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CLINIC Transition Paper: Remedying the Separation of Families at the U.S.-Mexico Border

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The Catholic Legal Immigration Network, Inc., CLINIC, promotes the dignity and protects the rights of immigrants in partnership with our network of immigration legal services providers. Visit us at cliniclegal.org/transition.

“I dread remembering this day — May 27 — when they separated me from my daughter. I will never forget this frightful day, when they treated me like an animal. Without any explanation, they treated me like a criminal, with my hands and feet chained. In jail, I did not know anything about my daughter for a month. I fainted many times from crying so hard. I asked one guard after another about my daughter and they just laughed at my pain, but they did not tell me anything about my daughter. The worst part was that where they took my daughter, they got it into her head that her dad and I did not want her anymore because we had brought her here. I never, never want to go through this again, and I do not want this to happen to anyone else. It is inhumane. Only someone without a heart could do this.”

– R.P., separated parent¹

“[W]hat was lost in the process was the family. The parents didn’t know where the children were, and the children didn’t know where the parents were. And the government didn’t know, either.”

– Judge Dana Sabraw, United States District Judge of the United States District Court for the Southern District of California²

CLINIC Transition Paper: Remediating the Separation of Families at the U.S.-Mexico Border

Why the families separated at the southern border deserve justice

The separation of families under the Trump administration's "Zero Tolerance" policy marks one of the darkest times in our country's history. The Trump administration first piloted the family separation policy in 2017³ and formally announced the "Zero Tolerance" policy in April 2018.⁴ For at least a year, parents and other caretakers fleeing their home countries arrived at the southwest border with their children in tow, only for immigration officials to apprehend and tear them away from their children. Officials separated families without regard to the child's age or needs and without a plan for reunification. Despite having forced the separation, the government inappropriately designated the children who had arrived to the United States with their parents as "unaccompanied" and sent them to tent cities and shelters hundreds of miles away from their parents.⁵ The government transferred the parents to criminal custody, expeditiously prosecuted them and gave them absolutely no information about where their children were or how they were doing. After enormous public and political pressure, President Trump issued an executive order that purportedly put an end to family separation, but it took a court order to begin to reunite the families. Many parents were reunited with their children after months of anguish, while others, who had already been deported without their children, faced a very real possibility of never seeing their children again.

Three years later, all of these families continue to bear the scars of the Trump administration's cruel and unlawful policy. The trauma of the separation has caused many children and parents to develop mental health diagnoses, which are compounded by the unnecessary anxiety of being separated once more for those families that have been reunited and the ongoing anguish of prolonged separation for those who remain separated. The United States government owes reparations and a path to citizenship to these families.

Number of people impacted

The U.S. government has admitted to separating 5,460 children from their parents or adult caretakers after they arrived at our southern border beginning in July 2017.⁶ 1,556 of these children were separated from their parents or caretakers from July 1, 2017 through June 26, 2018, and 2,814 children were in government custody as of the June 26, 2018 injunction in the *Ms. L. v. ICE* case.⁷ The U.S. government separated an additional 1,090 children from their parents or caretakers from June 2018 to October 2019.⁸ These numbers likely omit hundreds — if not thousands — of families separated at the border that have not yet been disclosed by the government.⁹

The human consequences of the previous administration's policy

The stated purpose of the family separation policy was to deter Central Americans from seeking asylum or otherwise coming to the United States.¹⁰ Through this policy, the U.S. government separated thousands of children from their parents or caretakers, violating the U.S. Constitution's guarantee of family integrity,¹¹ and inflicting needless and ongoing trauma upon these families.¹² In separating these thousands of families, the

Trump administration failed to take even the most basic steps to document and track which children belonged to which parent.¹³ Reuniting these families was never the goal.¹⁴ On June 26, 2018, a federal judge ordered the government to stop the separation of families and to reunite those families the government had already separated.¹⁵ While many of the families were reunited through the chaotic process that ensued, hundreds or thousands of others were not, either because the government had already deported the parents to the country they had fled or because the government had failed to identify those families that had been separated in the first place.

