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Department of Homeland Security

Samantha Deshommès, Chief, Regulatory Coordination Division
Office of Policy and Strategy
U.S. Citizenship and Immigration Services
Department of Homeland Security

Re: Recommendations to Support the Work of the Interagency Task Force on the Reunification of Families (“Notice”); Docket No. [DHS-2021-0051](#)

Dear Executive Director Brané and Chief Deshommès,

The Young Center for Immigrant Children’s Rights (“Young Center”) and the Center for the Human Rights of Children (CHRC) write to share our recommendations for ways to minimize the separation of immigrant parents and legal guardians from their children. While we have many recommendations for the Task Force on how to end family separation, given our experience under “Zero Tolerance” through today, we will focus our comments today on the impact of continued separations due to parents’ alleged or actual involvement in the criminal legal system. In particular, we will examine the impact of: 1) the criminal prosecution and increased use of imprisonment for immigration law violations, 2) the unjust penalization of parents and family members when criminal history is used as a metric of child safety, 3) the rampant racial bias in criminal justice systems which has a disproportionate impact on immigrants of color, and 4) the reality that DHS often separates children from parents only to reunite them for the sole purpose of repatriation, belying their supposed concern for child safety. For each of these deeply problematic outcomes, we provide recommendations that the Biden-Harris administration could immediately undertake to end ongoing family separation. For all families impacted by family separation, the administration should ensure a pathway to permanent legal status, access to counsel at government expense, and access to holistic, culturally competent case management and mental health services.

A child’s separation from parents is a deeply traumatizing experience and can carry significant physical and emotional consequences well beyond the period of separation.¹ The American Psychological Association has raised grave concerns that the sudden and unexpected separation of a child from their parent can cause severe emotional trauma, noting that “the longer that parents and children are separated, the greater the reported symptoms of anxiety and depression are for children.”² A Past President of the American Academy of Pediatrics cautions: “[H]ighly stressful experiences, like family separation, can cause irreparable harm, disrupting a child’s brain architecture and affecting his or her short- and long-term health. This type of prolonged exposure to serious

¹ Letter to Department of Homeland Security Secretary Kirstjen M. Nielsen, Renewed Appeal from Experts in Child Welfare, Juvenile Justice and Child Development to Halt the Separation of Children from Parents at the Border (June 7, 2018) (a letter from over 200 child-centered organizations opposed to family separation on the grounds that it “disrupts the parent-child relationship and puts children at increased risk for both physical and mental illness” even after reunification), <https://www.childrensdefense.org/wp-content/uploads/2018/08/child-welfare-juvenile.pdf>.

² See Letter to Former Department of Homeland Security Secretary John F. Kelly, AMERICAN PSYCHOLOGICAL ASSOC. (Apr. 5, 2017), <http://www.apa.org/advocacy/immigration/separating-families.pdf>.

stress—known as toxic stress—can carry lifelong consequences for children.”³ The World Health Organization agrees: “Parent-child separation has a direct and immediate impact on a child’s physical, cognitive, mental and emotional well-being.”⁴

Unfortunately, people of color in the United States have faced family separation for generations. Migrant families regularly experience separation, but so too do immigrant families who have been living in the United States for generations, and Black and Brown U.S. citizen families who face separation due to paternalistic child welfare policy and practice or because of over policing, criminalization, and mass incarceration.

U.S. immigration policy perpetuates and reinforces these biases against people of color, deeming immigrant children and their families suspicious, likely to commit crimes, engage in trafficking, or at a minimum, to be unable to adequately care for themselves, judging them against biased cultural norms about family. While the Trump Administration’s “Zero Tolerance” policy was perhaps the most public display of family separation in recent history, discriminatory, unjust, and egregious separations of children from their families have been all too common for families of color in the United States and they persist today. The Biden-Harris administration has an obligation to do everything in its power to stop this. We also believe that the government has an obligation to minimize the separation of children from non-parent/non-legal guardian family members and even fictive kin consistent with best practice in child welfare and federal law.

For many years and across multiple administrations, immigrant families have been separated at our southern border. Separations continue today as a result of the Remain in Mexico policy (“Migrant Protection Protocols”) and improper reliance on an obscure part of the U.S. code – Title 42 – which has been in place since the beginning of the COVID-19 pandemic, to close the border to almost all asylum-seekers. It is difficult to understand how the recommendations of the Interagency Task Force on the Reunification of Families will be taken seriously within this policy context where family separation has become an accepted consequence of larger enforcement and unlawful deterrence goals. We hope that the Task Force’s report can illuminate the irony of this situation and put an end to these ongoing family separation policies.

