



TEXAS
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CIVIL RIGHTS
PROJECT

The Real National Emergency:
Zero Tolerance & the Continuing Horrors
of Family Separation at the Border

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FOREWORD

Deep in South Texas, where the Rio Grande twists and turns as it meanders southeast toward the Gulf of Mexico, the city of McAllen bustles. Its stores teem with Mexican shoppers and its streets with the bilingual hum of a city that melds two countries into a single culture. In the last year, the city of my birth, the community that taught me to cherish family and kindness to the stranger as much as to the friend, became witness to the shame of family separation. In the name of securing the border that unites neighborhoods north and south of the river, children were taken from their parents. As tearful stories spread around the world during the summer of 2018, the irony of the mightiest government on the planet protecting itself from migrant families by prosecuting parents and thrusting children into a labyrinth of converted Wal-Marts, dusty motels, and an assortment of other shelters—prisons, advocates say—was lost on few.

In those days, I found myself visiting Auschwitz and Birkenau, Nazi concentration camps where humanity's worst excesses became an unspeakable reality. Arriving early for my scheduled tour, I stopped alongside a nondescript road marked by a single train car and a small sign. This, I learned, was where trains unloaded the people who would be distributed to the nearby camps. Standing a continent away from McAllen, the distance suddenly closed. There was a child being torn from his father's arms. From McAllen, the images came by way of journalists and advocates. From Nazi-era Poland, they came by way of drawings made by an unknown witness. Clearly, the end result was different. But the process was remarkably similar.

"I didn't like the sight, or the feeling, of families being separated," President Trump said in June 2018 as he signed an executive order ending his administration's policy. "We're keeping families together," he added from his White House desk.

Go to McAllen today and the emptiness of his words hangs heavy above the federal courthouse where, *The Real National Emergency: Zero-tolerance & the Continuing Horrors of Family Separation at the Border*, reveals the saga of family separation continues. Listen closely and you will still hear the cries of traumatized children. Watch and you will still witness parents walking through the nightmare not knowing when—or whether—they will see their children again. In this ground-breaking report, the Texas Civil Rights Project forces all of us who were recoiled in disgust a year ago to become uncomfortable again. Family separation is not yet the past; it remains the present.



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February 14, 2019
Denver, Colorado

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I. EXECUTIVE SUMMARY

The Texas Civil Rights Project (TCRP) has been interviewing separated asylum seeking and migrant parents at the southern border since the height of the family separation crisis in the summer of 2018. This report provides a comprehensive non-governmental account of family separations at or near McAllen, Texas during a six month period after the issuance of the Executive Order purportedly ending the practice. During the reporting period, TCRP screened nearly **10,000** migrants and asylum seekers who were being criminally prosecuted for illegal entry to determine whether family separation had occurred. Of those screened, TCRP attorneys and staff interviewed **272** adults separated from a child family member, including **38** parents or legal guardians separated from their children. Of the **38** parents/legal guardians, **46** children were separated, including **25** children under the age of 10. The youngest infant impacted was 8 ½ months old at the time of separation from her mother. To date, the government has not reported these children to anyone—neither to the courts nor to Congress—and the government has admitted it may be impossible to find all separated children.¹

The government’s “normal” practice under zero tolerance in the late spring and early summer of 2018 was to separate mothers and fathers from their children, regardless of age, regardless of any criminal record or finding of unfitness, and incarcerate them. This policy tortured thousands of families.² The examples below highlight separations that occurred after the issuance of an Executive Order intended to end the practice and a federal court order enjoining the government from separating families:

- Mr. V, a father who was separated from his seven year old son, allegedly due to a misdemeanor conviction of battery over 10 years ago ³ ;
- Mr. A, a father who was separated from his 11 year old daughter and nine year old son on uncorroborated allegations of gang affiliation;
- Ms. Y, a mother who fled sexual slavery and was accused of being a danger to society and unfit to be a parent because she had shot her captor non-fatally in self defense ⁴ ;
- Mr. Perez-Domingo, an indigenous father from Guatemala whose primary language is Mam and whose parentage was questioned by DHS due to lack of assistance by a translator;
- Ms. B., a legal guardian and biological aunt who has been separated from her child for over six months due to the government refusing to recognize her legal guardianship³ ; and
- Mr. Z, a father who entered the U.S. with his U.S. citizen son and who remains separated from him.

TCRP highlights the following key recommendations to Congress and the Executive Branch (a full list is included at the end of the report):

- End zero tolerance policy of prosecuting all asylum-seekers and migrants for illegal entry under 8 USC § 1325(a).

- Immediately reunify all families and end family separations, including separations of non-parental families, except where a clear finding of unfitness and best interest of the child is established under concrete, transparent procedures that comport with due process rights under the Fourteenth Amendment.
- Mandate the Department of Homeland Security (DHS) use interpreters during processing and questioning including for non-native Spanish speakers who speak an indigenous language.
- Establish flexible, clear procedures to prevent obstacles for legal guardians to establish custody over the child.
- Mandate release on parole for undocumented parents or legal guardians with U.S. citizen children who are apprehended by DHS.

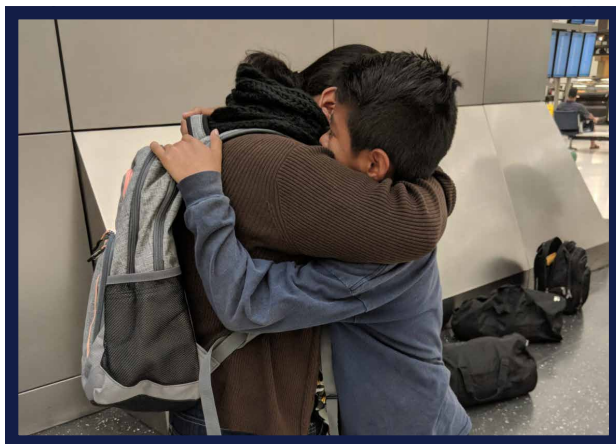
II. INTRODUCTION

About the Texas Civil Rights Project Family Reunification Efforts

The Texas Civil Rights Project (TCRP) boldly serves the movement for equality and justice in and out of the courts. We are Texas lawyers for Texas communities, and we use our tools of litigation and legal advocacy to protect and advance the civil rights of everyone in Texas. We undertake our work with a vision of a Texas in which all communities can thrive with dignity, justice, and without fear. We are lawyers deeply rooted on our communities, and when the family separation crisis hit our borders last summer, we were there to respond with action. For years, TCRP has fought back against mean-spirited and dangerous attacks against the most vulnerable in Texas, and our work defending the rights of asylum-seeking and migrant families represents our long-time commitment to quickly and aggressively respond to civil and human rights violations.