In order to remedy the separation of families at the border, the Biden administration should do the following within their first 100 days in office:

Recommendation 1

Establish a process for the safe reunification of deported parents with their children in the United States

Hundreds of children are permanently separated from their parent¹⁶ because their parent has been deported. The ACLU and the court-appointed Steering Committee for the *Ms. L. v. ICE* litigation have spent years trying to locate the deported parents of children who remain in the United States. In the fall of 2020, the Steering Committee notified the *Ms. L.* court that it had not been able to locate the parents of 666 children separated from their parents under “Zero Tolerance” and that they believed that about two-thirds of these parents had been deported.¹⁷ As of the December 2020 status report in *Ms. L.*, there were 628 children whose parents the Steering Committee had not been able to locate.¹⁸ This figure does not include the many children who are not members of the *Ms. L.* class and whose parents or caretakers were subsequently deported, including those who were separated after the June 26, 2018 order in the *Ms. L.* case.¹⁹ Nor does it capture the many *Ms. L.* class children whose parents have been located but who have made the heartbreaking decision to leave their child in the United States because of the danger the family faces in their home country.

While the total number of families who remain separated due to the “Zero Tolerance” policy is not currently known, it is clear that the government must devise a humane solution to allow these parents to return to the United States to reunite with their children. Such a solution will require the government to develop a mechanism for locating, transporting and allowing these parents to enter the United States through parole or other means. In cases where the family prefers to be reunited in their home country, the government should facilitate a safe return of the child to their parents.

Recommendation 2

Shield formerly separated families from deportation and provide them with a path to citizenship

Over the last four years, the Trump administration has imposed hundreds of new restrictions on asylum seekers, drastically reducing the number of people who are eligible for asylum.²⁰ Under these draconian restrictions, those individuals who base their claims of persecution on domestic or gang violence²¹ will have a very difficult time qualifying for asylum in the United States, especially when they attempt to make their asylum claims without counsel.²² These new restrictions effectively close the door on many asylum seekers from Central America, home to the vast majority of families that survived the “Zero Tolerance” policy. The Biden administration must shield these families from deportation and re-separation. The Biden administration could accomplish this goal through a variety of executive actions, including through the issuance of a memorandum on the use of prosecutorial discretion that prohibits ICE attorneys and employees from pursuing detention or deportation of individuals who were separated at the border.²³

For those families already in removal proceedings, the Biden administration must avoid continuing to re-traumatize these families. The Biden administration can avoid traumatizing the families by issuing guidance to its ICE Office of the Principal Legal Advisor attorneys to stipulate to asylum or alternative forms of relief where appropriate. Since a future administration could unravel executive actions, exposing these families to renewed fears of separation, the Biden administration must also work with Congress to provide a path to citizenship for these families.

Recommendation 3

Allow separated children designated by the government as unaccompanied children to retain that designation for the duration of their immigration proceedings

When the U. S. government forcibly separated children from their parents at the border, they effectively made these children unaccompanied, and they formally classified the children as “unaccompanied alien children,” or UC.²⁴ This UC determination meant USCIS asylum officers had initial jurisdiction over the children’s asylum claims even when ICE began removal proceedings against the child in immigration court, and that the children were entitled to full removal proceedings before an immigration judge and exempt from expedited removal.²⁵ Consequently, the UC designation allowed the children to first present their asylum claim in a non-adversarial, child-appropriate setting instead of in immigration court. This non-adversarial setting is particularly appropriate for separated children who face compounding trauma stemming from the persecution they fled and the forced separation they endured upon arriving at the border.

The Trump administration has taken various steps to limit access to these crucial asylum protections for unaccompanied children who later turn 18 or reunite with a parent, which CLINIC urges the Biden administration to reverse through a joint memo and other steps.²⁶ In addition, that memo should include a provision specifically addressing the asylum rights of formerly separated children. The Biden administration

should mandate that for those children whom the U.S. government took from their parents and classified as “unaccompanied,” the government is prohibited from revoking the attendant protections triggered by the “unaccompanied child” classification — including initial asylum jurisdiction with USCIS. This will allow children separated from their parents at the border to proceed with their cases in the non-adversarial, trauma-informed and child-sensitive setting of USCIS asylum interviews.

Recommendation 4

Settle Federal Tort Claims Act complaints and lawsuits filed by separated families against the government

The Federal Tort Claims Act, or FTCA, allows individuals to sue the United States government for injuries resulting from unlawful conduct of federal officers. Hundreds of families subjected to the “Zero Tolerance” policy have availed themselves of the right to file FTCA claims against the agencies that harmed them. These families have suffered greatly at the hands of the government of the country where they thought they would find safety — the United States. The Biden administration should seek to settle these claims at the administrative stage where families have not yet brought actions in federal court, and the Attorney General must order district attorneys to seek settlement in cases already in district court. The settlement of these claims and cases could involve stipulations for permanent relief from deportation and monetary awards.

