



DEATH BY A THOUSAND CUTS

THE TRUMP ADMINISTRATION'S SYSTEMATIC ASSAULT ON THE PROTECTION OF UNACCOMPANIED CHILDREN

MAY 2018

KIND | CELEBRATING
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ACKNOWLEDGEMENTS

This report was written by Jennifer Podkul and Cory Shindel, edited by Megan McKenna and Cory Smith, and designed by Alex Pender.

Kids in Need of Defense (KIND)

KIND was founded by the Microsoft Corporation and UNHCR Special Envoy Angelina Jolie, and is the leading national organization that works to ensure that no refugee or immigrant child faces immigration court alone. We do this in partnership with over 535 law firms, corporate legal departments, law schools, and bar associations has served more than 15,800 children since 2009, and trained over 25,000 private sector attorneys to provide them with high quality representation in their deportation proceedings. KIND promotes protection of children in countries of origin and transit countries and works to address the root causes of child migration from Central America. KIND also advocates to change law, policy, and practices to improve the protection of unaccompanied children in the United States, by educating policymakers, the media, and the broader public about the violence that is driving children out of Central America and their need for protection.

Vision Statement

A world in which children's rights and well-being are protected as they migrate alone in search of safety.

Mission Statement

KIND will achieve our vision by:

- Ensuring that no child appears in immigration court without high quality legal representation;
- Advancing laws, policies, and practices that ensure children's protection and uphold their right to due process and fundamental fairness; and
- Promoting in countries of origin, transit, and destination durable solutions to child migration that are grounded in the best interests of the child and ensure that no child is forced to involuntarily migrate.

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By Kids in Need of Defense (KIND)

1300 L St. NW

Suite 1100

Washington, DC 20005

Phone: 202-824-8680

www.supportkind.org

INTRODUCTION

Since its first days, the Trump Administration has sought to limit protections for some of the most vulnerable migrants seeking protection in this country—unaccompanied immigrant and refugee children. These protections, which were carefully crafted over nearly 15 years through bipartisan dialogue and collaboration in Congress, are grounded in basic child welfare principles. These procedural protections recognize that a child who has taken a life-threatening journey of hundreds, if not thousands, of miles—without a parent or legal guardian—is uniquely at-risk and should be treated in ways that help promote fundamental fairness in helping the child access the U.S. immigration system to ensure that we do not return a child to the often life-threatening harm they have fled.

Immediately after taking office in January 2017, President Trump, through a series of executive orders and published immigration priorities, categorized unaccompanied children in need of protection as opportunistic, and laws designed to give these children a fair opportunity to have their stories heard by our legal system as “loopholes.”¹ Since issuing these executive orders, the White House has also consistently supported legislative efforts that would undermine procedural protections for these children—as provided for by the Homeland Security Act of 2002, the Trafficking Victims Protection Reauthorization Act of 2008 (TVPR), and the *Flores Settlement Agreement*—and limit children’s access to a fair judicial process.

Congress has so far not rolled back important legislative protections.² Not finding legislative success, the Administration has instead turned to using its authority to implement policy changes that are dramatically undermining children’s ability to access our legal system. On a surface level, these changes appear to make only small adjustments to existing procedures. But taken as a whole, they represent a systematic assault on the ability of children to access the U.S. immigration system and assert claims for protection for which they may qualify under law.³ Based on the Administration’s own public statements and leaked drafts of forthcoming documents, the attacks on this vulnerable population will continue.

DEPARTMENT OF HOMELAND SECURITY

Immigration Enforcement

While the prior administration embraced a “felons, not families”⁴ approach to the use of limited enforcement resources for the deportation of dangerous criminals, this Administration has focused its enforcement resources to systematically target children and their families—all in an effort to create additional roadblocks and barriers to children trying to make their way through our immigration system. This pronounced shift in enforcement priorities has put the apprehension, detention, and, in some cases, prosecution of parents and children at the forefront of enforcement efforts.

Family Separation

In a deeply disturbing hallmark of the Administration’s enforcement strategy, U.S. Immigration and Customs Enforcement (ICE) and U.S. Customs and Border Protection (CBP) have begun to systematically separate arriving immigrant children from their parents at the border.⁵ On May 4, 2018, U.S. Department of Homeland Security (DHS) Secretary Kirstjen Nielsen announced that DHS would begin referring all immigrants apprehended crossing the U.S. border for criminal charges, even if they are a parent or asylum seekers. As a result, all children will be separated from the adults who are caring for them, rendering them unaccompanied. The children will have to be placed in the custody of the U.S. Department of Health and Human Services Office of Refugee Resettlement (ORR), which by law is charged with the care, custody, and placement with a sponsor of unaccompanied children. The adult will be placed in detention to await criminal proceedings.⁶

The use of criminal prosecution against arriving families, including asylum seekers, marks a notable departure from past practice, as immigration matters are themselves civil proceedings. Secretary's Nielsen's order makes separating children from their families—and referring for prosecution all parents and adults who cross the border between designated ports of entry—official DHS policy.