In May 2018, TCRP was contacted by the Federal Public Defenders of the Southern District of Texas. Their clients were parents being prosecuted for illegal entry under the Trump Administration's new zero tolerance policy, and the parents were stricken with fear and concern due to the forcible taking of their children by the U.S. government. The Defenders contacted TCRP to help find their clients' children when nobody else, including the government, knew where they were. In response, TCRP began interviewing parents during the height of the family separation crisis, investigating the whereabouts of their children, coordinating with local nonprofit children organizations to match family units, connecting parents with pro bono legal representation to prevent deportation, and working to reunify and assist families pursuant to the *Ms. L vs. ICE injunction*. In addition, TCRP filed a request for precautionary measures in the Inter-American Commission on

Human Rights seeking relief for these families.⁶ From May through June 20, 2018, TCRP assisted with reunification efforts for 382 families and, through our pro bono partners, we continue assisting with immigration representation for over 100 families.⁷ To date, the TCRP lawyers and staff in the Río Grande Valley continue daily interviews of parents being prosecuted under zero tolerance to monitor compliance with the Executive Order purportedly ending family separations.⁸



This report provides primary evidence of family separations after the issuance of the June 20th Executive Order intended to halt the abhorrent and widely condemned practice.⁹ Our findings are based on direct interviews with adult family members separated from their children at or near McAllen, Texas from June 22, 2018 through December 17, 2018.

To date, there are no independently verified figures and only the government has provided numbers of family separations. Most recently, the DHS reported 81 separations of children from parents or legal guardians after apprehension by U.S. Customs and Border Protection (CBP) from June 20 through November 2018.¹⁰ The DHS spokesperson stated that family separations are “rare” and have returned

to “normal levels.”¹¹ According to the DHS spokesperson, these separations occurred if the adult accompanying the child was not the parent or legal guardian, there was concern for the child's safety, or there was an urgent medical reason or serious criminal activity by the adult.^{12 13}

Our findings suggest that the number of family separations is higher than the 81 separations disclosed by DHS. During the six month reporting period, TCRP interviewed 272 family members separated from one or more children under the age of 18 after apprehension by CBP at or near McAllen, Texas. This area is only one place on the southwest border where migrants and asylum seekers are arraigned under the zero tolerance prosecutions of illegal entry. According to illegal entry prosecution data, there are at least 18 federal districts along the southwest border where U.S. Customs and Border Protection (CBP) refers illegal entry cases to the federal prosecutor.¹⁴

A Brief Overview of Zero Tolerance and Family Separations

The Department of Homeland Security (DHS) began discreetly implementing family separation policies in Texas and New Mexico from July 2017 through November 2017.¹⁵ Later that year, DHS officials circulated an internal sixteen-point strategy to strip asylum-seeking parents and children of their rights under the law.¹⁶ The strategy included plans to “increase prosecution of family unit parents,” which would require “placing the adults in adult detention, and placing the minors under the age of 18 in the custody of HHS as unaccompanied alien children.”¹⁷ The strategy disturbingly recommended prolonged detention of children by seeking criminal prosecution and removal of undocumented sponsors who voluntarily sought to save the child from the trauma of continued government detention.¹⁸ The chilling effect would admittedly “require HHS to keep the [children] in custody longer,” but that “once the deterrent impact is seen on smuggling and those

complicit in that process, in the long-term there would likely be less children in HHS custody.”¹⁹ At the same time, the policy recommended stripping children of their legal rights to asylum and circumventing established legal protections.²⁰ In April 2018, Attorney General Jeff Sessions announced the zero tolerance policy, instructing U.S. Attorneys across the southwest border to prosecute all instances of illegal entry referred by DHS.²¹



As had been carefully crafted by the Administration, the mass-scale forcible separations of parents from their children resulted in torturing families throughout the summer.²² It was during that period that TCRP, many other nonprofits, and law firms were on the ground seeking to assist the traumatized families. As a result of the widespread condemnation of the Administrations’ inhumane and illegal practice of separating families, President Trump in a rare about-face was forced to issue an Executive Order ending the practice and requiring the maintenance of “families during the pendency of any criminal improper entry or immigration proceeding.”²³ Shortly thereafter, a federal district court certified a class action, enjoined the Administration from separating families, and ordered the reunification of all families who had been separated prior to June 26, 2018.²⁴ Notably, the class excluded parents with criminal history or communicable diseases.²⁵ Following a chaotic and traumatic reunification process in July, many but not all children were reunited with their parents.²⁶

In two post-mortem investigations, the DHS Office of Inspector General found that “DHS was not fully prepared to implement the Zero Tolerance Policy, or to deal with the certain effects of the policy following implementation...[] children [were] separated under the policy for long periods in facilities intended solely for short-term detention... and [DHS failed to] reliably track separated parents and children.”²⁷ Months later, the Inspector General of the Department of Health and Human Services (HHS) concluded that “[t]he total number and current status of all children separated from their parents or guardians by DHS and referred to ORR’s care is unknown,” and that there is “even less visibility for separated children who fall outside the [Ms. L] court case.”²⁸ The Inspector General further noted that

“efforts to identify and assess more recent separations may be hampered by incomplete information,” and encouraged “efforts to improve communication, transparency, and accountability for the identification, care, and placement of separated children.”²⁹

The following findings shine a bright light into family separations following the purported end to the cruel and inhumane practice, which has been found to constitute torture.³⁰

“We can easily forgive a child who is afraid of the dark; the real tragedy of life is when men are afraid of the light.” - Plato

III. FINDINGS

Methodology

Since May 2018, the Texas Civil Rights Project has conducted ongoing monitoring of zero tolerance prosecutions at the United States District Court in McAllen, Texas.³¹ This report provides first-hand information into the monitoring activities conducted by TCRP from June 22, 2018³² through December 17, 2018. These activities include interviews with adult migrants and asylum-seekers prior to the criminal prosecution of alleged violations under 8 USC §1325(a) illegal entry (misdemeanor crimes) and 8 USC §1326 illegal reentry (felony crimes). Most commonly, the courts hold morning and afternoon “zero tolerance” hearings that require TCRP interview screenings twice daily. Since May 2018, the number of defendants in each zero tolerance hearing have ranged from a few dozen to over one hundred individuals per proceeding.

Prior to the start of the zero tolerance hearing before a United States Magistrate Judge,³³ TCRP attorneys and staff ask the group of defendants if any of them have been separated from a minor child when crossing the border. If a defendant raises his or her hand, the TCRP attorney or professional will conduct a brief interview with the individual to determine the relationship to the minor, name, age, date of birth, medical conditions of the minor, and if the government official provided any explanation for the separation.³⁴ TCRP also secures information from the defendant including name, country of origin, date of birth, removal history and criminal history, if any, and contact information for any family or friends in the United States or home country. This information has proven critical in order to assess the facts regarding each instance of family separation, and the ability to locate the individual following the completion of the illegal entry proceeding.

Since the Executive Order purportedly ended the family separation policy and practice, TCRP has continued investigating and representing families whose separation violates the Executive Order and/or the nationwide injunction issued in *Ms. L vs. ICE*. In addition, for non-parental family separations,³⁵ TCRP makes courtesy calls to family members in the United States to ensure they understand the process to sponsor the child or children who are being held in a government shelter. TCRP also attempts to secure representation for the adult in immigration proceedings in the event of long-term detention. In some cases, no family member in the United States knows the whereabouts of the child and TCRP helps locate the child in government custody. In other cases, there is no family member or friend in the United States, and TCRP investigates the case for family reunification in country of origin or locates the minor’s attorney to assist with alternative options in the event that he or she has deemed reunification is not in the best interest of the child.

