v. Lewis*, 92 F.3d 195, 204 (3d Cir. 1996).
[222] SARAH CAMPOS & JOAN FRIEDLAND, AMERICAN IMMIGRATION COUNCIL, SPECIAL REPORT: MEXICAN AND CENTRAL AMERICAN ASYLUM AND CREDIBLE FEAR CLAIMS BACKGROUND AND CONTEXT, May 2014, at 10, http://www.immigrationpolicy.org/sites/default/files/docs/asylum_and_credible_fear_claims_final.pdf.
[223] Statement of the American Immigration Lawyers Association Submitted to the U.S. Commission on Civil Rights, Briefing on "State of Civil Rights at Immigration Detention Facilities," Jan. 30, 2015, at 13-14, http://www.usccr.gov/OIG/Karen_Lucas_AILA_StatementforUSCommissiononCivilRights_FINALVERSION.pdf.
[224] LAURA ABEL, BRENNAN CENTER FOR JUSTICE, LANGUAGE ACCESS IN IMMIGRATION COURTS 9 (2011), http://www.brennancenter.org/sites/default/files/legacy/Justice/LangAccess/Language_Access.; *Augustin v. Sava*, 735 F.2d 32, 37 (2d Cir. 1984); *Khan v. Ashcroft*, 374 F.3d 825, 829 (9th Cir. 2004) (requiring meaningful participation through interpretation and translation).
[225] *See* WRC & LIRS, LOCKING UP FAMILY VALUES, AGAIN, *supra* note 22, at 16 (noting the judges' inability "to hear a detainee and see a detainee's facial expressions during [video or telephone] testimony").
[226] *Rusu v. INS*, 296 F.3d 316, 321-22 (4th Cir. 2002) (noting that video hearings in asylum cases have the potential to violate due process in some cases).

Dilley.[227] As a result, detained families currently do not even share a time zone with the judges hearing their cases. It is not possible for an attorney to work with a family at the detention center and then appear in person before the judge given the physical distance between the two sites. Even filing pleadings, evidence and applications is a difficult task, since the attorney will often need signatures or statements from the client in one state, which must be filed on a short time frame in the court in another state.

In another area of concern, the policies and practices of the government do not always guarantee that children have an opportunity to present an asylum claim independent of their mother's claim. This is true even when a child's claim cannot, by law, be derivative of her mother's claim because, for instance, the mother is subject to a prior deportation order and is in withholding-only proceedings. At least initially, DHS was not interviewing children separately to determine if they had asylum claims independent of those of their mothers.[228] This omission denies the children—a notably vulnerable population—their right to present their own claims.

Finally, there is concern that the fairness of the asylum process may be compromised by suggestions from high-level government officials that they consider most Central American asylum claims to be invalid, even in the face of agency and court determinations granting asylum in a significant number of cases.[229] In this context, DHS's instruction to immigration officers to err on the side of screening out detainees with possible asylum claims during the credible fear interview, rather than screening them in, is troubling. Specifically, in February 2014, DHS released a Memorandum emphasizing that the standard for passing the credible fear interview—the "significant possibility" standard[230]—requires an applicant to "demonstrate a substantial and realistic possibility of succeeding."[231] In releasing the Memorandum, DHS sought to clarify that standard amid concerns that it had "lately been interpreted to require only a minimal or mere

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[227] Press Release, U.S. Dep't of Justice, Executive Office for Immigration Review, *EOIR Announces Change to Immigration Judges Hearing Cases Out of Dilley* (April 14, 2015), http://www.justice.gov/eoir/pr/eoir-announces-change-immigration-judges-hearing-cases-out-dilley.

[228] *See* REPORT REGARDING GRAVE RIGHTS VIOLATIONS IMPLICATED IN FAMILY IMMIGRATION DETENTION AT THE KARNES COUNTY DETENTION CENTER, *supra* note 162.

