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The Honorable Jeff Sessions
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

The Honorable Kirstjen Nielsen
Secretary
U.S. Department of Homeland Security
3801 Nebraska Avenue, N.W.
Washington, D.C. 20528

Dear Attorney General Sessions and Secretary Nielsen:

On behalf of the American Bar Association and its more than 400,000 members, I write to express our strong opposition to recent actions by the Department of Justice and the Department of Homeland Security that have resulted in a drastic increase in the separation of children from their parents when arriving at the southern border.

While separation of parents and children has taken place on an incidental basis in the past, it has never been applied uniformly as a strategy to deter migration. Reports had indicated that nearly 700 children – more than 100 of them under the age of four – were separated from adults between October 2017 and April 2018. (“Hundreds of Immigrant Children Have Been Taken from Parents at U.S. Border,” NY Times, April 20, 2018, *available at* <https://www.nytimes.com/2018/04/20/us/immigrant-children-separation-ice.html>.) In the wake of the implementation of the “zero tolerance” policy, requiring referral for criminal prosecution all those apprehended crossing the border between ports of entry, these numbers increased exponentially. Deputy Chief Richard Hudson of the U.S. Border Patrol testified at a recent hearing that, between May 6 and May 19, 2018, 638 parents were separated from 658 children to allow for the prosecution of the adult parents. We are aware of reports from the field that many hundreds more have been separated in recent weeks.

It is apparent from the public comments of several high-ranking Administration officials that a primary purpose of the “zero tolerance” policy is to serve as a deterrent for migrant parents who enter the United States without authorization accompanied by their children. These statements make clear that family separation is not a collateral consequence of regular law enforcement under this policy; it is an explicitly intentional goal. Although the Supreme Court has never addressed a case involving the exact facts presented by the current practice of family separation, existing law suggests the policy violates rights to family integrity and due process. Moreover, the policy appears particularly unfair, inhumane, and, in the end, ineffective.

Intentional interference with parental rights. A long line of Supreme Court precedent underscores the fundamental relationship between children and their parents and makes clear that *intentional* government intrusion into this relationship is only permissible in very limited circumstances. In *Troxel v. Granville*, the Supreme Court cited nearly 80 years of precedent and

described parents' rights "in the care, custody, and control of their children" to be "perhaps the oldest of the fundamental liberty interests recognized by this Court." 530 U.S. 57, 66 (2000). The Court has explained that government action may only *intentionally* infringe on this liberty interest when necessary for the child's welfare and safety. Even in those circumstances, government action is limited, and the parent is constitutionally entitled to a hearing on her fitness before her child is taken from her custody. *Stanley v. Illinois*, 405 U.S. 645 (1972). These federal constitutional rights and protections have been applied equally to immigrant and citizen parents in child welfare cases. *See, e.g., In re Doe*, 281 P.3d 95 (Idaho 2012); *In re E.N.C.*, 384 S.W.3d 796 (Tex. 2010); and *In re Interest of Angelica L.*, 767 N.W.2d 74 (Neb. 2009).

Enforcement actions cannot be used as justification to affect intentional family separation.

The U.S. Court of Appeals for the First Circuit concluded in 2007 that Immigration and Customs Enforcement (ICE) officers had not interfered with parental rights when they arrested parents during a workplace raid and, as a collateral consequence, caused their separation from their children. *Aguilar v. U.S. Immig. and Customs Enforcement*, 510 F.3d 1 (1st Cir. 2007). As the court explained, "every lawful arrest of a parent[] runs the risk of interfering in some way with the parent's ability to care for his or her children," and parents subject to immigration enforcement actions are no different than those subject to criminal enforcement. The court's decision, however, hinged on the fact that ICE had not deliberately sought to interfere with the parents' rights, and any separation that occurred was merely incidental to the enforcement action.