Based on the information available at the time of publication of this report, TCRP may be the only non-governmental organization in the United States monitoring illegal entry prosecutions to identify instances of family separations and assist with reunifications. The findings below are limited to information that has been secured through the interviews with the clients, who were interviewed prior to the commencement of the illegal entry hearing at the federal courthouse in McAllen, Texas.

Findings

By the Numbers

During the approximately six month reporting period, TCRP screened an estimated 9,804 adults prosecuted for illegal entry under 8 USC §1325(a) and 492 adults prosecuted for illegal reentry under 8 USC §1326.³⁶ Of these prosecutions, the vast majority of the defendants were from the Northern Triangle in Central America (Guatemala, Honduras, and El Salvador).

During the six month period following the purported “end” of the family separation practice, TCRP screened 272 instances³⁷ of family separations in the following categories:

Parent-Child Separations	Legal Guardian or Step Parent	Siblings	Cousins	Grandparents	Uncles/Aunts	Mixed Legal Status	Non-Familial
34	4	107	28	22	62	1	14

Parents and Legal Guardians Separated from Children

About the children

Of the 38 separations of parents or legal guardians from their children:



Reunification status

TCRP tracks family reunification through phone calls to the separated family members or other relatives in the United States and home countries.



Parents Removal Status

TCRP has confirmed 6 parents have been removed from the United States.

- 3** cases the child has been released to a sponsor in the U.S.
- 2** cases the child remains in ORR custody
- 1** case child turned 18 and later removed to home country

Criminal History

Of the 38 parents and legal guardians forcibly separated from their children, a majority of the parents were fathers traveling with young children.³⁹ TCRP also determined through the interview process that 22 of the 38 parents/legal guardians had a prior criminal conviction in the United States. As such, the parents were typically “ineligible” for family reunification under the parameters established in the *Ms. L* class action.^{40 41} Moreover, the government has held a long-time policy of separating families under the TVPRA when it determines that the separation

is in the child’s best interest.⁴² Even during the height of the family separation crisis, the *Ms. L* class membership excluded parents with criminal history.⁴³ For the most part, the types of crimes included misdemeanors such as driving under the influence and possession of a controlled substance. In at least one case, there was a more serious violent conviction of rape.⁴⁴ Although the information is readily available, DHS does not always report this data to ORR. Moreover, “ORR officials and staff noted that from a child welfare perspective, not all criminal history rises to a level that would preclude a child from being placed with his or her parent.”⁴⁵

Mr. V

Mr. V was separated from his 7 year old son under the false promise that his son would still be at the CBP processing center upon his return from the illegal entry hearing.⁴⁶ During a screening interview with the father, a TCRP attorney informed Mr. V that his son might be transferred to a government shelter. In assessing the possible reason for separation, TCRP confirmed that Mr. V had been convicted of misdemeanor battery in Louisiana ten years ago. The father explained several people were arrested outside a home when a dispute between two families occurred in his neighborhood. Based on this conviction, TCRP advised that the government could take the position that the father was not eligible for reunification. The father broke down in tears, repeating that if he was deported, that he would want to be deported with his child. Mr. V was removed without his son approximately ten days later. Although Mr. V asked to be reunited with his son before getting on a plane to be removed to his home country, the officer refused his request. The officer told Mr. V that his son could be sent back home, but it had to be on a different plane—a plane for children. At no point did a government official require Mr. V to waive his rights to be removed without his child. At the time of this report, the child remains in government custody, and TCRP is currently advocating for the release of the child to his aunt in the United States.⁴⁷

Baseless Government Allegations of Criminal History

In at least two cases during the reporting period, the Department of Homeland Security separated parents from their children based on “suspicion” or “evidence” of criminal history or gang affiliation.

Mr. A

Mr. A was separated from his 11 year old girl and 9 year old boy on or around November 5, 2018. He fled El Salvador with his children due to violence and

threats of death by local gangs. He has been accused of being a gang member or having some criminal history that resulted in CBP separating him from his children. Following TCRP’s initial interview with Mr. A, TCRP lawyers conducted an investigation into his background. TCRP confirmed that he has no known criminal convictions in the United States or his home country of El Salvador, no tattoos indicating gang membership, and a long-time employer verified his good moral character. Mr. A had even presented some of this evidence to CBP when the agent accused him of being a gang member. Mr. A vehemently denies ever being affiliated with any gang or having any criminal history in El Salvador. As of the date of this report, TCRP and law firm partner Haynes & Boone have filed a motion for a temporary restraining order⁴⁸ in federal district court demanding the government provide an explanation for the separation and seeking relief with immediate reunification and a credible fear interview that comports with constitutional requirements. The father’s health is rapidly deteriorating due to this traumatic separation.

Mr. X⁴⁹

Mr. X was separated from his ten year old son on or about November 26, 2018. He fled Guatemala due to a violent and prolonged land dispute against indigenous peoples in North Central Guatemala. Mr. X and his child's primary language is Quiche, an indigenous language, and they had little understanding of Spanish upon their arrival to the U.S. Upon further investigation, TCRP confirmed that CBP separated the family due to a warrant for the father’s arrest in Guatemala. In collaboration with human rights defenders, former Peace Corps Volunteers and professors with connections to the region, TCRP discovered the arrest warrant was related to the local land dispute and serves as primary evidence in his claim for asylum. Mr. X contends that he is being persecuted by the government of Guatemala and other local actors on the basis of his indigenous heritage and political opinion. To date, both ICE and

ORR are utilizing a baseless, retaliatory arrest warrant in the home country as justification for continued detention of Mr. X and continued separation from his child. Mr. X remains in ICE custody and the child is held in a government shelter. Mr. X has had minimal opportunity to speak to his child, who is struggling in the government shelter due to his native language being Quiche.

Ms. Y



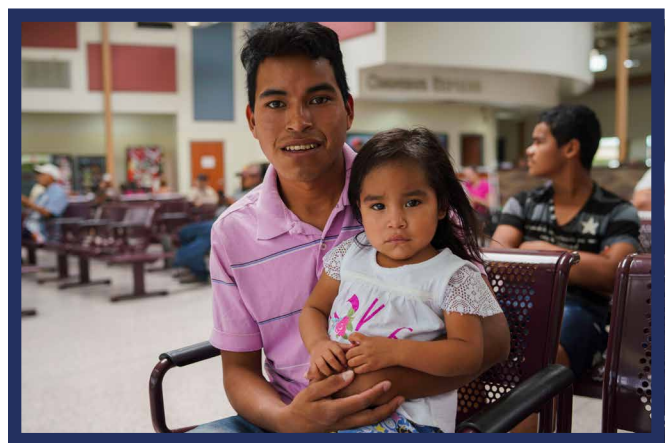
In a third case prior to the reporting period,⁵⁰ TCRP assisted with the reunification of a mother who fled sexual slavery in Honduras with her eleven year old daughter. In that matter, Immigration and Customs Enforcement (ICE) and the ORR utilized the mother’s statement that she had shot her captor non-fatally to escape sexual slavery as a reason for continued separation. The act of self-defense was a part of the mother’s claim for asylum, and she had given the voluntary statement in full compliance with questioning by an asylum officer during her credible fear interview. ICE used that statement to argue against releasing the mother on bond, and DHS further used that statement to find the mother was unfit to have her child released to her care. Through pro bono representation at her bond hearing, the Immigration Judge concluded the mother’s admission was insufficient to establish that she was a risk to society, and granted the mother bond. After release from ICE custody, TCRP in collaboration with Congressman Filemon Vela’s office advocated on the

mother’s behalf and provided written statements and explanations of the issue. The government eventually approved the release of the child to the mother after nearly four months of separation.