By criminalizing the pursuit of asylum based on where a person asserts their need for humanitarian protection, this policy runs counter to established refugee and asylum law permitting individuals to present themselves to immigration officials to request asylum wherever they are able, regardless of whether it is at a port of entry or at the U.S. border. The distinction between where and how migrants arrive is also troubling in light of the Administration's announcement in May 2018 that certain ports of entry were at capacity and unable to process asylum seekers for several days.⁷ As a result, those fleeing for their lives were left with the untenable options of risking prosecution and indefinite detention, or being turned away from the U.S. border to danger.

A policy of separating arriving families was first contemplated publicly in March 2017 as a means of deterring future asylum-seeking children and families from asking for protection.⁸ Despite strong, consistent opposition from Congress,⁹ separations continue to occur in high numbers. Although CBP asserts that it has not officially issued a blanket policy, families continue to be separated, including those families traveling with very young children and babies.¹⁰ This practice is not only cruel, but flies in the face of basic child welfare considerations. It has resulted in children being detained alone, which is not only traumatic, but places an enormous strain on the ORR care and custody system, which otherwise would not have to house children who have arrived in the United States with their parents. ORR already struggles to provide required services for children who truly need their support¹¹ and should not be overburdened by caring for children the government has separated for no purpose other than to make accessing protection in the United States more difficult and deter families from coming to the United States to seek protection.

In compliance with the law, ORR works to release unaccompanied children to parents or other sponsors in the United States as children wait for their immigration proceedings. However, the Administration's policy of locking up parents in immigration detention has made it harder to identify sponsors for children, and as a result, lengthened the amount of time that children remain in ORR custody.¹²

In addition, when children are separated from their parents, their legal cases are severed and courts must process the cases individually, compounding the problem of the current court backlogs. Children separated from their parents also have a very difficult time locating and communicating with family members and accessing key documents and information they need as evidence in their immigration cases.¹³ In many cases, children may not fully understand all the reasons their family had to come to the United States, as parents may have tried to shield their children from traumatizing facts and events in the home country. The Administration's separation of families—designed to deter future migration—aside from being immoral and cruel, in reality has only resulted in longer court delays, extended detention, and added strain on our nation's already-overburdened immigration court system.

Targeting of Sponsors

In June 2017, ICE began targeting the parents and relatives of unaccompanied immigrant children for deportation and, in some cases, even criminal prosecution. Announced as an effort to disrupt smuggling networks and protect children, this targeted enforcement instead only endangered and re-traumatized children by separating them from loved ones who stepped forward to care for them as they go through

the court process. These actions did nothing to punish or disrupt the work of high-level smugglers or traffickers. Instead, the Administration exploited the process for reuniting children with their families to facilitate enforcement against undocumented parents and family members, and hundreds of others who happened to be unlucky and present during enforcement actions. The disruption of reunification efforts and the separation of families undermines fundamental rights, traumatizes children, and limits access to due process. Enforcement targeting parents and sponsors has only served to stoke fear in communities, destabilize families, and place children at an increased risk of trafficking.

ICE Detention After 18th Birthday

Due to prolonged stays in ORR custody, many children now turn 18 while waiting to be reunified with a sponsor. ORR only has authority to hold children under the age of 18. The Trafficking Victims Protection Reauthorization Act of 2013 states that, when unaccompanied immigrant children in ORR custody turn 18, ICE “shall consider placement in the least restrictive setting available after taking into account the [individual’s] danger to self, danger to the community, and risk of flight.”¹⁴ Instead of automatically locking up these teens in adult prisons, Congress mandated that ORR and ICE consider alternatives, such as placement with sponsors or supervised group homes, for these children. Recently, however, ICE has begun to transfer children to its custody shortly after they turn 18, and even in some cases, on their 18th birthdays, without such consideration.¹⁵

In March 2018, the National Immigrant Justice Center, with pro bono partner Kirkland & Ellis LLP, filed a class-action suit in the United States District Court for the District of Columbia against DHS and ICE for failing to comply with TVPRA amendments related to the placement of unaccompanied immigrant teenagers who have turned 18.¹⁶ In April 2018, the court granted a preliminary injunction ordering ICE to reassess the placement decisions of two immigrant youth who had been transferred to ICE custody, finding the plaintiffs likely to succeed in proving that DHS did not comply with the TVPRA.¹⁷

Re-detaining Unaccompanied Children

The Administration’s enforcement actions have not only extended the time children are held in detention but actively targeted the re-detention of unaccompanied children previously released and reunified with sponsors. The Administration has repeatedly promoted the false narrative that all unaccompanied children are criminals and has used this erroneous contention to justify re-detention, as well as rapid deportations. President Trump and Attorney General Jeff Sessions have repeatedly tried to paint all unaccompanied children as gang members who pose a danger to this country, when in reality children are most often fleeing these very gangs and seeking protection from them in the United States.¹⁸ As part of this campaign, ICE has specifically targeted and tried to re-detain children they allege to have some sort of gang involvement.

Children have been targeted by ICE, even in the absence of real evidence of any criminal activity or gang affiliation, and detained in secure facilities far away from their parents and attorneys.¹⁹ In these efforts, many children were not given an opportunity to challenge the unsubstantiated claims against them. This unfair practice was halted by a federal judge, who ordered that these children be provided a hearing in which they can contest their re-detention.²⁰ The vast majority of these children have since been released from detention because there was no evidence they were gang involved or posed any danger to themselves or their communities.²¹

Humanitarian Protection

DHS has also focused its efforts on narrowing longstanding legal protections for children. These changes include a more limited interpretation of who can qualify for Special Immigrant Juvenile Status (SIJS).