[229] *See* Steve Inskeep, *Administration Moves to Speed Deportations of Unaccompanied Minors*, NPR, http://www.npr.org/2014/07/09/330038061/administration-moves-to-speed-deportations-of-unaccompanied-minors (White House advisor Cecilia Munoz indicating that most children and families from Central America do not qualify for asylum); Remarks to the Press with Q&A by Vice President Joe Biden in Guatemala (June 20, 2014), https://www.whitehouse.gov/the-press-office/2014/06/20/remarks-press-qa-vice-president-joe-biden-guatemala ("none of these children or women bringing children will be eligible under the existing law in the United States of America"); American Immigration Lawyers Association, Compilation of Family Detention Case Examples, AILA Doc. No. 14102446 (May 13, 2015), http://www.aila.org/ infonet/family-detention-asylum-grant-examples (providing examples of successful asylum claims).

[230] *See* 8 C.F.R. § 208.30(e)(2) ("An alien will be found to have a credible fear of persecution if there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, the alien can establish eligibility for asylum under section 208 of the Act or for withholding of removal under section 241(b)(3) of the Act.").

[231] Memorandum from John Lafferty, Chief, U.S. Citizenship and Immigration Servs., Asylum Division, to Asylum Office Directors et al., Release of Updated Asylum Division Training Course (ADOTC) Lesson Plan, *Credible Fear of Persecution and Torture Determinations* (Feb. 28, 2014), http://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/Memorandum-ReleaseofUpdatedADOTCLessonPlan.pdf.

possibility of success."[232] The Memorandum and the timing of its release seemed to be designed to encourage immigration officials to reduce the number of applicants passing interviews, raising the concern that some interviewers will overlook applicants with credible fears of persecution to further DHS policy and the statistics used in support of that policy.[233] The pattern of government officials apparently looking for ways to exclude rather than admit asylum-seekers creates a real risk that women and children with a genuine fear of persecution will be improperly returned to violent circumstances in the countries from which they fled.

## V. Pro Bono Response to the Increase in Migration in 2014 and the Use of Long Term Family Detention

Despite the inordinate obstacles, in substance and volume, encountered by members of the legal community working to respond to family detention, members of that community have made extraordinary efforts to assist. Lawyers have travelled from all over the country to the detention centers.[234] New pro bono projects have developed to address the needs of the thousands of detained mothers and children,[235] and national coordination among the participants has been critical. While obtaining some successes, these nationwide efforts can never be sufficient to overcome the overwhelming need for legal representation. The many hurdles created by DHS practices, the expertise and language skills necessary to provide competent counsel, and the sheer number of clients requiring assistance have created a crisis of ever growing proportions.

Efforts to provide legal assistance to detained families have been undertaken by a full network of legal service providers ranging from nonprofit organizations to small and large private law firms, from university law clinics to bar associations, all attempting to provide a full array of services from preparation for credible and reasonable fear interviews to representation in custody determination proceedings and on the merits of asylum claims to post-release placement and representation. An initial rapid response by pro bono attorneys grew into a structured services program with the support of the specialized immigration bar, university law clinics and non-profit organizations, which attracted even broader interest and large law firm support. Non-lawyer volunteers, including paraprofessionals and interpreters, among others, added to the effort and met critical needs as well. In turn, legal volunteers who provided representation joined with law firms and organizations working at the national level to engage in advocacy for policy improvements. We cannot do justice in this report to the legal community's valiant response to the crisis, but we do include an appendix (see, Appendix, below) with a partial description of the laudatory efforts of the legal community, which may serve as a point of reference for delivery of legal services to immigrants in the future.

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[232] *Id.*
[233] WRC & LIRS, LOCKING UP FAMILY VALUES, AGAIN, *supra* note 22, at 14-15.
[234] *See, e.g.*, Hylton, *supra* note 4.
[235] Press Release, American Immigration Council, Immigrants' Rights Groups to Provide Pro Bono Legal Services to Detained Families in Texas (Mar. 31, 2015), http://www.americanimmigrationcouncil.org/newsroom/release/immigrants%E2%80%99-rights-groups-provide-pro-bono-legal-services-detained-families-texas.

## VI. Conclusions and Recommendations

### A. Conclusions

The core mission of the Department of Homeland Security is national emergency planning and preparedness. It is essential that DHS be able to anticipate, and be prepared to address, periodic increases in the migration of individuals and families seeking asylum. Waves of people arriving in the United States, seeking safety and freedom in the arms of our democracy, have occurred periodically over the history of our country, particularly given our tradition as a nation of immigrants. History teaches that these instances are sure to happen again, meaning that fair and humane policies need to be in place beforehand. Dealing with those situations demands anticipation, effective solutions, significant reform, and hard work.