Interests of the Young Center for Immigrant Children’s Rights and the Center for the Human Rights of Children (CHRC) in the Task Force’s Work

The Young Center serves as the federally-appointed Child Advocate, akin to best interests guardian *ad litem*, for trafficking victims and other vulnerable unaccompanied children in government custody as authorized by the Trafficking Victims Protection Reauthorization Act (TVPRA).⁵ The Young Center is the only organization authorized by the Department of Health and Human Services’ Office of Refugee Resettlement (ORR) to serve in that capacity. The role of the Child Advocate is to advocate for the best interests of the child. A child’s best interests are determined by considering the

³ Colleen Kraft, American Academy of Pediatrics, Statement Opposing Separation of Children and Parents at the Border (May 8, 2018), <https://www.aap.org/en-us/about-the-aap/aap-press-room/Pages/StatementOpposingSeparationofChildrenandParents.aspx>.

⁴ Catherine Jan et al., *Improving the Health and Well-Being of Children of Migrant Workers*, BULLETIN OF THE WORLD HEALTH ORG. 850, 850 (2017), <http://www.who.int/bulletin/volumes/95/12/17-196329.pdf>.

⁵ William Wilberforce Trafficking Victims Protection Act of 2008, 8 U.S.C.A. § 1232(c)(6)(A) (Westlaw through Pub. L. No. 115-171).

child's safety, expressed wishes, right to family integrity, liberty, developmental needs, and identity. Since 2004, ORR has appointed Young Center Child Advocates for thousands of unaccompanied children in ORR custody.

Beginning in 2017, the Young Center was appointed as the independent Child Advocate for hundreds of children who were separated from their parents at the border during the policy that became known as "Zero Tolerance." All of these children were designated as unaccompanied children and transferred to ORR custody, despite arriving at our border with a parent or legal guardian. Although the policy was enjoined by a federal court on June 26, 2018, the court allowed DHS to continue separations based on a narrower set of criteria, which included parent's alleged criminal history. On July 29, 2019 the Young Center's policy director, Jennifer Nagda, filed a declaration in the case of *Ms. L v. ICE* in response to these ongoing family separations based on allegations of criminal conduct or possible abuse or neglect by the parent. The declaration drew on the experience of Young Center staff and volunteers appointed as independent Child Advocate for 121 children taken from their parents after the federal court order purporting to end the practice back in 2018. In nearly all of these cases, the separated child could have safely remained in the parent's care while concerns about the child's long-term safety were investigated to determine if separation was actually necessary and would be consistent with domestic child welfare laws.

The Center for the Human Rights of Children (CHRC) is an interdisciplinary Center representing educators and scholars in the fields of law, child development, child welfare, social work, education, psychology, public health, and mental health. Recognizing that children require special protections due to their vulnerabilities, the Center for the Human Rights of Children (CHRC), a University Center of Excellence, was established in 2007 to pursue an agenda of research, outreach, education, and advocacy to address critical and complex issues affecting children and youth, both locally and globally. The CHRC strives to honor and advance the principles derived from the UN Convention on the Rights of the Child and believes that a child's survival and healthy future is dependent on family, community, civil society, and government working toward a shared vision that protects the fundamental rights of all children. Together, CHRC Directors have over 30 years of experience working with vulnerable migrant children across an array of disciplines, including immigration law, including in the context of child trafficking and exploitation, child refugee and asylum seekers, and other humanitarian considerations of migrant children. CHRC Directors are subject matter experts on family separation with multiple publications addressing the Zero Tolerance policy.

1) **The criminal prosecution and subsequent imprisonment of people seeking protection at the border for civil immigration law violations separates children from their parents and families.**

Parental detention and incarceration for immigration violations are major sources of family separation. The use of detention and incarceration for immigration violations has increased every year for decades.⁶ In 2019, the average number of immigrants detained by ICE per day was 49,447 versus 38,106 in 2017.⁷ But in 1994 that number was 6,785.⁸ President Biden has rolled back some Trump-era immigration policies, including a 2017 policy memo which made it nearly impossible for people to get out of immigration detention regardless of the alleged safety risks they posed to the

⁶ Katie Sullivan & Jeff Mason, *Immigration Detention in the United States: A Primer*, BIPARTISAN POLICY CENTER, (Apr. 24, 2019), <https://bipartisanpolicy.org/blog/immigration-detention-in-the-united-states-a-primer/>.