Under federal law, children can qualify for Special Immigrant Juvenile Status, which is a path to permanent residency, if they have been abused, abandoned, or neglected by one or both parents. Recently, the Administration has implemented a policy of denying recent applications for relief for children who were identified as in need of protection between the ages of 18-21.

In other cases, the Administration is rescinding previous approvals for children who applied between the ages of 18 and 21.²² Disregarding state law and agency precedent, USCIS has issued guidance instructing adjudicators to strip SIJS status from children in this age group who were previously granted this classification. SIJS cases first go to a state's juvenile court, where the judge determines whether the child qualifies for particular protection under state law which upholds basic child welfare guidelines. Some states have special provisions extending juvenile court jurisdiction to youth ages 18 to 21²³ to promote protection for young people in this age group, who are also particularly vulnerable.

Rescinding previously granted protection is devastating to these children and young people who are child survivors of abuse, abandonment, neglect, and for whom it was not in their best interest to return to their country. Those who have been building lives in the United States are no longer able to rely on previously granted legal protection, creating profound instability and uncertainty for them. It also willfully ignores the authority of states to make decisions about the best interests of children residing in their jurisdictions.

USCIS has also modified its review of affirmative asylum applications by requesting that adjudicators refer certain proposed grants of relief to the agency's asylum headquarters for review.²⁴ This practice, which is typically used in novel or high-profile cases or those with national security concerns, is now required for cases in which an adjudicator proposes to grant asylum to an adult or child with alleged past or current gang affiliation, or to someone previously detained in secure or staff secure facilities.²⁵ Due to their age and the pervasiveness of gang activity in their countries of origin, unaccompanied children from Central America—many of whom are *fleeing* gang violence and recruitment—may be confronted with allegations of gang membership or affiliation. These allegations are often based on unreliable evidence such as a child's clothing or the neighborhood in which the child lives.

Central American Minors Program

The Administration has not just changed policies that undermine the protections of children in the United States, it has also targeted vital protections for children abroad. In November 2017, the Administration terminated a lifesaving refugee program designed to protect children in danger living in Central America. The Central American Minors (CAM) program began in 2014 and allowed children to apply for refugee status from their countries of origin.²⁶ This enabled children to make their claims for U.S. protection without having to undergo the dangerous journey to the U.S. border. The CAM program, although vital for the children who received protection through it, was in fact very limited. Only children with a parent with legal status in the United States were allowed to apply. Some 3,378 children had been protected and able to come into the United States through this program, either by gaining refugee status or humanitarian parole.²⁷

Despite the limited nature of the program, and its importance, the Administration cut off this crucial lifeline for thousands in need. Not only was the cancellation of the program a devastating blow to children and families who had hoped to apply, the abrupt termination of the program ended before more than 4,000 children who applied were interviewed by the U.S. government.²⁸

IMMIGRATION COURTS

One of the first changes the Department of Justice (DOJ) made in June 2017 was to terminate a program that provided counsel for unaccompanied children. The program, known as Justice AmeriCorps (JAC), was funded through a joint partnership of the Corporation for National and Community Service and the Executive Office for Immigration Review (EOIR). This three-year, \$7 million partnership provided critical funding for legal fellows in 29 cities around the country to support free legal services for unaccompanied children under the age of 16, and was expanded shortly before the program's conclusion to include children under 18.²⁹ The program aimed to improve court efficiency in a cost-effective manner and to identify children who had been victims of human trafficking or abuse and, as appropriate, refer them to others to assist in the investigation and prosecution of those who perpetrate such crimes. The Administration's summary elimination of this program limits access to crucial legal assistance for very young children.

Following the termination of the JAC program, EOIR then issued a series of legal memos addressing the processing of cases involving unaccompanied children. In September 2017, the General Counsel's office sent a memorandum to the Director of EOIR stating that EOIR is not legally bound by DHS's determinations regarding whether a child meets the definition of an "unaccompanied alien child (UAC)."³⁰ Prior to this memo, EOIR would defer to DHS's initial decision regarding whether or not a child who had been apprehended was "unaccompanied."

The designation of "unaccompanied alien child" carries with it certain procedural protections that affect the way in which a court processes a child's case.³¹ Among these are the right of the child to first have their asylum case heard in a non-adversarial setting before a trained asylum officer, rather than in immigration court, where the child would be required to defend themselves against a government attorney before an immigration judge. Recognizing that children are frequently transferred between detention facilities during their first year in the United States and that filing paperwork is impracticable without a permanent location, the TVPRA also eliminates the one-year filing deadline for unaccompanied children's asylum applications.

Previously, once DHS designated a child as unaccompanied, those protections would stay with the child for the pendency of their immigration court proceedings. This memo invites immigration judges to re-evaluate a child's unaccompanied status and significantly change the way a child's case is processed mid-way through the child's case. This not only creates confusion in processing the child's case, but also may result in children being forced to navigate more complex and hostile processes, add to the immigration courts' already overburdened system, and circumnavigate Congressional intent to provide streamlined and child-appropriate proceedings for this population. Additionally, due to eligibility requirements for federal legal services programs supporting unaccompanied children, a change in a child's designation as unaccompanied may also lead to the loss of critical legal representation.