The policy of detaining immigrant children together with their parents during the pendency of their immigration proceedings is not a new response to such challenges, the situation having arisen several times in just the past 20 years. As with previous iterations, the problems encountered in the most current round of family detention are myriad. Now is the time to address the legal and humanitarian issues that inherently accompany these historical realities so that our country is ready to meet the consequent demands that seem certain to occur again and again, today and tomorrow.

As is well acknowledged, a legion of problems was presented by the expansion of family detention that occurred over the last year. Yet, DHS vigorously defended the response for most of that period.[236] Recently, in the summer of 2015, ICE reaffirmed its commitment to detention as its preferred strategy one day, only to be followed by DHS the next day disavowing its prior unyielding support of family detention and resolving to release quickly as many families as possible.[237] When DHS began releasing families pursuant to this reversal, the releases were done chaotically and the process has been handled through means employed by the criminal justice system, notably monetary bond and electronic monitoring. Failure to accept the civil nature of immigration detention is still the rule.

Simply, immigration detention is not criminal incarceration. There are important distinctions between the characteristics of the immigration detention population in ICE custody and the administrative purposes underlying their detention. Immigration detention is intended to hold individuals only as long as necessary, when necessary, and to process and prepare them for removal or relief. Criminal incarceration, on the other hand, necessarily is punitive in its purposes and goals.[238] In 2009, a system-wide governmental study of immigration detention

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[236] Johnson Statement, *supra* note 3; Press Release, U.S. Immigration and Customs Enforcement, ICE Announces Enhanced Oversight for Family Residential Centers (May 13, 2015), https://www.ice.gov/news/releases/ice-announces-enhanced-oversight-family-residential-centers.

[237] ICE Statement on Family Detention Centers (June 23, 2015), http://www.ksat.com/content/pns/ksat/news/2015/06/22/ice-statement.html; Statement by Secretary of Homeland Security Jeh C. Johnson on Family Residential Centers (June 24, 2015), http://www.dhs.gov/news/2015/06/24/statement-secretary-jeh-c-johnson-family-residential-centers. The announcement of the intention to release families was silent as to the status of the construction of additional spaces at Berks and Karnes to detain families, which is nearing completion.

[238] IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS, *supra* note 31.

underscored the opportunity for ICE, in coordination with stakeholders, to design and implement a new system premised upon civil, rather than criminal, principles. Those notions rest upon the foundational precepts that migrants are not to be detained as punishment. Indeed, many in immigration detention qualify under the law for relief from removal. Consequently the process must be governed by the presumption that release to the community is the rule and not the exception; an objective risk assessment must be made requiring the use of the least restrictive means necessary to ensure attendance at mandated immigration proceedings in cases where release alone is insufficient. This assessment recognizes that monetary bond and electronic monitoring are *not* minimally restrictive alternative means for ensuring appearance of migrants at their proceedings. These precepts can no longer be ignored.

By resorting to family detention practices without regard to these foundational principles, indiscriminately labeling families as threats, and refusing to determine and utilize the least restrictive means of achieving compliance with immigration proceedings, DHS has not met its emergency preparedness, legal or fairness goals. These failures have left in their wake a population of traumatized children and their parents, struggling with the consequences of unnecessary detention. As a result, adjudication of asylum claims has become haphazard and unfair, and legal services have been redirected and depleted. Looking towards the future, DHS must be prepared for the inevitable, periodic influxes of migrant families seeking status. This requires the advanced development, and fair implementation, of viable plans to accommodate these marked changes by means other than detention, or release to the community with excessive supervision requirements, and accelerated deportation proceedings lacking in due process.

### B. Recommendations

Based on the foregoing analysis, we urge the U.S. Government take the following actions to the extent it has not already done so.

**Specific Remedies: Karnes, Dilley and Berks Family Detention Centers**

1. Immediately cease the expansion of family detention capacities at the Karnes, Dilley, and Berks family residential centers and expeditiously release families currently held in detention.

2. Provide timely notice to the Karnes, Dilley and Berks facility providers that their contracts for family residential housing and services will not be renewed.