⁷ *Id.*

⁸ *Id.*

public. Although Biden's policy memos direct ICE to prioritize the detention of people with specific criminal convictions, they also broadened ICE officers' discretion to make arrests and detain people as they see fit.⁹ As a result, detention numbers are creeping back up, with more than 22,000 people in ICE detention as of January 2022.¹⁰ By giving ICE agents unfettered power to detain, the Biden administration is unlikely to substantially decrease the number of people detained for immigration violations. As a result, the administration is unlikely to substantially decrease children separated from parents because of parents' immigration status.

The vast majority of non-citizen immigrants in federal prisons are incarcerated for immigration violations. Among non-U.S. citizens who received a federal prison sentence in 2015, nearly 70 percent were convicted of an immigration law violation as their most serious offense.¹¹ Between 2000 and 2015, the number of federal prison sentences for immigration law violations doubled, from 11,403 to 20,757, while the overall undocumented population grew by only 24%.¹² According to an analysis of federal criminal cases by the U.S. Sentencing Commission in 2015, more than 80% of people were incarcerated for 1325 and 1326 violations – illegal entry and reentry into the U.S.¹³

In short, DHS is abusing its discretion to incarcerate people, the vast majority of whom pose no threat to public safety. DHS has the power to stop family separation that results from the overuse of detention, and instead rely on alternatives to incarceration such as the family case management program.

The reckless use of detention and referral for criminal prosecution has lasting consequences not just on parents, but on their separated children. In addition to the time spent imprisoned for criminal charges based on immigration status, non-citizen immigrant parents can then be detained indefinitely while facing deportation. In one example,

⁹ Alejandro Mayorkas, Memorandum from Secretary of Homeland Security to Tae D. Johnson, Acting Director, U.S. Immigration and Customs Enforcement; Troy A. Miller, Acting Commissioner, U.S. Customs and Border Protection; Ur Jaddou, Director, U.S. Citizenship and Immigration Services; Robert Silvers, Under Secretary, Office of Strategy, Policy, and Plans; Katherine Culliton-González, Officer for Civil Rights and Civil Liberties, Office for Civil Rights and Civil Liberties; Lynn Parker Dupree, Chief Privacy Officer, Privacy Office, *Interim Guidance: Civil Immigration Enforcement and Removal Priorities*, Feb. 18, 2021, https://www.ice.gov/doclib/news/releases/2021/021821_civil-immigration-enforcement_interim-guidance.pdf.

Alejandro Mayorkas, Memorandum from Secretary of Homeland Security to Tae D. Johnson, Acting Director, U.S. Immigration and Customs Enforcement; Troy A. Miller, Acting Commissioner, U.S. Customs and Border Protection; Ur Jaddou, Director, U.S. Citizenship and Immigration Services; Robert Silvers, Under Secretary, Office of Strategy, Policy, and Plans; Katherine Culliton-González, Officer for Civil Rights and Civil Liberties, Office for Civil Rights and Civil Liberties; Lynn Parker Dupree, Chief Privacy Officer, Privacy Office, *Guidelines for the Enforcement of Civil Immigration Law*, Sept. 30, 2021, <https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf>.

¹⁰ Camilo Montoya-Valdez, *Coronavirus Infections Inside U.S. Immigration Detention Centers Surge by 520% in 2022*, CBSNEWS, (Jan. 14, 2022), <https://www.cbsnews.com/news/immigration-detention-covid-cases-surge/>. It is important to note that more than 75% of people in ICE detention have no criminal record. *Id.*

¹¹ The Sentencing Project, *Comments of Nazgol Ghandnoosh: On Proposed Rules to Expand Bars to Eligibility for Asylum Based on Criminal Histories Before the Dep't of Homeland Security and the Dep't of Justice*, at 7 (Jan. 21, 2020), <https://sentencingproject.org/wp-content/uploads/2020/01/Proposed-Asylum-Restrictions-Based-on-Criminal-Histories.pdf>.

¹² *Id.*

¹³ *Id.*

The Young Center was appointed to seventeen-year-old “DR” who was apprehended with and separated from his father in April 2019. His father was charged under 8 U.S.C. § 1326 for re-entry after removal. His criminal history was identified as multiple driving under the influence charges. There was no indication that the father was ever charged with endangering the welfare of a child. DR was held in custody for more than 50 days before he was released to a family member.¹⁴

Once deported, there are multiple barriers to family reunification.¹⁵ Some children of deported parents face the reality of permanent separation from their families.

For children, having an incarcerated parent is considered to be an “adverse childhood experience” (ACE). Children often suffer a number of social, emotional, health, financial and educational consequences as a result of that imprisonment.¹⁶ The detention or deportation of a parent is associated with mental health problems including an increase in suicidal ideation, as well as developmental delays, long-term physical health conditions, lower academic performance and increased poverty rates.¹⁷ In almost all cases, the detention, prosecution and incarceration of parents and family members, including those with minor children, serves no public benefit while exacting high costs on children. DHS has the power to stop this.