Recommendation 5

End family separation once and for all

The ultimate way for the Biden administration to honor the families cruelly and unlawfully separated under “Zero Tolerance” is to end family separation going forward. This plan must include, in the short term, a memorandum from the Attorney General to district attorneys to stop charging immigrants with entry-related offenses.²⁷ It also must include agency memoranda to ICE officers and CBP agents to prioritize family unity when making decisions regarding detention or alternatives to detention, and when deciding to issue notices to appear. In the longer term, the Biden administration must pursue systemic reforms to our nation’s immigration laws in Congress that significantly limit the use of detention and establish robust alternatives to detention models, create a path to citizenship for those here without lawful status, and expand the options for those seeking to come to our country lawfully as immigrants or nonimmigrants.

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Endnotes:

¹ The author has received permission from this formerly separated parent to share her story. CLINIC is in contact with hundreds of separated families through the National Reunited Families Assistance Project, which aims to ensure that separated families have access to the legal and social services they need.

² Transcript of Joint Status Report at 58, *Ms. L. v. ICE*, No. 18-cv-00428 DMS MDD (S.D. Cal. Jul. 27, 2018).

³ See Jeff Sessions, Attorney Gen., U.S. Dep't of Justice, Remarks Announcing the Department of Justice's Renewed Commitment to Criminal Immigration Enforcement (Apr. 11, 2017), [justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-announcing-department-justice-s-renewed](https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-announcing-department-justice-s-renewed); Lisa Riordan Seville & Hannah Rappleye, *Trump admin ran 'pilot program' for separating migrant families in 2017*, NBC NEWS, June 29, 2018, [nbcnews.com/storyline/immigration-border-crisis/trump-admin-ran-pilot-program-separating-migrant-families-2017-n887616](https://www.nbcnews.com/storyline/immigration-border-crisis/trump-admin-ran-pilot-program-separating-migrant-families-2017-n887616).

⁴ See, Press Release, U.S. Dep't of Justice, Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry (Apr. 6, 2018), [justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry](https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry).

⁵ Unpublished memorandum, U.S. Dep't of Homeland Sec., Policy Options to Respond to Border Surge of Illegal Immigration (Dec. 16, 2017), [documentcloud.org/documents/5688664-Merkleydocs2.html](https://www.documentcloud.org/documents/5688664-Merkleydocs2.html).

⁶ Elliot Spagat, *Tally of children split at border tops 5,400 in new count*, ASSOCIATED PRESS, Oct. 25, 2019, apnews.com/c654e652a4674cf19304a4a4ff599feb.

⁷ *Ms. L. v. ICE*, 415 F. Supp. 3d 980, 986 n. 3 (S.D. Cal. 2020).

⁸ Tyche Hendricks, *New Tally Totals Almost 5,500 Kids Taken From Parents at the Border*, KQED, Oct. 25, 2019, [kqed.org/news/11782685/new-tally-totals-over-5500-kids-taken-from-parents-at-the-border](https://www.kqed.org/news/11782685/new-tally-totals-over-5500-kids-taken-from-parents-at-the-border). See also, Office of Strategy, Policy, and Plans, U.S. Dep't of Homeland Sec., Family Unit Actions Report October 1, 2018–September 30, 2019 7 (Apr. 15, 2020), [dhs.gov/sites/default/files/publications/dmo_-_plcy_-_family_unit_actions_report_-_oct_2018_through_sept_2019.pdf](https://www.dhs.gov/sites/default/files/publications/dmo_-_plcy_-_family_unit_actions_report_-_oct_2018_through_sept_2019.pdf); Office of Strategy, Policy, and Plans, U.S. Dep't of Homeland Sec., Family Unit Actions Report October 1, 2019–February 29, 2020 6 (Aug. 5, 2020), [dhs.gov/sites/default/files/publications/immigration-statistics/Special_Reports/FUAR/fy_2020-m5_family_unit_actions_report_february_2020.pdf](https://www.dhs.gov/sites/default/files/publications/immigration-statistics/Special_Reports/FUAR/fy_2020-m5_family_unit_actions_report_february_2020.pdf).

⁹ See, e.g., Sarah Abdel-Motaleb, Roberto Lopez, and Andy Udelsman, *Family Separations Continue In South Texas, Years After They Allegedly Ended*, TCRPMAG, Oct. 21, 2020, [news.txcivilrights.org/2020/10/21/family-separations-continue-in-south-texas-years-after-they-allegedly-ended/](https://www.news.txcivilrights.org/2020/10/21/family-separations-continue-in-south-texas-years-after-they-allegedly-ended/); *Family Separation is not Over: How the Trump Administration Continues to Separate Children from Their Parents to Serve its Political Ends*, YOUNG CENTER FOR IMMIGRANT CHILDREN'S RIGHTS (June 25, 2020), theyoungcenter.org/report-family-separation-is-not-over.

