



Ms. Michelle Brané
Director, Family Reunification Task Force
U.S. Department of Homeland Security

Submitted online via the Federal eRulemaking Portal

**Re: Docket No. DHS 2021-0051
Identifying Recommendations to Support the Work of the Interagency Task Force on the Reunification of Families**

January 25, 2022

Dear Director Brané:

The Women's Refugee Commission (WRC) writes to provide recommendations on ways to prevent the separation of migrant families entering the United States and to inform the upcoming report of the Interagency Task Force on the Reunification of Families (Task Force) to the President with recommendations to ensure that the U.S. government will not repeat the policies and practices leading to the separation of families at the border. We present here our recommendations for measures of non-repetition and note that any non-repetition measures must center and protect family integrity, including where such integrity may be threatened as a collateral consequence of government policy and practice.

The WRC is a non-profit organization that advocates for the rights of women, children, and families fleeing violence and persecution. We are leading experts on the needs of refugee women and children and the policies and programs that can protect and empower them. The Migrant Rights and Justice (MRJ) Program focuses on the right to seek asylum in the United States and strives to ensure that migrants and refugees, including women and children, are provided with humane reception in transit to and in the United States, given meaningful access to legal protection, and are protected from exposure to gender discrimination or gender-based violence.

WRC has extensively documented family separation at the U.S.-Mexico border and has long been engaged in efforts not only to remedy the harms and reunite the families separated under the Zero Tolerance policy, but to ensure that forced separation of children from their parents and legal guardians never happens again.¹ We are one of the members of the court-recognized steering committee in the *Ms. L v. ICE* litigation, have testified before Congress repeatedly on family separation,² co-authored the 2017

¹ See, e.g., Women's Refugee Commission, *Five Ways Trump's Enforcement Regime is Devastating Children and Families* (June 22, 2018); Women's Refugee Commission, *Family Separation Background* (Mar. 9, 2017); Women's Refugee Commission, *Separation of Immigrant Families in U.S. Immigration Custody* (Sept. 9, 2016);

² See, e.g., Testimony of Michelle Brané: "Reviewing the Administration's Unaccompanied Children Program." House Appropriations Subcommittee on Labor, Health and Human Services, Education, and Related Agencies. February 27, 2019. <https://docs.house.gov/meetings/AP/AP07/20190227/108960/HHRG-116-AP07-Wstate-BranM-20190227.pdf>; Testimony of Michelle Brané: "The Department of Homeland Security's Family Separation Policy: Perspectives from the Border." House Committee on Homeland Security Subcommittee on Border Security, Facilitation and Operations. March 26, 2019.



report *Betraying Family Values*, and were one of the organizations who filed a critical December 2017 complaint with the Department of Homeland Security exposing rights violations and family separations prior to Zero Tolerance.³

Our comment, grounded in our extensive experience engaging on this issue, focuses on the importance and urgency of the following recommendations: (1) the need for full, comprehensive, and public investigations of Zero Tolerance and related policies and practices; (2) the importance of formal apologies for and memorialization of the human rights abuses of family separation; (3) the integral redress of families separated under Zero Tolerance and related policies and programs; and (4) the urgency of preventing and minimizing any future family separations.

(1) Full, Comprehensive, and Public Investigation and Accounting of the Zero-Tolerance Policy

Full, complete, and public investigations and accounting of the Zero-Tolerance policy and its origins, designs, and implementation are essential to ensuring that these practices and policies are not repeated. While WRC welcomes the work of the Family Reunification Task Force as well as the work accomplished by various government auditing bodies documenting deficiencies associated with the family separation policy,⁴ these reports focus on operational failures and lack the comprehensive and contextual accounting necessary to lay durable groundwork for non-repetition.

(a) Recommended authors and attributes of investigations

The Inter-American Commission on Human Rights (IACHR), a global leader on issues of non-repetition and reparative justice, offers as a guiding framework the notion of contextual investigation of systematic and grave human rights violations.⁵ Contextual investigations of massive human rights violations establish the

³ Women's Refugee Commission, Lutheran Immigration and Refugee Services, and Kids in Need of Defense, *Betraying Family Values* (Feb. 12, 2017); Al Otro Lado, American Immigration Council, American Immigration Lawyers Association, Florence Immigrant and Refugee Rights Project, Kids in Need of Defense, Lutheran Immigration and Refugee Services, Refugee and Immigrant Center for Education and Legal Services, Women's Refugee Commission, *Joint Complaint on Forcible Separation of Families in Customs and Border Protection Custody* (Dec. 11, 2017).