Recommendations for Immediate Action by the Biden-Harris Administration:

- Suspend referrals for prosecution for unauthorized entry or reentry violations (8 U.S.C. §§ 1325 and 1326).
- Vacate prior unauthorized entry or reentry convictions for parents and legal guardians apprehended or convicted at any point prior to or after Zero Tolerance and cease all unauthorized reentry prosecutions.
- Instruct DOJ attorneys to discontinue current and cease future prosecutions for unauthorized entry/re-entry against asylum-seekers, including but not limited to parents and caregivers who have been separated from their children
- Repeal the 2017 ICE Parental Interests Directive, and at a minimum, reinstate the 2013 directive to ensure the agency prioritizes family unity and refrains from enforcement actions against the primary caregivers of children.
- Work with Congress to repeal and revise the unauthorized entry/re-entry statutes so that these matters are handled through civil laws, and asylum seekers are not subjected to such prosecutions.

¹⁴ Decl. of Jennifer Nagda, Ex. E to Pls’ Mem. Supp. Mot. Enforce Prelim. Inj. at 87, *Ms. L v. U.S. Immigr. and Customs Enforcement*, No. 3:18-cv-00428-DMS-MDD, ECF No. 439-1 (S.D. Cal. July 30, 2019), <https://www.aclu.org/legal-document/ms-l-v-ice-memo-support-motion-enforce-pi>.

¹⁵ The U.S. is among only a handful of countries that do not consider family unity as an issue in deportation proceedings. See Yali Lincroft & Bill Bettencourt, *The Impact of ASFA on Immigrant Children in the Child Welfare System*, CENTER FOR THE STUDY OF SOCIAL POLICY & URBAN INSTITUTE, INTENTIONS AND RESULTS: A LOOK BACK AT THE ADOPTION AND SAFE FAMILIES ACT 115, 118, <https://affcnny.org/wp-content/uploads/IntentionsandResults.pdf>.

¹⁶ Annie Gjelsvik et al., *Adverse Childhood Events: Incarceration of Household Members and Health-Related Quality of Life in Adulthood*, 25 J. HEALTH CARE POOR UNDERSERVED 1169, 1170, 1174 (2014), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4897769/pdf/nihms-790324.pdf>.

¹⁷ *Id.* at 1174-75.

2) Using criminal history as a proxy for child safety unjustly penalizes children and their parents, and disregards well-established principles of child protection, family integrity, and non-discrimination.

The federal government holds non-citizen immigrant parents to different standards than it does U.S. citizen parents when it comes to the evaluation of parental fitness on the basis of alleged criminal history. Every state, the District of Columbia, and Puerto Rico require courts to consider the “best interests of the child” when making “placement and custody determinations, safety and permanency planning, and proceedings for termination of parental rights.”¹⁸ The “importance of family integrity and the preference for avoiding removal of the child from his/her home” is one of the most frequently-stated guiding principles in state statutes setting forth factors to consider in any best interests analysis.¹⁹ No state allows for best interests determinations to rest solely on a parent’s criminal history.²⁰ This is because the vast majority of criminal histories have no bearing on the parent’s ability to safely care for a child.

The right of parents to the care and custody of their children is protected by the Constitution and the child welfare laws of all 50 states.²¹ As the U.S. Department of Health and Human Services has explained, the government generally cannot remove a child from the care and custody of the parent absent “imminent danger” to the child’s safety.²² In those cases where the government removes a child from the care and custody of a parent, parents and children are entitled to protections including a prompt hearing before an independent judge, often within 48 hours.²³ The vast majority of states appoint counsel for parents, given the parents’ fundamental right to the care and custody of their children.²⁴ The child must be returned to the parent if reasonable measures can ensure the child’s safety while remaining in the parent’s custody.²⁵

As recently as February 2018, Congress passed the Families First Prevention Services Act (FFPSA), which is intended to decrease the removal of children—including children subjected to maltreatment—from their families. Under the FFPSA, federal funds previously available only for the

¹⁸ Children’s Bureau, Admin. for Children & Families, U.S. DEP’T OF HEALTH & HUMAN SERVS., *Child Welfare Information Gateway: Determining the Best Interests of the Child* at 1 (June 2020), https://www.childwelfare.gov/pubpdfs/best_interest.pdf.

¹⁹ *Id.* at 2.