Less Child-Friendly Courts

In December 2017, EOIR then issued a memo to all of its immigration judges with new instructions on how to proceed with cases in court involving children.³² The revised guidance weakens the use of child-friendly practices in cases involving unaccompanied children (such as the ability to view an empty courtroom before testifying), and directs judges to "be vigilant in adjudicating cases of a purported UAC" to guard against fraud and abuse, citing "an incentive to misrepresent accompaniment status or age in order to attempt to qualify for the benefits associated with UAC status."³³ These revised instructions do nothing to substantively change the ways in which the government can test the veracity of a child's

story, but serve only to make courts that are naturally adversarial even more so and more skeptical of these particularly vulnerable children as they try to explain the harrowing experiences at the core of their claims for relief.

New Performance Metrics

Another EOIR memorandum, issued in January 2018, modifies existing case priorities and establishes new case processing times and goals for immigration courts to evaluate their performance.³⁴ These measures, coupled with the agency's inclusion of case completion metrics for immigration judges, pressure immigration judges to restrict the use of continuances. Continuances can be necessary not only to allow children more time to find an attorney, but also to give USCIS, which has jurisdiction over the humanitarian protection claims for which most unaccompanied children are eligible, including asylum, special immigrant juvenile status, and trafficking visas, adequate time to adjudicate these claims. EOIR's imposition of artificial time limits on complex cases involving multiple government agencies will result in children who qualify for humanitarian protection being ordered deported to harm and persecution.

Attorney General Certifications

Finally, the Attorney General has recently certified a number of cases to himself for review.³⁵ These referrals effectively allow the Attorney General to reconsider old decisions and make binding authority in cases previously decided by the Board of Immigration Appeals (BIA). The cases certified by the Attorney General address issues of critical importance to the adjudication of children's claims, including the ability of immigration judges to grant continuances or administrative closure, the availability of asylum to those seeking protection based on membership in a "particular social group," and the ability of asylum applicants to provide oral testimony in support of their applications.

It seems likely that the Attorney General has taken on these cases to limit asylum protections for children in profound ways. Many children's asylum applications are based on persecution suffered at the hands of the children's own family or other non-state actors such as transnational criminal organizations. Children's asylum applications often assert that the persecution occurred as a result of the child's membership in a particular social group. Any limitations on the applicability of this protected ground, which is defined in the United Nations Refugee Convention, and the United States Refugee Act of 1980, will have a devastating impact on children's claims. Additionally, because children are not guaranteed legal representation, and their asylum stories are often complex, they must be provided an opportunity to supplement their written applications with oral testimony so they can explain why they need protection. Limiting this opportunity would harm the ability of children to fully make their case.

Far from mere technical changes, restrictions the Attorney General will seemingly impose would be yet another way the Administration's policies will result in children being returned to danger or even to face death.

OFFICE OF REFUGEE RESETTLEMENT

The Office of Refugee Resettlement (ORR) is required by the Trafficking Victims Protection Reauthorization Act of 2008 (TVPPRA) and the *Flores Settlement Agreement*³⁶ to hold children in the least restrictive setting possible. This has been interpreted to mean that ORR will work to reunify children with an adult in the United States who is willing to care for the child throughout their immigration court proceedings. ORR has specific policies for evaluating potential sponsors based on their relationship to

the child and whether the child has any special needs.³⁷ Traditionally, the agency's primary concern has been ensuring the process results in a safe placement for the child.

Changes to Release Policy

The Administration has changed the release policy for some children. It now requires ORR's Director of Children's Services to personally approve the release of children who are placed in, or who have ever been placed in, a staff secure or secure facility for safety concerns for themselves or others.³⁸ Children can be moved to higher and lower security levels based on very limited information, or even for reporting that they were victimized by a gang. ORR bases its release decisions on the expert opinions of its staff and thorough background checks. Children likely will be held longer in detention as a result of this policy change, including children who pose no risk to themselves or to the communities in which they would be released. This change has also created a bottleneck of cases in which children approved for reunification based on the expert opinion of ORR staff and background checks are needlessly held in detention facilities for longer periods of time.³⁹

With policy changes resulting in children being detained for longer periods of time, children are not able to withstand the stress of prolonged detention and often choose to give up their cases just to get out. Being separated from family and held in secure confinement with no clear understanding of how or when they will be released often proves too much for children to endure.⁴⁰ As a result, they choose to drop their claims for protection and prefer to risk the dangers they face in their country of origin, rather than remain confined.

In addition to prolonged detention having an impact on children's ability to proceed with their cases, the ORR Director has also placed new restrictions on girls' access to reproductive healthcare.⁴¹ The agency suggested that girls who wanted access to services they could not get while detained should abandon their cases, and accept voluntary departure from an immigration judge so that they may attempt to access services in their country of origin.⁴²

Sharing Sponsor Information with ICE for Enforcement

In another disturbing change, ORR has been sharing more information about children and their families with DHS. ORR has historically protected the information it gathers from children about their families from DHS. ORR has traditionally considered the safety of the home paramount in considering the release of a child. The agency had, in accordance with basic child welfare principles, prioritized the child's reunification with a safe family member over the sponsor's immigration status. Because a family member can often provide the best care for a child, and because an unaccompanied child has an immigration case unrelated to that of their family member, the immigration status of the sponsor was not relevant.