Language Barriers Cause Further Injustice

A majority of the families seeking protection at this area of the U.S.-Mexico border are from Central America. In Guatemala alone, over 60 percent of the population is indigenous, representing approximately 22 different indigenous peoples⁵¹ and dozens of indigenous languages and dialects. In relation to the rest of the country, 21 percent of indigenous peoples face extreme poverty in Guatemala, compared to 7.4 percent of the non-indigenous population.⁵² Moreover, indigenous peoples face challenges to political participation, extreme violence against women, and access to basic resources.⁵³ As a result of these push factors, TCRP screens many Guatemalan migrants and asylum-seekers of indigenous origin who have limited understanding of Spanish. The language barrier poses a specific challenge for these indigenous families, as fathers are sometimes accused of human trafficking.

Mr. Perez-Domingo



On or about July 5, 2018, Mr. Perez-Domingo, an indigenous Guatemalan whose primary language is Mam, was separated from his two year old daughter

after a CBP agent accused him of not being the biological father of the child. In interviews with Mr. Perez-Domingo, TCRP confirmed that he spoke very little Spanish and had limited understanding of what happened when the agent took his daughter away. Mr. Perez-Domingo had offered a copy of the birth certificate to the agent, who accused him of providing a fraudulent document. The agent pressured Mr. Perez-Domingo, repeating the leading question—“You’re not the father, right?” Confused and scared, Mr. Perez-Domingo agreed with the agent, not understanding what that meant for his family. At no time did the agent seek the assistance of a Mam translator to facilitate the critical interview. TCRP conducted an investigation into the matter, and confirmed with the Guatemalan consulate the authenticity of the birth certificate. TCRP found the young child had been transferred to a foster family in El Paso, Texas. After demanding immediate reunification,⁵⁴ TCRP engaged in negotiations with an officer of Homeland Security Investigations (HSI).⁵⁵ The officer stated that confirmation of parentage through DNA testing would be required in order to reunify the family. The officer further stated that if the DNA test concluded that Mr. Perez-Domingo was not the father, he could be charged with serious crimes of smuggling or trafficking. TCRP required DHS to secure a translator to receive the father’s consent to the DNA testing, and to provide consent for his daughter. After receiving his consent with the assistance of a translator, it took DHS over two weeks to figure out which contractor was authorized to conduct the DNA testing. There was little to no guidance about how to coordinate with ORR regarding DNA testing, which resulted in bureaucratic delays. Following positive results of the DNA test confirming parentage, DHS reunified the family on August 3, 2018. The lack of assistance of translators, in combination with aggressive questioning by the CBP agent, resulted in severe discrimination and traumatic consequences for this indigenous family. Had TCRP not interviewed this father early in the process, it is highly likely that Mr. Perez-Domingo

would have been deported without his daughter, and his child unlawfully orphaned in the United States.⁵⁶

Legal Guardians Face Significant Hurdles

Legal guardians and stepparents face significant challenges demonstrating legal custody over their children. Despite objections filed by two legal guardians represented by TCRP and King & Spalding in *Ms. L vs. ICE*, the court declined to specifically include legal guardians as class members. In at least five interviews during the reporting period, legal guardians and stepparents expressed frustration at government officials for failing to recognize the legal documentation they carry with them when they come to the United States.⁵⁷ These challenges contravene the Flores Settlement Agreement, which requires highly preferential treatment for legal guardians.⁵⁸

Ms. B.

Ms. B is a *de facto* parent and legal guardian separated from her daughter last June during the height of family separations. In separate litigation, the legal guardian seeks relief before in federal district court. Ms. B is the biological aunt of the child, and she sought legal custody due to the death of the sole-providing parent. As of the date of this report, Ms. B remains detained in ICE custody and separated from her child—in large part because the government refuses to treat legal guardians as parents to keep families together.

Troubling Concerns for U.S. Citizen Children

The U.S. government admits to continue separating families where the children are found to be U.S. citizens.⁵⁹ The government separates the families in part because DHS lacks the authority to “detain U.S. citizen children in these instances.”⁶⁰ In most instances, DHS will rely on the relevant child protective services agency to place the child with a relative in the United States. However, if no relatives are available and the parent remains detained or

deported, then the child likely ends up ensnared in the foster care system. In those cases, the harm to the parent amounts to de facto loss of parental rights. Moreover, even if a parent is released from immigration custody and reunified with the child, the state child protective services agency can continue taking punitive actions against the parent for child endangerment—even if the family fled their home country to seek protection in the United States.

Mr. Z

On or about August 27, 2018, Mr. Z was separated from his twelve year old U.S. citizen son after crossing the U.S.-Mexico border. Mr. Z and his family fled Honduras due to the return of a violent, criminal gang member who had violated his U.S. citizen son when he was a child. After the gang member's return, the family had been subjected to death threats and physical attacks by the gang member's associates. Upon investigation, TCRP made contact with Child Protective Services (CPS), the agency in charge of placing the child with a family member in the U.S. After several days, CPS was able to locate the biological mother who had entered the U.S. at a different time. The U.S. citizen son was released to the care of the biological mother. Unfortunately, Mr. Z remains in ICE custody and separated from his family. He continues to fight his removal from the U.S. based on relief under asylum, withholding of removal, and the Convention Against Torture. At the same time, CPS has taken action against the father, adding further complication and stress to an already tenuous situation for a family at risk of permanent separation.