²⁰ Decl. of Jennifer Nagda, Ex. E to Pls’ Mem. Supp. Mot. Enforce Prelim. Inj. at 87, *Ms. L v. U.S. Immigr. and Customs Enforcement*, No. 3:18-cv-00428-DMS-MDD, ECF No. 439-1 (S.D. Cal. July 30, 2019) (internal citation omitted), <https://www.aclu.org/legal-document/ms-l-v-ice-memo-support-motion-enforce-pi>.

²¹ *See, e.g., Troxel v. Granville*, 530 U.S. 57, 65–66 (2000) (holding that the Due Process Clause of the Fourteenth Amendment “protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children . . . and that the right to care for one’s child is “perhaps the oldest of the fundamental liberty interests recognized by [the] Court.”).

²² Children’s Bureau, Admin. for Children & Families, U.S. DEP’T OF HEALTH & HUMAN SERVS., *How the Child Welfare System Works*, at 4 (Oct. 2020), <https://www.childwelfare.gov/pubPDFs/cpswork.pdf#page=3&view=What%20Happens%20When%20Possible%20Abuse%20or%20Neglect%20Is%20Reported> (confirming that a child must be at risk of “immediate danger” before a state can remove that child from the custody of his caregiver).

²³ *See generally* Children’s Bureau, Admin. for Children & Families, U.S. DEP’T OF HEALTH & HUMAN SERVS., *Child Welfare Information Gateway: Understanding Child Welfare and the Courts* (Oct. 2016), <https://www.childwelfare.gov/pubPDFs/cwandcourts.pdf>.

²⁴ *Id.*

²⁵ *Id.* at 7; *see also* Children’s Bureau, Admin. for Children & Families, U.S. DEP’T OF HEALTH & HUMAN SERVS., *Child Welfare Information Gateway: Reasonable Efforts to Preserve or Reunify Families and Achieve Permanency for Children* (Sept. 2019), <https://www.childwelfare.gov/pubPDFs/reunify.pdf>.

purposes of supporting children in foster care can now be used for preventative services for children who are at risk of being removed from their families and placed into foster care. As a result of FFPSA, federal funds can be applied toward services designed to keep children with their families even in situations where there is a history or risk of abuse and neglect by the parent.²⁶

However, there is no statute mandating that that federal immigration officials act in the best interests of immigrant children. The practices established under “Zero Tolerance” and those that continue today demonstrates that DHS has ignored the principles and best practices outlined in FFPSA when it makes decisions about removing children from family members with alleged criminal histories. In one example:

*The Young Center was appointed as child advocate for two-year-old “YJ” who was separated from her father on February 26, 2019. Her father had previous charges involving misdemeanor theft and misdemeanor driving under the influence. After their separation, Baby YJ’s father was released from immigration detention. Baby YJ was separated from her father for 78 days.*²⁷

Instead of doing everything in its power to ensure immigrant children benefit from the same trauma-sensitive and evidence-based practices as those enshrined in federal law, DHS has routinely separated children from parents on the basis of alleged criminal histories that have no bearing on child safety or parental fitness.²⁸

The Young Center has been appointed to hundreds of children who were separated because of the parent’s alleged criminal history. In nearly every case, we found that the parent’s alleged or actual criminal history would not have been enough to justify separating the parent and child under state child welfare laws; that the parent did not pose a threat to the child’s safety; and that separation was contrary to the child’s best interests. Those separated children spend months in government custody without their parents and critically, without any family court review of the government’s decision to separate.

By refusing to adopt a best interests of the child standard and acting in contravention to broadly accepted, evidenced-based practices which prioritize family unity barring imminent danger to the child, the federal government actively harms children. It runs a child welfare system which is parallel to those of the states, but which prioritizes immigration enforcement over children’s best interests.²⁹ DHS has the power to stop separating children from parents with alleged criminal histories or known criminal convictions in all but the most exceptional cases. In those instances in which there may be red flags, DHS must call in professionals trained in child health, welfare and development, and who are subject to the authority of a duly authorized court, to conduct a review of family relationships.

²⁶ Family First Prevention Services Act, 42 U.S.C. § 622 (2018); *The Family First Prevention Services Act*, NAT’L CONF. FOR STATE LEGISLATURES (June 27, 2019), <http://www.ncsl.org/research/human-services/family-first-prevention-services-act-ffpsa.aspx>; Susan Schmidt, *Trauma Inflicting, Not Trauma Informed: The U.S. Federal Government’s Double Standard toward Migrant Children*, 64 SOCIAL WORK 91–93 (2019).

²⁷ Decl. of Jennifer Nagda, Ex. E to Pls’ Mem. Supp. Mot. Enforce Prelim. Inj. at 88, *Ms. L v. U.S. Immigr. and Customs Enforcement*, No. 3:18-cv-00428-DMS-MDD, ECF No. 439-1 (S.D. Cal. July 30, 2019), <https://www.aclu.org/legal-document/ms-l-v-ice-memo-support-motion-enforce-pi>.