In April 2018, ORR finalized a written memorandum of agreement with ICE outlining policies and procedures for conducting background checks on potential sponsors for children.⁴³ Although ORR maintains responsibility for making decisions about the appropriateness of a sponsor, the agency has agreed to refer information about potential sponsors to ICE so that ICE may conduct criminal and immigration checks on sponsors. This new process will result in many undocumented sponsors, including parents, either not being eligible for sponsorship or discouraged from even applying out of fear of deportation. Under the new agreement, if sponsors are vetted by ICE, children may be prevented from reunifying with the best or safest caregiver for them. As in so many other examples referenced in this report, immigration enforcement would prevail over basic child protection.

Both DHS and HHS have moved quickly to implement the memorandum of agreement through the solicitation of public comments on records and forms related to the collection of information from sponsors and other adults. On May 8, 2018, DHS published notice of its modified record system in the Federal Register and clarified that it would accept public comments for 30 days.⁴⁴ The notice clarifies that new vetting and information-sharing procedures would apply to potential sponsors as well as other adult members of the potential sponsors' household.

The DHS notice states among its purposes the screening of individuals “to verify or ascertain citizenship or immigration status, immigration history, and criminal history to inform determinations regarding sponsorship of unaccompanied alien children who are in the care and custody of HHS and to identify and arrest those who may be subject to removal....” The implementation of these procedures—and the likely immigration enforcement to follow—pose far-reaching consequences for children in ORR custody, who may face prolonged stays in ORR custody and choose to give up their legal claims if their parents or other sponsors decline to come forward to care for them or are deported.

MORE HARMFUL CHANGES TO COME

Statements and priorities issued by the White House detail a range of additional policy changes that the Administration hopes to pursue, both administratively and legislatively, to the protections for unaccompanied children.⁴⁵ Among these are changes that would: subject all unaccompanied children to the narrower protections and cursory screening procedures currently provided to unaccompanied children from Mexico and Canada; eliminate the opportunity for unaccompanied children to have their asylum applications first heard in a non-adversarial setting; and strip “unaccompanied child” status and the related procedural protections from children if a parent or sponsor is located.⁴⁶

The Administration also seeks to terminate the longstanding *Flores Settlement Agreement* (FSA) pertaining to the treatment of immigrant children in detention. In fall 2017, as part of the federal government's agenda for future regulatory action, DHS published notice of its intent to engage in rulemaking regarding provisions of the FSA.⁴⁷ DHS framed the proposed action, which is planned for September 2018, as a necessary response to changes in the applicability of the settlement's terms and an effort to ultimately seek termination of the agreement and related litigation in court.⁴⁸

The Administration has also suggested entering into a “Safe Third Country Agreement” with Mexico to deny access to asylum to children who have traveled through Mexico en route to the United States. The term “safe third country” applies to countries from which no one flees persecution as a refugee, or those countries where refugees can receive asylum without being in danger while they wait for their claim to be considered.⁴⁹ If the Administration declares Mexico to be a safe third country it would mean any child who traveled through Mexico would be required to seek asylum in Mexico and not be eligible for this form of protection in the United States. This change would slam the door on children escaping violence who are poor and forced to journey by foot through Mexico to find permanent protection and reunify with family in the United States.

Mexico is not currently able to provide protection to the majority of children seeking asylum there and is not a realistic alternative to requesting protection in the United States.⁵⁰ Despite recent improvements to its asylum system, Mexico is still unable to process large numbers asylum claims. It does not have the infrastructure to ensure children are systematically informed of their right to seek asylum or process the large number of cases that would be forced on Mexico's system if the United States implemented this

policy. Especially for children with family in the United States, or who are fleeing criminal organizations currently operating in Mexico, seeking permanency in Mexico is not in the child's best interest.

These potential changes would severely undermine due process for the most vulnerable in our immigration system and risk the return of children to harm and danger in their home countries. While the timeline for future action remains uncertain, U.S. agencies continue to draft policies and support legislative activity in these priority areas.

CONCLUSION

Without question, these policy changes and those likely to come dramatically undermine the United States' system of protection for immigrant and refugee children and fundamentally alter the identity of the United States as a global leader in the protection of the most vulnerable. Moreover, these policies decrease government efficiency and waste taxpayer dollars in unnecessary costs.

The cruel irony is that none of these policies address the root causes of why these children are fleeing to the United States in historic numbers. Until we do this in a meaningful way that prioritizes protection, children will continue to come, at greater risk to themselves, and we will very likely return those who do manage to cross our borders to harm after only a cursory review of their request for protection.

This ruthless and brutish treatment of these particularly vulnerable children is being done in the name of all Americans.