⁴ See, e.g., U.S. Department of Justice Office of the Inspector General, [Review of the Department of Justice's Planning and Implementation of Its Zero Tolerance Policy and Its Coordination with the Departments of Homeland Security and Health and Human Services](#) (Jan. 2021); U.S. Department of Homeland Security (DHS) Office of the Inspector General (OIG), [DHS Lacked Technology Needed to Successfully Account for Separated Migrant Families](#) (Nov. 2019); DHS OIG, [CBP Separated More Asylum-Seeking Families at Ports of Entry Than Reported and For Reasons Other Than Those Outlined in Public Statements](#) (May 2020); see also Committee on Oversight and Reform, US House of Representatives, [Child Separations by the Trump Administration](#) (July 2019); U.S. Gov't Accountability Office, Report to Congressional Requester, [Southwest Border: Actions Needed to Improve DHS Processing of Families and Coordination Between DHS and HHS](#) (Feb. 19, 2020); U.S. Dep't of Health & Human Servs., Off. of Inspector General, [Communication and Management Challenges Impeded HHS's Response to the Zero-Tolerance Policy](#) (Mar. 5, 2020).

⁵ Inter-American Commission on Human Rights, *Compendium of the Inter-American Commission on Human Rights on truth, memory, justice and reparation in transitional contexts* (Apr. 12, 2021), OEA/Ser.L/V/II. Doc.121/21, at ¶ 71. Despite its reference to transitional contexts, the IACHR makes clear that its guidance is meant to strengthen



patterns and modus operandi involved⁶ and identify institutional deficiencies and responsibilities.⁷ Critically, their evaluation of the impact on the victims of systematic human rights violations enables the recognition of the victims as individuals and subjects of rights, a humanizing process that is fundamental to achieving non-repetition.⁸ In investigating impact on the victims, contextual investigations pursue varied approaches to capture the differentiated impacts on distinct vulnerable populations.⁹

WRC urges the U.S. government to pursue full, comprehensive, and public investigations into both government responsibility and responsibility of specific government officials through the Federal Bureau of Investigation (FBI) and other relevant components of the Department of Justice (DOJ), as well as other appropriate Executive Branch bodies. DOJ, the Department of Homeland Security (DHS), and the Department of Health and Human Services (HHS) should conduct robust internal investigations into family separation under Zero-Tolerance and related programs, including determining which actors were responsible for overseeing the practice and recommending and pursuing potential sanctions for these actors. All Executive Branch investigations, including internal investigations at DOJ, DHS, and HHS, should be granted independent investigatory authority and may not be subject to final review by agency leadership.

These comprehensive and transparent Executive Branch investigations must be accompanied by robust and sustained encouragement of and support for relevant Congressional bodies to pursue such investigations and accounting, including the creation of special investigative committees. Such efforts should require officials who authorized and implemented family separation to publicly testify about their role in the practice, as well as ensure accountability for government officials whose actions resulted in human rights abuses, violated department policy, and/or flouted the law, including serious allegations of abuse and sexual assaults of children in DHS and HHS custody. Special attention in all investigations must be paid to the particular impact of family separation on indigenous peoples, people of African descent, children, people with disabilities, and women.

Full transparency on the part of the government will be key to not only the success of any investigations and accounting but also their ultimate goal of non-repetition. For this reason, we strongly recommend that the government withdraw its application of executive privilege to records relating to the Zero-Tolerance policy and related programs.¹⁰ This would bring the United States in line with international and customary law and practice, as well as the law and practice of other countries in the region that prohibit the application of State privilege to government records concerning human rights violations.¹¹ Moreover, withdrawing executive privilege protections for records related to Zero-Tolerance and related programs

the “intrinsic relationship between democracy and human rights...the IACHR hopes that...the compendium will serve as a tool for the construction and consolidation of a culture of human rights based on the rule of law.” *Id.* at ¶ 9.

⁶ *Id.*

⁷ *Id.* at ¶ 129.

⁸ *Id.* at ¶ 88.

⁹ *Id.* at ¶ 121.

¹⁰ Jacob Soboroff and Julia Ainsley, “[Biden DOJ refuses to release key Trump admin documents about zero tolerance family separation policy](#),” NBC News (Apr. 12, 2021).

¹¹ See *supra* n. 3 at ¶¶ 125, 147.



would ensure due recognition of this policy as a threat to the rule of law, in consonance with other circumstances where the Biden administration has declined to assert privilege over government records concerning threats to the rule of law and democratic institutions.¹²

(b) Identifying structural causes of family separation

As recognized by the Request for Input, exploration and identification of the causes of family separation through Zero Tolerance and related policies and programs are critical to the goal of ensuring that it never happens again. Any investigations should include assessment of not just individual or particular but also structural causes of family separation. It is important to note that families were not only separated when they crossed between ports of entry, but also when they sought asylum directly at ports of entry.¹³ However, while not the only mechanism to result in family separation at the border, assessments of structural causes should start with the structural effects of the longstanding criminalization of irregular entry to the U.S., codified in the federal penal code at 8 U.S.C. §§ 1325 and 1326.