²⁸ See Susan Schmidt, *Trauma Inflicting, Not Trauma Informed: The U.S. Federal Government’s Double Standard toward Migrant Children*, 64 SOCIAL WORK, at 91–93 (2019).

²⁹ See *id.*

Recommendations for Immediate Action by the Biden-Harris Administration:

- Implement a policy that requires DHS to consider the best interests of the child in all decisions from apprehension through adjudication of claims, and provide clear guidance to all staff within the agency (CBP, ICE, USCIS) on how to apply that standard to decisions impacting children.
- Keep children apprehended with their parents or legal guardians physically together at all times while in DHS custody unless 1) the child requests privacy temporarily; or 2) an independent child protection professional (outside of the employment of DHS) documents by clear and convincing evidence that the continued custody of the child by the parent or legal guardian is likely to create imminent danger for the child. In the rare instance in which a child must be separated from a parent or legal guardian, the child should be returned after the potential danger to the child is sufficiently mitigated or remedied.
- Adopt recommendations made by the Young Center and experts in child welfare to collaborate with HHS officials to screen unaccompanied children traveling with non-parental or non-legal guardian caregivers to evaluate family relationships so that children remain safely in the custody of their trusted family member and are released to the community while pursuing relief from removal.
- Limit the consideration of a parent or family member's criminal history to only those convictions that endanger child safety within clear timeframes that align with child welfare laws and best practices.
- Work with Congress to pass legislation requiring that all federal agencies consider the best interests of every child in all decisions for children in immigration proceedings.

3) The criminalization of people of color has a disproportionate impact on immigrant children and their families, leading to more involvement with the criminal legal system based on inaccuracies, stereotypes, and targeted policing.

Racial disparities, differential treatment, and racial discrimination in the U.S. criminal legal system is well-documented. This bias is demonstrated not only in arrest and incarceration numbers, but also in the way we define crimes, what is criminalized, the language we use to describe the people and behaviors that are criminalized, and in every decision made by actors within the system. Not surprisingly, much of this rhetoric, criminalization, and “tough on crime” mindset has infiltrated immigration policy and practice. At present almost all refugees, asylum-seekers, economic and climate migrants are people of color who are subjected to much harsher consequences than those faced by European migrants of the past.³⁰ Today, non-citizen immigrants confront a range of punitive policies, put into place via racialized debates and false narratives about the dangers posed by people seeking protection at the border. The system is designed to penalize, dehumanize, and paint as undeserving all undocumented immigrants whether arriving at our borders or living in the United States for a generation.

The structural racism throughout our immigration and criminal legal systems results in many Black and Brown immigrants having contact with both systems. Actors across these systems – many of whom have significant discretion, including around decisions to separate parents from children – are influenced by racial bias. Access to counsel and the supportive services asylum seekers and other migrants need to defend themselves are grossly underfunded or unavailable, putting them at a

³⁰ Charles Kamasaki, *US Immigration Policy: A Classic, Unappreciated Example of Structural Racism*, BROOKINGS, (Mar. 26, 2021), <https://www.brookings.edu/blog/how-we-rise/2021/03/26/us-immigration-policy-a-classic-unappreciated-example-of-structural-racism/>.

disadvantage. As a result, many allegedly “race-neutral” policies have a disproportionate racial impact.

A relentless focus on “gang” involvement by migrants of color has exacerbated these structural inequities. There is a growing acknowledgement that gang databases used by law enforcement are riddled with misinformation, rife with racial bias, and often used as a pipeline for deportation.³¹ These databases lack transparency, and the “gang member” label is often applied not by a court but by law enforcement officers.

These deeply flawed systems also impact migrants at the border. Any mention of gang-related behavior to a CBP agent or an asylum officer at the border can lead to prolonged detention without any evidence of wrongdoing—and this includes accusations leveled against children, who are often transferred directly to youth jails on the basis of mere allegations of gang contact.³² The Trump administration used allegations of criminal history, including gang affiliations, to continue to separate parents from children well after Zero Tolerance officially ended. In one example:

*The Young Center was appointed to six-year-old “EE” who was apprehended with his mother in August 2018. They were separated on the basis of his mother’s alleged gang affiliation. However, EE’s mother had been coerced into participating in gang activities, and she was granted a finding of credible fear by immigration authorities. Despite this positive recognition of the threat she faced in home country, EE’s mother sought voluntary departure so that she could be reunited with her son as quickly as possible. In total, EE spent more than 100 days in federal custody, separated from his mother, before returning to home country with her; in their case, DHS also approved their joint repatriation.*³³