ENDNOTES

¹ Executive Order 13767 of Jan. 25, 2017, Border Security and Immigration Enforcement Improvements, 82 Fed. Reg. 8793 (Jan. 30, 2017), <https://www.gpo.gov/fdsys/pkg/FR-2017-01-30/pdf/2017-02095.pdf>

² CNBC, “Trump Seeks Border Wall, Crackdown on Unaccompanied Minors for 'Dreamer' Deal,” by Reuters, October 8, 2017,

<https://www.cnbc.com/2017/10/08/trump-seeks-border-wall-crackdown-on-unaccompanied-minors-for-dreamer-deal.html>

³ See generally, The Marshall Project, “Trump’s Quiet War on Migrant Kids: How the Administration is Turning Child Protection into Law Enforcement,” by Eli Hager, May 1, 2018,

<https://www.themarshallproject.org/2018/05/01/trump-s-quiet-war-on-migrant-kids>

⁴ White House, Remarks by the President in Address to the Nation on Immigration, November 20, 2014, <https://obamawhitehouse.archives.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration>

⁵ See, e.g. The New York Times, “Hundreds of Immigrant Children Have Been Taken From Parents at U.S. Border,” by Caitlin Dickerson, April 20, 2018, <https://mobile.nytimes.com/2018/04/20/us/immigrant-children-separation-ice.html>

⁶ CNN, “DHS to Prosecute all Illegal Border Crossings, Potentially Separating Families,” by Tal Kopan, May 7, 2018, <https://www.cnn.com/2017/03/29/politics/border-families-separation-kelly/index.html>

⁷ USA Today, “Migrant Caravan: No Room for Asylum Seekers at Border Crossing, U.S. says,” by Daniel Gonzalez and Rebecca Plevin, April 30, 2018, <https://www.usatoday.com/story/news/nation-now/2018/04/30/migrant-caravan-border-asylum-seekers/563851002/>

⁸ CNN, “Kelly: DHS is Considering Separating Undocumented Children from their Parents at the Border,” by Daniella Diaz, March 7, 2017, <https://www.cnn.com/2017/03/06/politics/john-kelly-separating-children-from-parents-immigration-border/index.html>

⁹ Letter from 75 Democratic Congressmembers to DHS Secretary Nielsen, Feb. 8. 2018, <https://democrats-homeland.house.gov/sites/democrats.homeland.house.gov/files/documents/DemsLetterDHSFamilies.pdf>. Letter from 33 Senate Democrats to DHS Secretary Nielsen, Feb. 12, 2018, <https://www.harris.senate.gov/imo/media/doc/021218%20Letter%20to%20DHS%20on%20Separation%20of%20Families%20at%20Border.pdf>

¹⁰ See Joint Complaint by Women’s Refugee Commission, Lutheran Immigration and Refugee Service, Kids in Need of Defense (KIND), et al. to DHS Office of Civil Rights and Civil Liberties and Office of Inspector General, December 11, 2017, at pp. 6 & 17, <https://www.womensrefugeecommission.org/rights/resources/1540-joint-complaint-on-forcible-separation-of-families-in-customs-and-border-protection-custody>; *Mrs. L. v. U.S. Immigration and Customs Enforcement, et al.*, Case 18-cv-00428-DMS-MDD (S.D. Cal.) [Amended Complaint Mar. 9, 2018], https://www.aclu.org/sites/default/files/field_document/2018.03.09_32_amended_complaint.pdf.

¹¹ See, e.g. U.S. Senate, Homeland Security and Governmental Affairs Permanent Subcommittee on Investigations, *Protecting Unaccompanied Alien Children from Trafficking and Other Abuses: The Role of the Office of Refugee Resettlement* (Staff Report), at 42-44 (discussing ORR’s provision of post-release services in only 10 percent of cases), <https://www.hsgac.senate.gov/imo/media/doc/Majority%20&%20Minority%20Staff%20Report%20-%20Protecting%20Unaccompanied%20Alien%20Children%20from%20Trafficking%20and%20Other%20Abuses%202016-01-282.pdf>.

¹² In FY2015, the average length of stay for children in ORR shelter care was 34 days. U.S. Government Accountability Office, *Unaccompanied Children: HHS Can Take Further Actions to Monitor Their Care*, February 2016, <https://www.gao.gov/assets/680/675001.pdf>. In FY 2017, the average length of stay was 41 days. ORR, *Facts and Data* (Length of Stay), <https://www.acf.hhs.gov/orr/about/ucs/facts-and-data#lengthofstay>. An HHS official recently testified that the average length of stay for FY2018 through March 2018 was 56 days. Testimony of Steven Wagner, Acting Assistant Secretary, Administration for Children and Families, U.S. Department of Health and Human Services, Before Senate Homeland Security and Governmental Affairs Permanent Subcommittee on Investigations, April 26, 2018, <https://www.hsgac.senate.gov/imo/media/doc/Wagner%20Testimony.pdf>.

¹³ Kids in Need of Defense (KIND), Women’s Refugee Commission, and Lutheran Immigration and Refugee Service, *Betraying Family Values*, March 2017, <https://supportkind.org/resources/betraying-family-values/>

¹⁴ 8 U.S.C. § 1232(c)(2)(B), Enhancing Efforts to Combat the Trafficking of Children, <https://www.law.cornell.edu/uscode/text/8/1232>

¹⁵ *Ramirez v. ICE, et al.*, Case: 1:18-cv-00508 (D. D.C. 2018) (Complaint), http://www.immigrantjustice.org/sites/default/files/content-type/press-release/documents/2018-03/GarciaRamirezvICE_Complaint_filestamped_20180305.pdf.