Deported Parents

Of the 38 separated parents and legal guardians interviewed by TCRP during the reporting period, at least six are known to have been removed from the United States. Parents who have been removed from the United States without their children face severe challenges locating their children and navigating the

ORR system to be able to speak with their children. They also face significant challenges in securing a sponsor in the United States, particularly when the sponsor does not have lawful status, as DHS and HHS agreements put sponsors at risk for detention and removal by ICE.⁶¹ In addition, even if a sponsor is secured in the United States, ORR procedures are costly—charging sponsors and their families thousands of dollars to pay for transportation. As has also been widely reported, deported parents face great risk losing their parental rights permanently due to adoption in the U.S.⁶²

Reunification Challenges during Federal Criminal Custody

The implementation of the Administration's zero tolerance policy continues to rip families apart. Parents who are charged with illegal reentry under 8 USC §1326, a felony, face even greater hardship in locating and communicating with their children. The President created a loophole when issuing the Executive Order purportedly ending family separations. The Order instructs the Secretary of DHS to “maintain custody of alien families during the pendency of *any criminal improper entry* or immigration proceedings involving their family members.”⁶³ Since DHS does not have custody over the parent during pendency of the illegal reentry proceeding, the Administration maintains that a parent in U.S. Marshals custody does not have the right to be reunified with the child. While family separations are violations of federal and international laws, these separations particularly shock the conscience because parents and children are left in the dark to suffer while the criminal justice system claims no duty to keep the family informed, much less together.

Mr. C

Mr. C was separated from his five year old daughter by a CBP agent on December 20, 2018, after crossing into the United States. Mr. C is being charged with

8 USC §1326 illegal reentry—a felony charge which will likely result in several months of imprisonment in the U.S. Marshals custody. Partly because the father is not yet in DHS custody, ORR had not communicated with Mr. C regarding the location of his child. For six weeks, Mr. C had no idea why his daughter had been taken away, where she was being held, or if he would ever see her again. As a result, Mr. C suffered from severe anxiety and depression, crying constantly during consultations. It required TCRP intervention to locate the child in government custody. At that point, TCRP requested permission from the U.S. Marshals to facilitate a phone call with the child. Mr. C finally got to speak with his child after nearly two months of separation. At the time of this report, it is uncertain whether the U.S. Marshals and ORR will provide continued communication between the father and daughter.

Unknown Basis for Family Separation

At least ten parents interviewed by TCRP during the reporting period had no known criminal conviction in the United States or their country of origin. Of these ten cases, TCRP has verified that five children have been reunified with either the separated parent or the sponsor. One child is pending reunification with a

sponsor. At least two parents remain in immigration custody while seeking relief from removal while their children remain in government shelters. The status of two families is unknown at this time. Without further information from the government as to the basis for these separations, they appear to be clear violations of the Executive Order and Ms. L federal injunction.⁶⁴

Non-parental family separations

TCRP interviewed 234 non-parental/legal guardian family separations. The majority were siblings who traveled together due to violence and insecurity in their home countries. For many of these siblings, the adult sibling is under the age of 21 and traumatized by the separation. For grandparents traveling with their grandchildren, they are often the sole provider for the grandchildren. Aunts and uncles have similar relationships with their nieces and nephews, often taking the arduous journey with the child because the parents are either under threat of violence or have died due to violence in their home region. Once again, the Administration's zero tolerance policy continues to rip families apart without any recourse for families—and particularly for the children who may have lost the only caretaker and provider that the child has known.

IV. ANALYSIS

The Administration Bends Legal Authorities to Implement Broad Family Separation Policies in Support of Zero Tolerance Agenda

The common legal justification for family separations is found in the 2008 Trafficking Victims Reauthorization Act (TVPRA). That law requires the Secretaries of HHS and DHS to promulgate policies to “ensure that unaccompanied alien children in the United States are protected from traffickers and other persons seeking to victimize or otherwise engage such children in criminal, harmful, or exploitative activity.”⁶⁵ In addition, the TVPRA states unaccompanied minors “may not be placed with a person or entity unless the Secretary of Health and Human Services makes a determination that the proposed custodian is capable of providing for the child’s physical and mental well-being. Such determination shall, at a minimum, include verification of the custodian’s identity and relationship to the child, if any, as well as an independent finding that the individual has not engaged in any activity that would indicate a potential risk to the child.”⁶⁶ U.S. District Court Judge Dana Sabraw in the *Ms. L vs. ICE* litigation further provided a carve-out for the government, excluding parents with any criminal history from class membership. In addition, the court found that the DHS officials had discretion to determine “fitness” of a parent, within the definition of the class:

“Fitness” is an important factor in determining whether to separate parent from child. In the context of this case, and enforcement of criminal and immigration laws at the border, “fitness” could include a class member’s mental health, or *potential criminal involvement in matters other than “improper entry” under 8 U.S.C. § 1325(a)*, (see Executive Order § 1), among other matters. Fitness factors ordinarily would be *objective and clinical*, and would allow for the *proper* exercise of discretion by government officials.⁶⁷

The Administration has exploited the plain meaning of the TVPRA and abused Judge Sabraw’s judicial opinions to create a broad policy that results in continued family separations. A fact sheet from DHS confirms a broader policy, including family separations in the following instances:

- 1) when DHS is unable to determine the familial relationship,
- 2) when DHS determines that a child may be at risk with the parent or legal guardian, and
- 3) when the parent or legal guardian is referred for criminal prosecution.⁶⁸

Former Obama Administration officials have conceded that some family separations may have occurred, but not as a result of a specific policy set by the administration.⁶⁹ DHS has not rescinded the fact sheet cited above, despite the Executive Order requiring the maintenance of family units during pendency of criminal illegal entry or immigration proceedings. TCRP meetings with CBP officials confirm that family separations continue to occur if the agent is unable to verify parentage or there is some arbitrary “suspicion” of criminal history. Once CBP separates a family, the minor is referred to ICE, which coordinates with HHS to designate the child as an “unaccompanied minor.” Pursuant to the TVPRA regulations, DHS is required to transfer the minor to HHS custody within 72 hours.⁷⁰ These aggressive policies promulgated by DHS undermine the spirit of the TVPRA and contort the critical language in Judge Sabraw’s decisions in *Ms. L vs. ICE*. As a result, erroneous and oftentimes irreparable family separations continue to occur.

DHS' Broad Family Separation Policies Lead to *De-Facto* Loss of Parental Rights Without Due Process Under the Law.

The Supreme Court has established procedural safeguards to protect the constitutional rights of parents, which the Court has long considered to be fundamental rights. In terms of the burden of proof on a State, “the Due Process Clause of the Fourteenth Amendment demands . . . [that] [b]efore a State may sever completely and irrevocably the rights of parents in their natural child . . . the State [must] support its allegations [of parental unfitness] by at least clear and convincing evidence.”^{71 72} Moreover, in one of its earliest decisions, the Supreme Court held that “all . . . parents are constitutionally entitled to a hearing on their fitness before their children are removed from their custody.”⁷³ A parent’s rights can be terminated only when there has been a finding the parent is unfit, and only then can the State turn to the best interest of the child.⁷⁴ State laws define fitness.