3. Pursue placements in small-sized group homes sufficient in number to humanely address detention where exceptional circumstances preclude other less restrictive means.

**Reform of Detention Policies and Practices impacting Families and Children**

4. Permanently abandon deterrence-based detention policies.

5. Adopt a presumption against detention, particularly in the case of families, children, and asylum seekers.

6. Where detention is required, it must not be lengthy. Every effort must be taken by government to satisfactorily address impediments to the release of families and children.

7. Revise detention policies and practices consistent with the presumption that detention, when necessary, must be for the briefest time possible.

8. Establish and adhere to clear standards of care that include unique provisions for families and children that do not follow a penal model.

9. Establish a system of informed immigration enforcement, which includes management tools and informational systems capable of building and maintaining a continuum of care for those taken into ICE custody. These systems shall give priority to community placements whenever feasible and detention strategies consistent with objectively and individually assessed risk as necessary, utilizing the least restrictive means to achieve compliance.

10. Provide meaningful federal oversight of detention operations, through an on-site presence at facilities of federal officials authorized to intercede quickly and as often as necessary, and ensure that effective complaint mechanisms are in place. Track performance and outcomes and make reliable information readily available to the public. Put into place enforcement mechanisms to ensure accountability.

11. Adopt a presumption of release into the community as the rule rather than the exception. Prioritize release of families into the community on parole (without the requirement of a parole bond) or on recognizance in all possible cases.

12. When release alone into the community is insufficient, an objective risk assessment shall be employed to identify the least restrictive means, such as community-based supervision, to achieve compliance with attendance at immigration proceedings. More restrictive alternatives to detention, including electronic monitoring and cash bond, shall be used only where demonstrably necessary in an individual case.

13. In those limited cases where a specific flight risk or danger has been established and payment of a financial bond is the least restrictive means of addressing such risks, set the bond amount at an attainable level based on individual circumstances.

14. For families placed in expedited removal proceedings, provide an individualized custody assessment immediately after a credible or reasonable fear finding, taking into account the family's individual circumstances and particular vulnerabilities as well as the specific likelihood that they pose a flight risk or danger to the community.

15. Conduct systematic independent monitoring for compliance of administration of bonds and assignments to community supervision and detention in addition to detention conditions.

16. Ensure meaningful access to legal representation and legal information for all families subjected to detention at every stage of the immigration proceedings. Meaningful access must also include the removal of geographic and policy hurdles that impede the involvement of pro bono attorneys, and a stated priority supporting the continual and consistent accommodation of the needs of attorneys seeking to represent clients.

17. Guarantee legal representation for all families subjected to detention, through private or pro bono counsel, legal services organizations funded for this purpose by the federal government or counsel appointed by the government.

18. Develop emergency preparedness plans in order to effectively respond to periodic increases in border arrivals and crossings by means other than detention, and continuously assess and improve its activities and operations.

# APPENDIX

PRO BONO RESPONSE TO DETENTION OF CENTRAL AMERICAN FAMILIES COMMENCING IN SUMMER OF 2014

## A. The Work of Pro Bono Representation Projects

Given the threat of immediate deportation through an expedited removal process, access to experienced immigration counsel very quickly became critical for the women and children detained in Artesia in late June 2014. It was clear that any meaningful legal representation program would most effectively be built in partnership with experienced legal services providers. The pro bono community relied heavily on the screenings and evaluations conducted by volunteers from specialized professional organizations, such as the American Immigration Lawyers Association, and local expert legal services organizations with access to the detained families. Those legal services organizations were already working at or above capacity, the economic downturn of the past several years having reduced the sizes of some staffs. The Administration had provided no additional funding for the provision of legal services to detained families, although it had offered limited financial support for representation of unaccompanied minors. Despite this reality, the pro bono community expanded its efforts to try to meet the increasing demand for legal services. Several key initiatives were launched to address the crisis.

### *i. First Responders in Artesia, New Mexico*

When the Artesia site first opened, there were no immigration attorneys in the region, and the list of free legal service providers given to the detainees consisted exclusively of lawyers located three and a half hours away. Even if the detained women wanted to consult with counsel remotely, there were no phones available in the facility other than ICE agent cell phones. Early access to pro bono counsel was non-existent, and yet five asylum officers were churning through dozens of credible fear interviews every day.