¹⁰ STAFF OF H. COMM. ON THE JUDICIARY, SUBCOMM. ON IMMIGRATION AND CITIZENSHIP, 116TH CONG., THE TRUMP ADMINISTRATION'S FAMILY SEPARATION POLICY: TRAUMA, DESTRUCTION, AND CHAOS 21 (2020) ("Within weeks of President Trump's inauguration, the Administration began formulating a plan to separate parents from their children as a means to deter migration."); *60 Minutes: Chaos on the Border, Robots to the Rescue, To Kill a Mockingbird* (CBS television broadcast Nov. 25, 2018) (revealing an un-redacted copy of the memo implementing the "Zero Tolerance" policy that stated that the policy's purpose was deterrence), [cbs.com/shows/60_minutes/video/YgchIHxvobJCHtm1DzqQhZurZV7_UV/chaos-on-the-border-robots-to-the-](https://www.cbs.com/shows/60_minutes/video/YgchIHxvobJCHtm1DzqQhZurZV7_UV/chaos-on-the-border-robots-to-the-)

[rescue-to-kill-a-mockingbird/](#); Philip Bump, *Here are the administration officials who have said that family separation is meant as a deterrent*,

WASH. POST, June 19, 2018, [washingtonpost.com/news/politics/wp/2018/06/19/here-are-the-administration-officials-who-have-said-that-family-separation-is-meant-as-a-deterrent/](#); Donald Trump (@realDonaldTrump), Twitter (Dec. 16, 2018, 8:25 AM), (“[I]f you don’t separate, FAR more people will come.”).

¹¹ See *Ms. L. v. ICE*, 302 F. Supp. 3d 1149, 1161–67 (S.D. Cal. 2018) (finding that plaintiffs had stated a legally cognizable claim for a violation of their substantive due process rights to family integrity under the Fifth Amendment to the United States Constitution based on their allegations that the Government had separated them from their minor children while they were held in immigration detention and without a showing that they were unfit parents or otherwise presented a danger to their children); *Ms. L. v. ICE*, 310 F. Supp. 3d 1133, 1142–46 (S.D. Cal. 2018) (finding that plaintiffs were likely to succeed on their substantive due process claim when assessing their motion for a preliminary injunction). See also *Smith v. Organization of Foster Families*, 431 U.S. 816, 845 (1977) (liberty interest in family relationships has its source in “intrinsic human rights”).

¹² See, e.g., Hajar Habbach, Kathryn Hampton & Ranit Mishori, *You Will Never See Your Child Again: The Persistent Psychological Effects of Family Separation*, PHYSICIANS FOR HUMAN RIGHTS (Feb. 25, 2020), [phr.org/wp-content/uploads/2020/02/PHR-Report-2020-Family-Separation-Full-Report.pdf](#); OFFICE OF THE INSPECTOR GENERAL, U.S. DEP’T OF HEALTH & HUMAN SERVS., OEI-09-18-00431, *Care Provider Facilities Described Challenges Addressing Mental Health Needs of Children in HHS Custody* (Sept. 2019), [oig.hhs.gov/oei/reports/oei-09-18-00431.pdf](#); Human Rights Watch, US: Separated Families Report Trauma, Lies, Coercion (Jul. 26, 2018), [hrw.org/news/2018/07/26/us-separated-families-report-trauma-lies-coercion](#).