In addition to alleged gang membership, immigrant children have been separated from their parents for a range of low-level offenses, including drug offenses, which are often enforced at higher rates among low-income communities of color.³⁴ Ingrained racial bias undoubtedly influences immigration officials’ decision to separate on the basis of these types of offenses. In one example:

The Young Center was appointed to five-year-old “EY” who was apprehended with her father in December 2018, separated from him and rendered unaccompanied. Her father was charged under 8 U.S.C. § 1326 for re-entry after removal. His sole criminal history was identified as a controlled substance offense (“manufacturing, distributing or disbursing of any controlled substance”). There is no indication that the father was ever charged with endangering the welfare of a child. EY spent 144 days in custody—

³¹ Katherine Conway, *Fundamentally Unfair: Databases, Deportation, and the Crimmigrant Gang Member*, AMERICAN UNIVERSITY LAW REVIEW: Vol. 67: Iss.1 , Article 6, <https://digitalcommons.wcl.american.edu/aulr/vol67/iss1/6>.

³² Capital Area Immigrants’ Rights Coalition, *The Effects of SIRs for Children in Detention*, (Nov. 21, 2017), <https://www.caircoalition.org/2017/11/21/the-effects-of-sirs-for-children-in-detention?language=en>.

³³ Decl. of Jennifer Nagda, Ex. E to Pls’ Mem. Supp. Mot. Enforce Prelim. Inj. at 89, *Ms. L v. U.S. Immigr. and Customs Enforcement*, No. 3:18-cv-00428-DMS-MDD, ECF No. 439-1 (S.D. Cal. July 30, 2019), <https://www.aclu.org/legal-document/ms-l-v-ice-memo-support-motion-enforce-pi>.

³⁴ The Sentencing Project, *Comments of Nazgol Ghandnoosh: On Proposed Rules to Expand Bars to Eligibility for Asylum Based on Criminal Histories Before the Dep’t of Homeland Security and the Dep’t of Justice*, at 4 (Jan. 21, 2020), <https://sentencingproject.org/wp-content/uploads/2020/01/Proposed-Asylum-Restrictions-Based-on-Criminal-Histories.pdf>.

*nearly five months—before she was reunified with her father so that they could be deported together. DHS facilitated their joint repatriation.*³⁵

In the experience of the Young Center, many criminal allegations are unfounded and most convictions do not impact the parent's ability to safely care for the child.

The Family Reunification Task Force has not provided public guidance on whether it will include families who have been separated on the basis of alleged criminal history, in its reunification efforts. Efforts to reunify only “innocent” parents with their children—that is, people without even alleged criminal histories let alone criminal convictions—condones and reinforces these racist systems that criminalize and penalize immigrants of color. The Family Reunification Task Force must acknowledge that even its policies are not race-neutral and navigate the reunification of families with as much integrity as it can while recognizing that it is operating within systems that discriminate against immigrants of color.

Recommendations for Immediate Action by the Biden-Harris Administration:

- Include all families separated between January 20, 2017 and through the date of any settlement in *Ms. L.*, regardless of alleged criminal histories or criminal convictions which are not related to a parent's ability to safely care for their child, in any efforts to reunify still-separated families and in all efforts to support families subjected to the policy—including through damages awards, access to holistic services, and protection from deportation in the future.
- Develop a pathway for directly impacted parents to submit formal challenges with the Justice Department to any decision by DHS to separate them from their children based on accusations of criminal history and fund independent representation of all parents and children subject to this practice, to ensure they receive due process in all proceedings.
- End the reliance on gang databases (domestic and international) and alleged gang affiliations in ICE and CBP enforcement practices.
- Explicitly reject the narrative of “good” immigrant versus “bad.” These narratives distort reality, perpetuate racist stereotypes, and facilitate the further militarization of our border and expansion of immigrant detention. The Task Force should use its platform to call out this harmful rhetoric and support policies that treat immigrants with dignity.

4) DHS will separate children from parents only to reunite them for the sole purpose of repatriation, showing their lack of true concern for child safety.

In a number of cases to which the Young Center was appointed during and after Zero Tolerance, DHS permitted a child it had previously separated due to alleged safety concerns to be reunified with the separated parent—but only for the purpose of repatriation. In most of these cases, the children suffered the trauma of separation and often spent months in federal custody before repatriation—and without any opportunity to seek protection pursuant to their legal right. In one example:

The Young Center was appointed to six-year-old “AT,” who was apprehended with and separated from her father in February 2019. Her father's prior criminal history consisted of breach of peace and assault charges. DHS nevertheless agreed to AT's reunification with her father for the sole purpose of their joint return to home country.