By contrast, the court explained that a violation of the right to family integrity *could* be found in government conduct that intends to interfere with rights to family integrity in some way. Indeed, the First Circuit went so far as to state that "it is easy to imagine how viable claims might lie" if by government action "a substantial number of young children [were] knowingly placed in harm's way." In a decision last week in the Southern District of California, a federal judge relied on exactly that statement to identify a constitutional concern with the way the government's family separation policy is playing out at the border today. *Ms. L. v. ICE*, No.18-cv-0428 (June 6, 2018). We share those concerns.

Separating families is detrimental to children's well-being, burdens the immigration court process, and increases costs to the government.

Aside from the potential legal issues, separation of families is unwise from a policy perspective. Intentionally rendering children unaccompanied has negative consequences to the children and parents, as well as to the adjudication system. Separating a child from a parent is traumatic for both parties, and this practice has been proven to be detrimental to the well-being of children. Medical professionals, including the American Academy of Pediatrics, have condemned the practice of family separation, explaining that "[f]ear and stress, particularly prolonged exposure to serious stress without the buffering protection afforded by stable, responsible relationship . . . can harm the developing brain and harm short-and long-term health." (Letter from Colleen A. Kraft, MD, FAAP, President of the American Academy of Pediatrics, March 1, 2018, [available at https://downloads.aap.org/DOFA/AAP%20Letter%20to%20DHS%20Secretary%2003-01-18.pdf](https://downloads.aap.org/DOFA/AAP%20Letter%20to%20DHS%20Secretary%2003-01-18.pdf)).

Once children are taken from their parents, they are designated as unaccompanied, requiring that they be placed in the custody of the Office of Refugee Resettlement, which must provide a wide array of services related to their care. Children who are rendered unaccompanied also are placed

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in separate removal proceedings before an immigration judge. (8 U.S.C. § 1229a.) Family separation thus transforms a single case into multiple immigration court cases. Children proceeding in court alone often will not be competent to present their claims for relief or have access to vital evidence held by their parents. This necessitates additional time and attention by the immigration judge, causing increased inefficiencies in the already significantly backlogged immigration courts.

We recognize that these are challenging issues and that immigration involving children is, in general, a complicated matter with no easy solutions. We confidently believe, however, that the present approach will create greater problems than it alleviates. While the Supreme Court has never addressed the legality of an intentional family separation policy, dealing with family immigration is not new for this Administration or any other. *See, e.g., R.I.L.-R v. Johnson*, 80 F. Supp. 3d 164 (D.D.C. 2015) (enjoining the Obama Administration's policy of deterring family immigration through civil detention). In 1993 Justice Scalia in *Reno v. Flores* (507 U.S. 292) explained that ensuring that minors will be cared for during the pendency of removal proceedings is "easily done when the juvenile's parents have also been detained and the family can be released together." Invoking Justice Scalia's reasoning, we ask the question now: Why are we rejecting the easy path in favor of the more difficult one?

It is an especially baffling question given that experience has shown that punitive measures are not likely to deter desperate parents from seeking protection for their children. As you know, most of this population comes from three countries – El Salvador, Guatemala, and Honduras – that are among the most dangerous in the world. Credible fear passage rates for those who are screened have remained high, a strong indicator that this population presents valid claims to asylum. So long as the conditions of extreme violence and endemic corruption in these countries of origin exist, families will seek refuge in the United States.

The systemic practice of separating parents and children is antithetical to our values as a country, appears to violate longstanding precedent protecting rights to family integrity, burdens the federal criminal justice and immigration adjudication systems, and increases costs to the government. We urge you to rescind the "zero tolerance" policy and refrain from criminally prosecuting those who are seeking asylum in the United States. When families are apprehended and placed in removal proceedings, parents and children should be kept together in the least restrictive environment necessary or released on an appropriate alternative to detention.

We understand that the number of families arriving at the southern border in recent years has created challenges for the government. Nonetheless, we should address these challenges by means that are humane, fair, and effective – and that uphold the law and our values as a country.

Thank you for your consideration of our views.

Sincerely,



Hilarie Bass