¹⁶ *Id.*

¹⁷ *Ramirez v. ICE, et al.*, Case 1:18-cv-00508-RC (D.D.C. 2018) (preliminary injunction), <http://www.immigrantjustice.org/sites/default/files/content-type/press-release/documents/2018-04/Garcia%20Ramirez%20Preliminary%20Injunction%20Order%204.18.2018.pdf>

¹⁸ The New York Times, “Trump Targets MS-13, a Violent Menace, if Not the One He Portrays,” by Ron Nixon, Liz Robbins and Katie Benner, March 1, 2018, <https://www.nytimes.com/2018/03/01/us/politics/ms13-gang-threat-trump-policy.html>

¹⁹ *Saravia v. Sessions*, Case No. 17-cv-03615-VC (N.D. Cal. 2017), https://www.aclunc.org/sites/default/files/20171121-Gomez_v_Sessions-Order_Granteeing_PI_and_Class_Cert.pdf.

²⁰ *Id.*

²¹ ACLU, Press release, *Twenty-two Immigrant Teens Freed after Wrongful Arrests by the Trump Administration*, Dec. 20, 2017, <https://www.aclunc.org/news/twenty-two-immigrant-teens-freed-after-wrongful-arrests-trump-administration> (noting that 22 of 34 class members had been ordered released to date, with others still in the hearing process); *Saravia v. Sessions*, Case No. 18-15114 (9th Cir. 2018), Appellee’s Answering Brief, at 2 (“At these ‘Saravia hearings,’ an overwhelming majority—including the three Named Plaintiffs—have been released from detention after showing that they did not present a danger or risk of flight that warranted their continued detention.”), <https://www.clearinghouse.net/chDocs/public/IM-CA-0109-0007.pdf>.

²² The New York Times, “A Rule Is Changed for Young Immigrants, and Green Card Hopes Fade,” by Liz Robbins, Apr. 19, 2018, <https://www.nytimes.com/2018/04/18/nyregion/special-immigrant-juvenile-status-trump.html>.

²³ Currently Maryland, Washington, Massachusetts, New York, California, and Texas state law contain these provisions.

²⁴ See USCIS, USCIS Asylum Division Quarterly Stakeholder Meeting, Questions and Answers, August 8, 2017, at p. 9-10 (section a.),

https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/PED_AsymDivisionQuarterlyStakeholderMeeting08112017_QA.pdf; USCIS, USCIS Asylum Division Quarterly Stakeholder Meeting, Questions and Answers, November 13, 2017, at p. 5 (section e.), https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/PED_AsymDivisionQuarterlyStakeholderQA_11032017.pdf.

²⁵ Secure facilities are the most physically restrictive of ORR’s facilities, used to house unaccompanied children deemed to present a danger to themselves or others, or who have committed a criminal offense. Staff secure facilities are less restrictive than secure placements, but have security features, including additional staff to enable closer supervision, for children who may present disruptive behavior but not require secure placement. See ORR, *Children Entering the United States Unaccompanied: A Guide to Terms*, Mar. 21, 2016, <https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-guide-to-terms>.

²⁶ See USCIS, Central American Minors (CAM): Information for Parole Applicants, <https://www.uscis.gov/humanitarian/humanitarian-parole/central-american-minors-cam-information-parole-applicants>.

²⁷ Huffington Post, “Trump Left Nearly 4,000 Applicants For Central American Refugee Program Stranded,” by Elise Foley, Apr. 30, 2018, <https://www.msn.com/en-us/news/politics/trump-left-nearly-4000-applicants-for-central-american-refugee-program-stranded/ar-AAwyvLB>.