³⁵ Decl. of Jennifer Nagda, Ex. E to Pls' Mem. Supp. Mot. Enforce Prelim. Inj. at 87, *Ms. L v. U.S. Immigr. and Customs Enforcement*, No. 3:18-cv-00428-DMS-MDD, ECF No. 439-1 (S.D. Cal. July 30, 2019), <https://www.aclu.org/legal-document/ms-l-v-ice-memo-support-motion-enforce-pi>.

In all, AT spent more than 121 days—almost four months—separated from her father before they were jointly repatriated.³⁶

The hypocrisy of DHS decision-making in these cases is hard to overstate. When there is a chance, however remote, that the agency might be held accountable for a failure to separate an abusive parent from a child or trafficker, DHS uses its discretion liberally, regardless of the trauma inflicted on both children and parents. Once the family abandons its protection claims, however, DHS seems more than willing to send children back to their allegedly dangerous parents without a second thought. DHS can hold its officers more accountable for decision-making that undermines family unity without clear evidence of harm. Adopting a best interests of the child standard for decision-making, and removing the power of CBP officers to separate parents and children except in the most exceptional circumstances, could help prevent unnecessary separations and keep families together.

Recommendations for Immediate Action by the Biden-Harris Administration:

- All parents and/or children who were subject to family separation policies and subsequently repatriated to home country between January 20, 2017 and through the date of any settlement in *Ms. L.* should be afforded the opportunity to return to the United States together, with additional family members, and receive permanent protection from deportation as a result of the harm they experienced at the hands of federal government actors.
- Keep children who are apprehended with their parents or legal guardians physically together with their parent or legal guardian at all times while in DHS custody unless 1) the child requests privacy temporarily; or 2) an independent child protection professional (outside of the employment of DHS) documents by clear and convincing evidence that the continued custody of the child by the parent or legal guardian is likely to create imminent danger for the child. In the rare instance in which a child must be separated from a parent or legal guardian, the child should be returned after the potential danger to the child is sufficiently mitigated or remedied.
- If there is sufficient cause to separate the child and parent, the government should ensure the child is appointed counsel and receives an independent child advocate pursuant to the TVPRA; the government should also provide counsel at government expense to the parent.

Conclusion

U.S. immigration policy, narratives, and attitudes towards immigrants have evolved amid racially-charged debates that have increasingly dehumanized and penalized people for seeking safety and opportunity at our borders. Racism and xenophobia permeate the system; yet at the same time so many of these egregious policies have become normalized. Government officials and the public alike accept that enforcement priorities should trump parents' and children's rights to family unity.

The Biden administration came to power with a promise to restore dignity to our asylum system and condemned family separation in the harshest terms.³⁷ And yet, every day the administration fails to

³⁶ Decl. of Jennifer Nagda, Ex. E to Pls' Mem. Supp. Mot. Enforce Prelim. Inj. at 91, *Ms. L v. U.S. Immigr. and Customs Enforcement*, No. 3:18-cv-00428-DMS-MDD, ECF No. 439-1 (S.D. Cal. July 30, 2019), <https://www.aclu.org/legal-document/ms-l-v-ice-memo-support-motion-enforce-pi..>

³⁷ See, e.g., THE BIDEN PLAN FOR SECURING OUR VALUES AS A NATION OF IMMIGRANTS, <https://joebiden.com/immigration/> ("It is a moral failing and a national shame when . . . President Trump uses family separation as a weapon against desperate mothers, fathers, and children seeking safety and a better life."); John Burnett, *Biden Pledges To Dismantle Trump's Sweeping Immigration Changes — But Can He Do That?*, NPR (Sept. 20, 2020), <https://www.npr.org/2020/09/14/912060869/biden-pledges-to-dismantle-trumps-sweeping-immigration-changes-but-can-he-do-that> ("Within his first 100 days, Biden says he would implement a wide range of policies:

reject false narratives about “good” and “bad” immigrants and has not acted with sufficient alacrity to provide remedies to the families harmed by its policies. DHS must conduct an evaluation of all its policies, and with the support of the Family Reunification Task Force, should prioritize those policies – official and informal – that lead to family separation and the dehumanization of immigrants. DHS should hold itself to a higher standard when it comes to protecting family unity and prioritizing the best interests of children, by changing policy and practice to end the unnecessary separation of families.

not another mile of border wall, no more separating families, no more prolonged detentions or deportations of peaceable, hardworking migrants. Biden also says he would restore the asylum system.”).