Two private lawyers retained by two of the detainees' family members sent a desperate plea to a listserv of immigration attorneys, seeking pro bono representation. Five practitioners responded immediately, three of them providing remote support, and the other two traveling to Artesia to help organize a response, their trunks full of as much content from their law libraries as they could transport. For a week, there were only two pro bono attorneys on the ground.

On July 22, 2014, the Center for American Progress, Human Rights First, the ACLU, and a number of human rights and other organizations toured the Artesia facility. Several of the detained women approached the tour group, begging for representation and giving their names to the tour group lawyers on pink post-it notes. Those post-it notes became "The List" of clients seeking attorneys. Using that list, the early volunteers were able to connect detained women to counsel for the first time.

*ii. The AILA-AIC Pro Bono Project*

By July 24, 2014, ten days after the first wave of deportations, just over a dozen lawyers arrived in Artesia. While a handful of stipends were available, most came as volunteers, leaving their private practices and paying their own transportation and lodging costs. There were already between 400 and 500 women and children in detention, none of whom had been screened by attorneys to evaluate their cases. With no funding and no infrastructure, the volunteers promised to represent anyone who wanted an attorney, without weeding out difficult cases.

Amid these challenges, the AILA-AIC Pro Bono Project ("Project"), a partnership between the American Immigration Lawyers Association (AILA) and AILA's sister organization, the American Immigration Council (AIC), was born. AILA marshalled 6-8 volunteers per week, eventually hiring one of those volunteer lawyers, at a very meager salary, to work full-time in Artesia. AILA members and other small firm and solo practitioners with immigration expertise responded in significant numbers. Large law firms, such as Jones Day, also contributed volunteers and other support. Using a cloud-based database developed by immigration attorney Stephen Manning of the Innovation Law Lab, volunteers uploaded documents and tracked information to try to create continuity of representation and streamline case development as teams of volunteers shifted in and out of the facility week-to-week. Facing overwhelming demand, the Project was intended to quickly increase access to pro bono representation. Rather than a single attorney handling a single case, volunteer attorneys would instead spend up to a week in Artesia and each handle up to twenty or more cases, handing off the files at the end of the week to the rotating, incoming team of volunteers. The on-the-ground team met with the clients and conducted the initial interviews, collecting information about their claims, which was then shared with remote volunteers who investigated further, contacted family members, and located supporting documentation. The remote volunteers then drafted and filed pleadings. By the time the Artesia detention center closed in December 2014, the Project had involved approximately 300 lawyers, paralegals, interpreters, and translators working on the ground and remotely.

*iii. The Karnes Pro Bono Network*

When the Karnes facility became a family facility at the beginning of August 2014, a few well-respected private immigration attorneys, the law firm of Akin Gump, and the University of Texas Law School Immigration Clinic began to take cases on a pro bono basis, mainly pursuing release on bond for families facing the government's no-release policy. A pro bono network of volunteer attorneys soon developed, and dozens of San Antonio and Austin area attorneys became involved, handling the direct representation of clients throughout their proceedings. In the fall of 2014 alone, volunteer attorneys with the network won the release of almost 100 families in bond proceedings. As described further below, Akin Gump Strauss Hauer & Feld LLP played a crucial role in providing initial support and structure for the pro bono network, and then RAICES (Refugee and Immigrant Center for Education and Legal Services) took over much of the coordinating work. Volunteers with the Karnes pro bono network continue to represent clients in seeking release and in merits proceedings. Of the small number of cases for which merits hearings have been held, pro bono attorneys from the network have obtained relief for at least a half dozen families.

*iv. The CARA Pro Bono Project*

Building on the models developed in Artesia and Karnes, the pro bono community quickly mobilized to provide services at the new detention facility in Dilley, Texas. Volunteer team leaders arrived each week, which AILA subsidized, but it soon became clear that there would need to be consistent leadership on the ground. AILA worked with the Catholic Legal Immigration Network, Inc. (CLINIC), AIC, and RAICES to form the CARA Pro Bono Project. Each organization took on funding responsibility for an element of the effort: equipment and supplies, a supervising attorney, and a volunteer coordinator.