²⁸ *Id.*

- ²⁹ Corporation for National and Community Service, justiceAmericorps, <https://www.gcir.org/sites/default/files/resources/CNCS%20AmeriCorps%20Fact%20Sheet%20justice%20AmeriCorps%20MacArthur%20Foundation%2006-2014%20%28FINAL%29.pdf>; Laura Simich, Vera Institute of Justice, *Evaluation of the justice Americorps Legal Services for Unaccompanied Children Program*, <https://www.vera.org/projects/evaluation-of-justice-ameri-corps-legal-services-for-unaccompanied-children-program/overview>; see Email from program contractor Equal Justice Works to program fellows and supervisors, dated Jan. 10, 2017 (discussing change to client eligibility for jAC program) (on file with KIND).
- ³⁰ Memorandum from Jean King, General Counsel of Executive Office for Immigration Review, to James R. McHenry III, Acting Director of EOIR, *Legal Opinion re: EOIR's Authority to Interpret the Term Unaccompanied Alien Child for Purposes of Applying Certain Provisions of TVPRA* (Sept. 19, 2017), <https://cliniclegal.org/sites/default/files/resources/King-9-19-17-UAC-TVPRA.pdf>.
- ³¹ See, e.g., Trafficking Victims Protection Reauthorization Act of 2008, 8 U.S.C. 1232(a)(5)(D).
- ³² Memorandum from MaryBeth Keller, Chief Immigration Judge, EOIR, Operating Policies and Procedures Memorandum 17-03: *Guidelines for Immigration Court Cases Involving Juveniles, Including Unaccompanied Alien Children*, Dec. 20, 2017, <https://www.justice.gov/eoir/file/oppm17-03/download>.
- ³³ *Id.* at p. 7-8.
- ³⁴ Memorandum from James R. McHenry III, Director, EOIR, *Case Priorities and Immigration Court Performance Measures*, Jan. 17, 2018, <https://www.justice.gov/eoir/page/file/1026721/download>.
- ³⁵ 8 C.F.R. § 1003.1(h)(1)(i) (“The Board shall refer to the Attorney General for review of its decision all cases that: (i) The Attorney General directs the Board to refer to him. . . .”). See *Matter of E-F-H-L*, 27 I&N Dec. 226 (A.G. 2018) and 26 I&N Dec. 319 (BIA 2014); *Matter of Castro-Tum*, 27 I&N Dec. 187 (A.G. 2018); *Matter of A-B-*, Respondent, 27 I&N Dec. 227 (A.G. 2018); *Matter of L-A-B-R*, 27 I&N Dec. 245 (A.G. 2018).
- ³⁶ United States District Court Central District Of California, *Flores v. Reno, Stipulated Settlement Agreement*, <http://www.aila.org/File/Related/14111359b.pdf>
- ³⁷ See, e.g. ORR, *Children Entering the United States Unaccompanied: Section 2 Safe and Timely Release from ORR Care*, Section 2.2.1 (Identification of Qualified Sponsors); Section 2.4 (Sponsor Assessment Criteria and Home Studies); Section 2.4.1 (Assessment Criteria); Section 2.4.2 (Home Study Requirement), <https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-2#2.1>.
- ³⁸ ORR, *Children Entering the United States Unaccompanied: Section 2 Safe and Timely Release from ORR Care*, Section 2.7 Recommendations and Decisions on Release, <https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-2#2.7>.
- ³⁹ ORR, *Facts and Data*, <https://www.acf.hhs.gov/orr/about/ucs/facts-and-data>
- ⁴⁰ American Academy of Pediatrics, *Detention of Immigrant Children*, March 2017, <http://pediatrics.aappublications.org/content/early/2017/03/09/peds.2017-0483>
- ⁴¹ The Guardian, “Blatant and Brazen' Trump Accused of Blocking Abortions for Undocumented Women,” by Ed Pilkington, January 26, 2018, <https://www.theguardian.com/world/2018/jan/26/trump-accused-abortion-block-women-aclu>
- ⁴² The New York Times, “U.S. Must Allow Undocumented 17-Year-Old to Have Abortion, Judge Says,” by Matt Stevens, October 18, 2017, <https://www.nytimes.com/2017/10/18/us/texas-immigrant-abortion-ruling.html>
- ⁴³ The New York Times, “Federal Agencies Lost Track of Nearly 1,500 Migrant Children Placed With Sponsors,” by Ron Nixon, April 26, 2018, <https://www.nytimes.com/2018/04/26/us/politics/migrant-children-missing.html>
- ⁴⁴ Federal Register, DHS, Notice of Modified System of Records, May 8, 2018, <https://www.federalregister.gov/documents/2018/05/08/2018-09902/privacy-act-of-1974-system-of-records>
- ⁴⁵ See White House Framework on Immigration Reform and Border Security, January 25, 2018, (<https://www.whitehouse.gov/briefings-statements/white-house-framework-immigration-reform-border-security/>); White House, *Immigration Principles and Policy Priorities*, October 8, 2017, <http://www.aila.org/infonet/wh-immigration-principles-and-policies>.

⁴⁶ See White House, Immigration Principles and Policy Priorities, October 8, 2017, <http://www.aila.org/infonet/wh-immigration-principles-and-policies>, Section B (Unaccompanied Children). <http://www.aila.org/infonet/wh-immigration-principles-and-policies>.

⁴⁷ DHS, Unified Agenda, Apprehension, Processing, Care and Custody of Alien Minors (Fall 2017, <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201710&RIN=1653-AA75#>; 83 Fed. Reg. 1717, January 12, 2018, <https://www.gpo.gov/fdsys/pkg/FR-2018-01-12/pdf/2017-28207.pdf>.

⁴⁸ 83 Federal Register 1717, Jan. 12, 2018, <https://www.gpo.gov/fdsys/pkg/FR-2018-01-12/pdf/2017-28207.pdf>.

⁴⁹ Section 608 of IIRIRA amended the INA as follows:

INA §208 (a)(2)(A) SAFE THIRD COUNTRY.-Paragraph (1) [stating that any alien physically present in the United States or who arrives in the United States, irrespective of status, may apply for asylum in accordance with the provisions of § 208] shall not apply to an alien if the Attorney General determines that the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality or, in the case of an alien having no nationality, the country of the alien's last habitual residence) in which the alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection, unless the Attorney General finds that it is in the public interest for the alien to receive asylum in the United States.

⁵⁰ Human Rights Watch, *Closed Doors: Mexico's Failure to Protect Central American Refugee and Migrant Children*, March 2016, <https://www.hrw.org/report/2016/03/31/closed-doors/mexicos-failure-protect-central-american-refugee-and-migrant-children>