In Texas, the existence of criminal history and prior deportation of a parent is legally insufficient to support termination of parental rights:

A court cannot terminate a person’s parental rights unless the State proves by clear and convincing evidence that the parent engaged in certain proscribed conduct, as specified in the Family Code, and that termination is in the best interest of the children. In this case, an immigrant convicted in another state of unlawful conduct with a minor and given a probated sentence years before his children were born was later deported to Mexico. The State relied on these facts in petitioning to terminate this father’s

parental rights, yet put on no evidence concerning the offense committed years earlier, nor the circumstances of his deportation. We are asked to determine whether legally sufficient evidence supports termination of this father’s parental rights under these facts. We conclude the evidence is legally insufficient and, accordingly, reverse the court of appeals’ judgment in part and remand the case to the trial court.⁷⁵

When a parent or legal guardian separated from a child is removed from the United States, a *de facto* loss of parental rights occurs without due process. As reported above, of the 38 parent/legal guardian separations, at least six parents are known to have been removed from the United States—all without their children. In the case of Mr. Perez-Domingo, Mr. A, Mr. X, and several other cases investigated by TCRP, DHS has failed to even closely meet the legal standards to make a determination of fitness under federal or state law. In many cases, it is extremely difficult and time-consuming—and in some cases impossible—to reunite that parent and child. In those instances, DHS is violating federal and state laws requiring a fair hearing, a finding of unfitness by clear and convincing evidence, and a determination of the best interest of the child *before* removing a parent. Instead, a CBP agent’s “suspicion” of fraud or criminal history, or a ten-year-old misdemeanor battery conviction, results in a parent being removed, potentially never to see their child again. The lack of due process in these situations is a clear contravention of our laws.

V. KEY RECOMMENDATIONS TO CONGRESS AND THE EXECUTIVE BRANCH

- End zero tolerance policy of prosecuting all asylum seekers and migrants for illegal entry under 8 USC § 1325(a).
- Immediately reunify all families and end family separations, including separations of non-parental families, except where a clear finding of unfitness and best interest of the child is established under concrete, transparent procedures that comport with due process rights under the Fourteenth Amendment.
- Require the Department of Homeland Security (DHS) to share criminal history about a parent with the Health and Human Services Department's Office of Refugee Resettlement (ORR).
- Provide access to independent counsel for parents accused of alleged criminal history, gang affiliation, or where there is a question that the individual is the biological parent *prior to* the separation of a family unit.
- Mandate DHS use interpreters during processing and questioning including for non-native Spanish speakers who speak an indigenous language.
- Establish flexible, clear procedures to prevent obstacles for legal guardians to establish custody over the child.
- Mandate release on parole for undocumented parents or legal guardians with U.S. citizen children who are apprehended by DHS.
- Immediately halt removal of parents who have been separated from their children until ORR makes a finding of fitness and best interest of the child *prior to* the removal of the parent.
- Require the DHS or the Department of Justice (DOJ), through Congressional oversight, to provide the U.S. Judiciary, U.S. Federal Public Defenders, and non-profit organizations serving migrant populations on the southwest border a detailed account of any family separations that occur as a result of the implementation of the zero tolerance policy.
- Convene combined House Oversight Committee Hearings with Administration officials in the Department of Homeland Security and the Department of Justice to analyze the legality, implementation, and effects of the zero tolerance policy.

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This report would not be possible without the TCRP lawyers and staff on the border continuing the daily work monitoring family separations, assisting with family reunifications, and helping highlight these human rights violations:

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Laura Peña, Senior Visiting Attorney
Karla Vargas, Senior Attorney
Ricky Garza, Staff Attorney
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¹ Scoboroff, Jacob and Romero, Dennis (February 2, 2019). *Finding all migrant children separated from parents may be impossible, feds say*. NBC News. Retrieved from <https://www.nbcnews.com/news/us-news/finding-all-migrant-children-separated-their-families-may-be-impossible-n966266>

² The authors do not use the term torture lightly. In an October 2018 report, Amnesty International analyzed and concluded that family separations met the definition of torture noting, “[t]aken together, the *de facto* policy and practice of family separations by the Trump administration were clearly (1) intentional; (2) carried out and condoned by government officials; and (3) carried out for the specific purposes to deter asylum-seeking families from seeking protection in the United States, or to coerce those who already had sought asylum into giving up their claims [and (4)] inflicted severe pain and suffering, particularly mental pain and suffering, with an apparently negative impact on physical health in some cases.” See USA: Catastrophic immigration policies resulted in more family separations than previously disclosed. (2018, October 11). Retrieved from <https://www.amnesty.org/en/latest/news/2018/10/usa-treatment-of-asylum-seekers-southern-border/> See also Emergency Request for Precautionary Measures Pursuant to Article 25 Rules of Procedure of the Inter-American Commission on Human Rights on Behalf of Parents Systematically Separated from Their Children at the United States-Mexico Border. (May 31, 2018) Retrieved from https://texascivilrightsproject.org/wp-content/uploads/2018/05/20180531-Emergency-Request-For-Precautionary-Measures_Redacted.pdf

³ This separation occurred after the reporting period in January 2019.

⁴ This separation occurred prior to the reporting period in June 2018. It is included to highlight common practices of using victim statements against them to prevent reunification.

⁵ This separation occurred prior to the reporting period in June 2018. It is included to highlight the challenge legal guardians face to establish the relationship with the child.

⁶ Texas Civil Rights Project. (2018, May 31). *Civil & Human Rights Groups File Emergency Request to Inter-American Commission on Human Rights to Stop Family Separations, Reunite Families* [Press release]. Retrieved from <https://texascivilrightsproject.org/civil-rights-groups-family-separations/>

⁷ TCRP would like to thank the hundreds of pro bono lawyers who stand with us and continue to assist in representing families torn apart during this ongoing crisis. The following law firms have gone above and beyond in their efforts: Arnold & Porter, Haynes and Boone, King & Spalding, Gibson, Dunn & Crutcher, Ropes & Gray, and Williams & Connolly. We also thank the numerous immigration practitioners and lawyers who have offered their time to help mentor our law firm partners.

⁸ TCRP would like to thank Federal Public Defender of the Southern District of Texas, Marjorie Meyers, Branch Chief Miguel “Andy” Noguera, Senior Litigation Counsel Azalea Alemán, and all the attorneys, investigators, and staff in the McAllen Federal Public Defenders office for their continued partnership to advocate in the best interest of the families traumatized by separation. These families would be lost in the system without this critical partnership, and this report would not be possible without their continued, committed collaboration.

⁹ Exec. Order No. 13841, 83 C.F.R. 29435-29436 (2018).

¹⁰ Sands, G. (2018, December 6). 81 children separated at border since Trump’s executive order on dividing families. Retrieved from <https://www.cnn.com/2018/12/06/politics/immigrant-family-separations-children-border-undocumented/index.html> At the time of the report, the statement was no longer available on the DHS website.