The work of the AILA-AIC Pro Bono Project and the CARA lawyers and volunteers reveals a level of dedication illustrative of many who responded to the crisis. These individuals have provided counsel under very challenging logistical conditions, often at significant personal and economic sacrifice. For example, the lead attorney for CARA on the ground in Dilley, funded by CLINIC, also volunteered in Artesia and then moved from Ohio to south Texas to take on this work. A small staff oversees weekly teams of anywhere from three to fifteen volunteers, including attorneys, paralegals, interpreters, graduate students, law students, and clergy.

The volunteers pay their own airfare and lodging, and dedicate an average of 19 hours a day for a full week. The volunteers, as a group, see as many as 80 to 100 clients a day. Volunteers, whose knowledge of asylum law varies widely, are trained for 3.5 hours before entering the facility and are then thrust into the role of decision-maker, acting as the primary representative for a given client, going through the intake interview, uploading relevant documents to the database, and preparing affidavits, motions, bond documents, and letters of support, all while struggling with slow Wi-Fi hotspots, a sluggish printer/scanner, and no cell phone access. The volunteers have also lost valuable time hauling files and supplies in and out of the facility in a Radio Flyer wagon at the beginning and end of each day because there is no secure on-site attorney workspace.

The CARA project currently assists clients in preparing for credible fear and reasonable fear interviews, review of credible/reasonable fear determinations, full intake interviews following positive credible/reasonable fear findings, and custody redetermination hearing preparations. A single volunteer will work as many as 40 to 50 cases in a week before passing the load to the incoming group. All of the work product and supporting documentation are centralized in the database, so that, as one volunteer put it, if anyone is bitten by a rattlesnake, someone else can easily pick up where the last volunteer left off. As time passes and some of the women reach their merits hearings, former CARA volunteers have offered to continue to represent the clients they saw while in south Texas. The network of former volunteers, having dispersed back to their home offices, continues to play a role in representing the detained women and children, either in using the database to remotely access files, draft motions, and file documents before the Immigration Judge, or in providing assistance to women who make bond and are released pending their merits hearing. There is a remote bond team coordinated out of Connecticut, a translation team coordinated out of Los Angeles, and a private practitioner in Miami who prints and files court documents every day. Despite these challenges, this network

of remote attorneys, facing overwhelming logistical and economic hurdles, and compelled by the difficult and worsening conditions detainees face, is growing.

*v. American Gateways*

American Gateways conducts the Legal Orientation Program at both Karnes and Dilley. The organization has been involved with providing know-your-rights presentations at detention facilities in South Texas for many years. When the new family detention centers opened, the Department of Justice needed to expand its programming to those sites, and American Gateways began providing general legal orientation to the new arrivals. Staff attorneys provide a general overview of the immigration process, put on pro se workshops focused on bond hearings, merits hearings, asylum issues, and more. The attendees can also request short, individual sessions with the American Gateways attorneys, at which time the detainees are screened for possible pro bono referral. Most of those screened referrals are directed to the CARA attorneys. Some are directed to private pro bono attorneys in San Antonio and Austin with whom American Gateways works. Dozens of orientations have taken place both at Karnes and Dilley. More than 1400 detainees have attended the LOP sessions at Karnes and Dilley since the surge of border-crossings began last summer. American Gateways has a staff of just 20 people, yet between their various programs they serve facilities with more than 5000 detainees.

*vi. Human Rights First*

In working with national law firms, Human Rights First recognized the outstanding need to coordinate nationally among the various efforts beginning around the country. The organization learned from various stakeholders that there was a need for facilitation of communication and coordination among the national law firms, bar associations and legal services providers that were striving to expand their efforts to address the representation gaps facing families with children. As initiated by the Association of Pro Bono Counsel (APBCo), Human Rights First launched weekly national stakeholder teleconference calls which have grown to include more than 90 participants. Out of this effort, as well as a detailed letter to Vice President Biden outlining the numerous hurdles to engaging in the same pro bono representation he specifically called for in last year's White House meeting, grew regular meetings with the White House Office of Public Engagement. These meetings provide a reliable forum at which the legal community's now-coordinated voice can raise issues with representatives from the White House, the Department of Homeland Security, the Department of Justice, the Executive Office for Immigration Review, and others. Chaired by Human Rights First, these meetings have proven to be a valuable opportunity to discuss ways to overcome the many hurdles to pro bono representation.