¹³ OFFICE OF THE INSPECTOR GENERAL, U.S. DEP’T OF HOMELAND SEC., OIG-18-84, *Special Review—Initial Observations Regarding Family Separation Issues under the Zero Tolerance Policy 9–10* (Sept. 27, 2018) (noting, among other things, that agencies’ incompatible computer systems erased data that connected children with their families); OFFICE OF THE INSPECTOR GENERAL, U.S. DEP’T OF HEALTH & HUMAN SERVS., OEI-BL-18-00511, *Separated Children Placed in Office of Refugee Resettlement Care at 2, 13* (Jan. 17, 2019) (reporting that the lack of an integrated data system to track separated families across HHS and DHS added to the difficulty in HHS’ identification of separated children); OFFICE OF THE INSPECTOR GENERAL, U.S. DEP’T OF HEALTH & HUMAN SERVS., OEI-BL-18-00510, *Communication and Management Challenges Impeded HHS’s Response to the Zero-Tolerance Policy* (Mar. 2020) (concluding that “Poor interagency communication and internal management decisions that failed to prioritize and protect children’s interests left HHS unprepared for the zero-tolerance policy” and adding that while “HHS was not responsible for separating families, but HHS’s inadequate communication, management, and planning made the situation worse for many separated children.”); *Ms. L. v. ICE*, 310 F. Supp. 3d at 1144 (“[t]he government readily keeps track of personal property of detainees in criminal and immigration proceedings. Money, important documents, and automobiles, to name a few, are routinely catalogued, stored, tracked and produced upon a detainee’s release, at all levels—state and federal, citizen and alien. Yet, the government has no system in place to keep track of, provide effective communication with, and promptly produce alien children. The unfortunate reality is that under the present system migrant children are not accounted for with the same efficiency and accuracy as *property*.”) (Emphasis in original).

¹⁴ See *Ms. L. v. ICE*, 310 F. Supp. 3d at 1140–41; see also U.S. GOV’T ACCOUNTABILITY OFF., GAO-19-163, *Unaccompanied Children: Agency Efforts to Reunify Children Separated from Parents at the Border 21* (2018) (“HHS officials told [the GAO] that there were no specific procedures to reunite children with parents from whom they were separated at the border prior to the June 2018 court order.”).

¹⁵ *Ms. L. v. ICE*, 310 F. Supp. 3d at 1149–50.

¹⁶ In carrying out these recommendations, the Biden administration must use an expansive definition of family, as “Zero Tolerance” affected not only biological parents and children, but also children who came seeking asylum with other adult caregivers. For simplicity, these recommendations will state “parents,” but the term should be read broadly to include other adult care takers.

¹⁷ Jacob Soboroff and Julia Ainsley, *Lawyers can't find the parents of 666 migrant kids, a higher number than previously reported*, NBC NEWS, Nov. 9, 2020, [nbcnews.com/politics/immigration/lawyers-can-t-find-parents-666-migrant-kids-higher-number-n1247144](https://www.nbcnews.com/politics/immigration/lawyers-can-t-find-parents-666-migrant-kids-higher-number-n1247144); Joint Status Report at 7, *Ms. L. v. ICE*, No. 18-cv-428 DMS MDD (S.D. Cal. Oct. 20, 2020).

¹⁸ Joint Status Report at 8, *Ms. L. v. ICE*, No. 18-cv-428 DMS MDD (S.D. Cal. Dec. 2, 2020).

¹⁹ Sarah Abdel-Motaleb, Roberto Lopez, and Andy Udelsman, *Family Separations Continue In South Texas, Years After They Allegedly Ended*, TCRPMAG, Oct. 21, 2020, [news.txcivilrights.org/2020/10/21/family-separations-continue-in-south-texas-years-after-they-allegedly-ended/](https://www.news.txcivilrights.org/2020/10/21/family-separations-continue-in-south-texas-years-after-they-allegedly-ended/).

²⁰ See, e.g., Sarah Pierce and Jessica Bolter, *Dismantling and Reconstructing the U.S. Immigration System: A Catalog of Changes under the Trump Presidency*, MIGRATION POLICY INSTITUTE (July 2020), migrationpolicy.org/research/us-immigration-system-changes-trump-presidency.

²¹ *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018).

²² INA § 240(b)(4)(A) (providing that “the alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien’s choosing who is authorized to practice in such proceedings”).

²³ See John Morton, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens*, U.S. Immigration and Customs Enforcement (June 17, 2011), [ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf](https://www.ice.dhs.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf); John Morton, *Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs*, U.S. Immigration and Customs Enforcement (June 17, 2011), [ice.gov/doclib/foia/prosecutorial-discretion/certain-victims-witnesses-plaintiffs.pdf](https://www.ice.dhs.gov/doclib/foia/prosecutorial-discretion/certain-victims-witnesses-plaintiffs.pdf).

²⁴ 6 U.S.C. § 279(g)(2).

²⁵ INA § 208(b)(3)(C). CLINIC is class co-counsel in *J.O.P. v. Dep’t of Homeland Sec.*, No. 19-01944 (D. Md.), a lawsuit challenging USCIS policies that restrict the asylum rights of many applicants previously determined to be unaccompanied children.

²⁶ INA § 208(b)(3)(C).

²⁷ E.g., 8 U.S.C. §§ 1325 and 1326.