¹¹ *Id.*

¹² *Id.*

¹³ Previous disclosures of family separations by CBP to Amnesty International indicated approximately 6,000 separations of family units from April to August 2018, although a DHS official later disavowed the number without further explanation. See USA: Catastrophic immigration policies resulted in more family separations than previously disclosed. (2018, October 11). Retrieved from <https://www.amnesty.org/en/latest/news/2018/10/usa-treatment-of-asylum-seekers-southern-border/> and Devereaux, R., Speri, A., & Currier, C. The Trump Administration Carried Out Thousands More Family Separations than Previously Acknowledged. (2018, October 11). Retrieved from <https://theintercept.com/2018/10/11/trump-family-separation-immigration/>

- ¹⁴ See “Zero Tolerance at the Border: Rhetoric vs. Reality.” (2018, July 24). Retrieved from <https://trac.syr.edu/immigration/reports/520/>.
- ¹⁵ Sacchetti, M. (2018, April 26). Top Homeland Security officials urge criminal prosecution of parents crossing border with children. *The Washington Post*, Retrieved from https://www.washingtonpost.com/local/immigration/top-homeland-security-officials-urge-criminal-prosecution-of-parents-who-cross-border-with-children/2018/04/26/a0bdcee0-4964-11e8-8b5a-3b1697adcc2a_story.html?noredirect=on&utm_term=.9093c91ac439
- ¹⁶ U.S. Department of Homeland Security. (2017, December 16) *Policy Options to Respond to Border Surge of Illegal Immigration*. Retrieved January 17, 2019, from <https://www.documentcloud.org/documents/5688664-Merkleydocs2.html#document/p2>
- ¹⁷ *Id.*
- ¹⁸ *Id.*
- ¹⁹ *Id.* at 2.
- ²⁰ *Id.* at 3.
- ²¹ The United States Department of Justice, Office of Public Affairs. (2018, April 6). *Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry* [Press release]. Retrieved from <https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry>
- ²² “At its core, the Trump administration’s ‘zero-tolerance’ policy was intended to cause severe mental anguish for asylum-seeking families - first through family separations, and then through the indefinite detention of divided family members.” USA: “You Don’t Have Any Rights Here” (2018, October 18). Retrieved from <https://www.amnesty.org/en/latest/research/2018/10/usa-treatment-of-asylum-seekers-southern-border/>
- ²³ Exec. Order No. 13841, 83 C.F.R. 29435-29436 (2018).
- ²⁴ *L. v. United States Immigration & Customs Enf’t (“ICE”)*, 310 F. Supp. 3d 1133 (S.D. Cal. 2018).
- ²⁵ *Id.*
- ²⁶ Pettersson, E., Maki, S. & Hurtado, P. (2018, July 6). Judge Not Ready to Delay Reunification of Immigrant Children. *Bloomberg*, Retrieved from <https://www.bloomberg.com/news/articles/2018-07-06/u-s-seeking-to-delay-reuniting-immigrant-children-with-parents>
- ²⁷ U.S. Department of Homeland Security. (2018). *Special Review - Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy* (Report No. OIG-18-84). Retrieved from <https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-84-Sep18.pdf> at 4.
- ²⁸ U.S. Department of Health & Human Services. (2019). *Separated Children Placed in Office of Refugee Resettlement Care* (Report No. OEI-BL-18-00511). Retrieved from <https://oig.hhs.gov/oei/reports/oei-BL-18-00511.pdf> at 13.
- ²⁹ *Id.*
- ³⁰ See USA: Catastrophic immigration policies resulted in more family separations than previously disclosed. (2018, October 11). Retrieved from <https://www.amnesty.org/en/latest/news/2018/10/usa-treatment-of-asylum-seekers-southern-border/>
- ³¹ In November 2018, the Texas Civil Rights Project honored the Federal Public Defenders with the 2018 Cristy Couvillon Pro Bono award for their commitment to their clients in helping them find their children.
- ³² Exec. Order No. 13841, 83 C.F.R. 29435-29436 (2018).
- ³³ NPR reporter Julia Preston described a zero tolerance prosecution hearing in McAllen, Texas: “Picture a federal courtroom. The defendants sit with their lawyers at one table, the prosecutors on the other side, the judge up front. The McAllen courtroom [zero tolerance proceeding] was a stunningly different site. Five rows of wooden benches, usually meant for visitors, were packed with defendants, squeezed in shoulder to shoulder. 74 of them...they’re shackled at the ankles and chained around the waist. They all had one hand that was cuffed tightly to the waist chain and just one hand free.” Glass, I. (Host). (2018, September 14). Let Me Count the Ways [Radio program]. *This American Life*. Washington, DC: National Public Radio. <https://www.thisamericanlife.org/656/transcript>

³⁴ The Texas Civil Rights Project receives consent from the individual to share the sensitive information with an immigration attorney, if necessary, and secures government privacy waivers, publicity waivers, and attorney representation documentation when necessary.

³⁵ Non-parental family separations include stepparents, legal guardians, siblings, grandparents, aunts, uncles, cousins and in some instances caretakers.

³⁶ The numbers of prosecutions are solely estimates based on TCRP screenings and do not reflect actual government numbers of prosecutions. However, TCRP believes the number is low because according to government records secured by Transactional Records Access Clearinghouse at Syracuse University, there were 4,561 prosecutions filed in the Southern District of Texas with 8 USC §1325 as a lead charge in Fiscal Year 2019 (October - November).

³⁷ This number reflects the instances of family separations. The actual number of children separated from their family members is higher, as some families travel with more than one minor under the age of 18.

³⁸ The mother of the infant remains in prison. The whereabouts of the child are unknown at this time.

³⁹ Of the 38 parents or legal guardians, 33 were fathers or male legal guardians. TCRP interviews with DHS officials indicate that border agents target men due to suspicion of human trafficking or smuggling of undocumented children. DHS Secretary Nielsen and Administration officials have also pointed to an increase of smugglers fraudulently using children as “bait” to “get out of jail free.” However, DHS reported family fraud in only 0.6 percent of the 31,000 families apprehended in the first five months of the 2018 fiscal year, debunking the exaggerated excuse in support of family separations. See Qiu, L. (2018, June 18). Kirstjen Nielsen Justifies Family Separation by Pointing to Increase in Fraud. But the Data Is Very Limited. *The New York Times*, Retrieved from <https://www.nytimes.com/2018/06/18/us/politics/nielsen-family-separation-factcheck.html?action=click&module=inline&pgtype=Homepage>

⁴⁰ *Ms. L. v. United States Immigration & Customs Enf't (“ICE”)*, 310 F. Supp. 3d 1133 (S.D. Cal. 2018).

⁴¹ Our legal advocacy leads us to conclude that government officials and contractors may also be utilizing the zero tolerance prosecution as “criminal history” establishing a parent is unfit for the child. In one phone call with a case worker at a government shelter, TCRP attorney suggested that the minor crime of battery ten years ago failed to constitute a justification for separating a father from his five year old daughter. In response, the case worker said, “Well, that is not the only crime that the father has committed. He also crossed illegally, so really there are two crimes.”

⁴² William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (2008). Notably, there is no child protection agency involved in this purported parental fitness or best-interest-of-the-child determination. Rather, the determination is made in the sole discretion of the Customs and Border Protection agent(s) involved in apprehending and processing the adult and child.

⁴³ Order Granting Plaintiffs’ Motion for Classwide Preliminary Injunction, *Ms. L. v. United States Immigration & Customs Enf't (“ICE”)*, 310 F. Supp. 3d 1133 (S.D. Cal. 2018).