Human Rights First also quickly raised funds to expand its capacity to provide pro bono representation to non-detained families and children through its offices in New York, Houston and Washington DC. The organization hired a total of nine new staff members, including three attorneys, three paralegals, and three social workers. With this new staff, Human Rights First is providing direct representation and also recruiting, training, and mentoring pro bono attorneys. Human Rights First has sent legal staff to Artesia, Karnes, Dilley and Berks to assist with legal

counsel and representation, and its family clients include some who were held at family detention facilities as well as some who were released by CBP at the border.

### B. The Response of Large Private Law Firms

Major private law firms have also been involved in meeting the growing demand for representation of detained families. Despite many obstacles, numerous firms have launched significant efforts to respond effectively to family detention. A few firms have initiated major pro bono representation projects.

The national law firm of Jones Day rented a small office in Artesia and began sending teams of five lawyers per week, adding to the ongoing pro bono representation being provided by the AILA-AIC Project. Their initial charge was to help with screening, but the mission soon turned to full representation of some of the families screened by AILA volunteers. A retired firm partner came out of his retirement to manage the effort, working closely with the firm's pro bono partner/APBCo member and an administrative assistant who was instrumental in collecting the data included in the Innovation Law Labs database. When the Artesia facility closed, Jones Day transferred the focus of its efforts largely to the women and children detained in Dilley. One attorney worked full-time for eight months on the cases accepted for representation. Teams were formed to share responsibilities on many additional files. In all, Jones Day has taken on more than 100 clients either detained at, or after release from, the detention facilities in Artesia, Dilley, and Karnes. The firm has shouldered large out-of-pocket expenses to have teams on the ground in south Texas and to send attorneys to Miami, where the Dilley cases are now being heard. At the urging of firm leadership, Jones Day continues to accept new matters on a weekly basis. To date, the firm has litigated six cases to final status, prevailing for their clients in each instance.

With an office in San Antonio, the firm of Akin Gump was in a unique position to respond to the family detention crisis. Focusing its efforts on Karnes, the firm began to pursue release from detention for its new clients there and to support a larger network of pro bono attorneys handling custody cases. The firm rented office space near the facility and assigned a recently admitted lawyer to work full-time at the Karnes detention center. Under the direction of the firm's pro bono partner/APBCo member, the young associate worked at the facility for four months, helping dozens of women prepare for their credible fear interviews and matching many cases with pro bono attorneys who would represent them in custody redetermination hearings before the immigration courts, challenging ICE decisions denying release. The influx of attorneys handling bond hearings, and the success rate attendant to that representation, helped the court in San Antonio effectively streamline the bond proceedings and make the process far more efficient. Akin Gump's on-the-ground associate was eventually replaced by a newly designated staff attorney at RAICES, and Akin Gump then funded a two-year Equal Justice Works fellow to work at RAICES. Akin Gump continues to be a key player in the national pro bono effort, leading efforts to deal with ICE, DHS, and White House officials to address the challenges on a systemic level.

Fried Frank, a New York based firm, has also allocated a significant portion of time to working on these efforts. Its Washington, D.C./APBCo member pro bono counsel travelled to Artesia, and working with AILA, has helped locate pro bono representation for women with

children who are released from custody and who then disperse to cities around the country where their families reside. Senior attorneys at the firm, including APBCo members, have also devoted substantial time and effort to policy work relating to family detention, and the firm's New York office is a key part of the screening program being overseen by Human Rights First.

Many additional law firms around the country are providing further pro bono assistance. Through APBCo, several firms toured the various detention facilities and are representing individual families as those detainees are released and dispersed to cities in every region of the nation. Other firms are involved in White House meetings. Still more are helping to staff the accelerated family dockets in other parts of the country. Several have sent attorneys to Dilley and Karnes to work for limited periods of time. Others are working with their local immigration legal services providers to represent former detainees in post-release proceedings around the country. Firms such as Chadbourne & Park are coordinating over-crowded immigration dockets, working to represent, or find representation for, the hundreds of immigrants in their home courtrooms in desperate need of assistance. In California, several firms are coordinating clinics to assist families with the timely filing of initial pleadings and applications for relief.