⁴⁴ The following are the criminal convictions for the separated parents and legal guardians: Single Driving Under the Influence (DUI) Conviction (3), Multiple DUIs or Possession of Controlled Substances (2), Assault Causing Bodily Injury (2), Possession of Controlled Substance (4), Infliction of Corporal Injury on Spouse (1), Domestic Assault (1), Assault with a Deadly Weapon Not Firearm (2), Assault on a Female (1), Rape - 2nd Degree (1), Identity Theft (1), Larceny (1), Sexual Battery (1), Hit & Run (1), and Driving Recklessly (1).

⁴⁵ U.S. Department of Health & Human Services. (2019). *Separated Children Placed in Office of Refugee Resettlement Care* (Report No. OEI-BL-18-00511). Retrieved from <https://oig.hhs.gov/oei/reports/oei-BL-18-00511.pdf> at 12.

⁴⁶ TCRP interviewed this separated father in January 2019, outside the reporting period, but the case provides the most recent example of a family separation based on minor criminal history.

⁴⁷ As part of the sponsorship process, ORR required Mr. V to sign a designation letter to authorize the release of the child to the aunt in the United States. Mr. V was not afforded this opportunity while still present in the United States. Moreover, the sponsor is a single mother with two children who is unable to pay the approximately \$2,000 for transportation of the minor.

⁴⁸ Plaintiff's Emergency Motion for Temporary Restraining Order and Preliminary Injunction, *A. v. ICE*, No. 4 (D.D.C. Jan. 3, 2019).

⁴⁹ Mr. X was referred to TCRP through former Peace Corps volunteers who have remained active in Guatemala. As such, TCRP interviewed Mr. X after his criminal prosecution hearing.

⁵⁰ The family was separated in early June 2018 during the height of the family separation policy. TCRP mentions this case because flimsy government allegations, including allegations that closely relate to the reason the family is fleeing persecution, are often used to cause more harm to the asylum seeking family.

⁵¹ World Directory of Minorities and Indigenous Peoples: Guatemala. (2018, January). Retrieved from <https://minorityrights.org/country/guatemala/>

⁵² Indigenous peoples in Guatemala. Retrieved from <https://www.iwgia.org/en/guatemala>

⁵³ *Id.*

⁵⁴ Texas Civil Rights Project. (2018, May 31). *Texas Civil Rights Project Reveals Government's Violation of Family Separation Injunction* [Press release]. Retrieved from <https://texascivilrightsproject.org/statement-texas-civil-rights-project-reveals-governments-violation-of-family-separation-injunction/>

⁵⁵ CBP issued a response letter to TCRP, confirming that Mr. Perez-Domingo had stated he was the father of the child and later recanted that statement. The letter further noted that when CBP "contacted the individual Mr. Perez-Domingo identified as the child's mother, that individual had trouble answering basic information biographical questions about the child, including the child's full name or date of birth." No translators were utilized throughout the CBP's investigative process.

⁵⁶ TCRP has filed a civil rights complaint with DHS regarding the discriminatory treatment and lack of language assistance for this indigenous family who was in CBP custody.

⁵⁷ In some cases, legal guardians have a "carta de poder," a legal document that recognizes a parent has provided authority to the individual to take custody over the minor. Although not legal guardianship, these parents are expressly provided authorization to care for the child.

⁵⁸ In order of preference, unaccompanied minors should be released to a parent, a legal guardian, an adult relative (defined as a sibling, aunt, uncle, or grandparent), an individual or entity designated by the parent or guardian as capable and willing to care for the minor's wellbeing, a licensed program willing to accept custody, and finally any adult or entity seeking custody "when it appears that there is no other likely alternative to long[-]term detention and family reunification does not appear to be a realistic possibility." Flores Agreement ¶ 14. *Flores Settlement Agreement* (Reno v. Flores, 507 U.S. 292, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993)).

⁵⁹ See Guerrero, J. (2018, September 28). U.S. Still Separating Families at Border When Children Are U.S. Citizens. *KPBS*, Retrieved from <https://www.kqed.org/news/11695281/u-s-still-separating-families-at-border-when-children-are-u-s-citizens>

⁶⁰ *Id.*

⁶¹ *J.E.C.M. v. Lloyd*, No. 1:18-cv-00903, 2018 WL 6004672 (E.D. Va. Nov. 15, 2018).

⁶² See The Associated Press. (2018, October 9). Deported Parents May Lose Kids to Adoption, Investigation Finds. Retrieved from <https://www.nbcnews.com/news/latino/deported-parents-may-lose-kids-adoption-investigation-finds-n918261>

⁶³ Emphasis added. Exec. Order No. 13841, 83 C.F.R. 29435-29436 (2018).

⁶⁴ *L. v. United States Immigration & Customs Enf't ("ICE")*, 310 F. Supp. 3d 1133, 1149-1150 (S.D. Cal. 2018).

⁶⁵ William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (2008).

⁶⁶ 8 U.S.C. § 1232(c)(3)(A) (2018).

⁶⁷ *L. v. United States Immigration & Customs Enf't ("ICE")*, 310 F. Supp. 3d 1133 (S.D. Cal. 2018).

⁶⁸ See U.S. Department of Homeland Security. (2018, June 18). *Myth vs. Fact: DHS Zero-Tolerance Policy*. Retrieved (February 2, 2019) from <https://www.dhs.gov/news/2018/06/18/myth-vs-fact-dhs-zero-tolerance-policy>. At the time of issuance of the fact sheet, the Administration was also implementing the family separation policy which President Trump attempted to end in his Executive Order.

⁶⁹ See NPR interview with former DHS Secretary Jeh Johnson, stating "I can't say that it never happened. There may have been some exigent situation, some emergency. There may have been some doubt about whether the adult accompanying the child was in fact the parent of the child. I can't say it never happened but not as a matter of policy or practice. It's not something that I could ask our Border Patrol or our immigration enforcement personnel to do." Simon, S. (Host). (2018, June 9). Jeh Johnson On Immigration And Trump [Radio program]. *Weekend Edition Saturday*. Washington, D.C.: National Public Radio. <https://www.npr.org/2018/06/09/618496706/jeh-johnson-on-immigration-and-trump>

⁷⁰ Except in the case of exceptional circumstances, any department or agency of the Federal Government that has an unaccompanied alien child in custody shall transfer the custody of such child to the Secretary of Health and Human Services not later than 72 hours after determining that such child is an unaccompanied alien child. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (2008). Retrieved from <https://www.congress.gov/110/plaws/publ457/PLAW-110publ457.pdf> at 35.

⁷¹ *Santosky v. Kramer*, 455 U.S. 747, 747-48 (1982).

⁷² Undocumented immigrants are entitled to protections under the Fourteenth Amendment of the U.S. Constitution. "Whatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the . . . Fourteenth Amendment[]." *Plyler v. Doe*, 457 U.S. 202, 210 (1982).

⁷³ *Stanley v. Illinois*, 405 U.S. 645, 658 (1972).

⁷⁴ *Id.*

⁷⁵ *In re E.N.C.*, 384 S.W.3d 796, 798 (Tex. 2012).