This criminalization of a migration-related act gave cover to government officials who sought to use these statutes to inflict an illegal double punishment on migrant families seeking safety in the U.S. in 2017 and 2018.¹⁴ As a result, officials including former DHS Secretary Kirstjen Nielsen claimed that they were merely enforcing the law through the Zero Tolerance policy.¹⁵ In reality, the architects of Zero Tolerance were able to make tools of the deeply unjust but nevertheless still in force statutes of illegal entry and reentry to pursue the policy goal of deterring migration of families through extralegal punishment, specifically by targeting application of these statutes to families in a manner that would then result in systematic separation of children from parents and guardians.¹⁶

Notably, in August 2021, a federal district court judge found that the illegal reentry statute violated the Equal Protection Clause of the Constitution due to the racial malice involved in the passage of the law and the discriminatory application of the statute.¹⁷ This not only demonstrates the widespread arbitrary and discriminatory application of these statutes beyond Zero Tolerance, but also the ongoing susceptibility of these statutes to abuse like that of Zero Tolerance and related programs. The Biden administration's continued prosecution of individuals under both 8 U.S.C. §§ 1325 and 1326 underscores the risk that it

¹² See, e.g., Evan Perez and Zachary Cohen, "[Biden refuses to assert privilege over Trump documents sought by January 6 committee](#)," CNN (Oct. 9, 2021); Aaron Parsley, "[Jen Psaki Says Biden Has 'No Intention to Lead an Insurrection' While Explaining Decision to Release Documents](#)," PEOPLE (Oct. 15, 2021).

¹³ *Ms. L. v. U.S. Immigration & Customs Enforcement*. February 26, 2018. <https://www.aclu.org/legal-document/ms-l-v-ice-complaint>.

¹⁴ Human Rights First, *Punishing Refugees and Migrants: The Trump Administration's Misuse of Criminal Prosecutions* (Jan. 18, 2018).

¹⁵ Bill Chappell and Jessica Taylor, "Defiant Homeland Security Secretary Defends Family Separations," NPR (June 18, 2018), <https://www.npr.org/2018/06/18/620972542/we-do-not-have-a-policy-of-separating-families-dhs-secretary-nielsen-says>.

¹⁶ Laura Peña and Efrén C. Olivares, *The Real National Emergency: Zero Tolerance & the Continuing Horrors of Family Separation at the Border*, Texas Civil Rights Project (Feb. 2019), <https://texascivilrightsproject.org/wp-content/uploads/2019/02/FamilySeparations-Report-FINAL.pdf>.

¹⁷ See [U.S. v. Carrillo-Lopez, 3:20-cr-00026, U.S. District Court, Nevada \(Reno\)](#).



will continue to be used - and could well again be weaponized - in the future.¹⁸ As such, the repeal of these laws will be critical not only to preventing future family separations but also to restoring justice.

Other structural causes that permitted the weaponization of statutes criminalizing migration relate to deficiencies in institutional culture and accountability at DHS and DOJ. These causes are linked, though not solely due, to decades of border policy securitization which inappropriately measures success or failure based on number of arrivals, apprehensions, and removals. This misguided approach has led the development and use of dangerous deterrence mechanisms like the Consequence Delivery System and “Repeat Offender Initiative” intended to make it harder to enter the U.S., including for people seeking asylum or other immigration protection and relief, and has resulted in a culture of cruelty and of dehumanization of those who do arrive at the border.¹⁹ A common theme that emerged from dozens of interviews with separated parents was the consistent cruelty and indifference of the DHS front-line officers and agents with whom the parents interacted, first at the border and later in ICE detention.²⁰ Multiple parents reported having officers and agents tell them that their children would be adopted. Other parents found their desperate pleas for help in locating their children systematically dismissed by the government officials with whom they interacted. A number of parents suffered severe medical incidents while in detention, clearly as a consequence of their extreme trauma and distress at having been separated from their children, only to find their medical needs ignored, minimized, or even mocked. This salt in the wounds of separated, suffering parents reflects an institutional culture that was primed to perpetuate the systematic abuses of Zero Tolerance and related policies. Even today, it remains unclear whether officials who engaged in this kind of behavior and abuse - actions that have led to perhaps irreparable trauma and harm - have ever been held accountable or disciplined.²¹

The culture of dehumanization and of cruelty against migrants at the border is only further compounded by the lack of regular and independent oversight or monitoring of CBP facilities at the border. Unlike ICE facilities, CBP facilities remain largely inaccessible and non-governmental organizations (including WRC) have routinely been denied any sort of monitoring or visitation access to both Ports of Entry and Border Patrol stations.

(c) Accountability mechanisms

¹⁸ TRAC, *Federal Immigration Prosecutions at Record Lows* (Nov. 1, 2021), <https://trac.syr.edu/tracreports/crim/665/>.

¹⁹ See U.S. Customs and Border Protection (CBP), *Operational Update* (July 2021), <https://www.cbp.gov/newsroom/national-media-release/cbp-releases-july-2021-operational-update>.

²⁰ Women’s Refugee Commission, Lutheran Immigration and Refugee Services, and Kids in Need of Defense, *Betraying Family Values* (Feb. 12, 2017); Women’s Refugee Commission [@wrccommission]. (Nov. 11, 2021). *We can’t forget: 5,500+ children were separated from their families at the US-Mexico border under the Trump administration without* [Tweet]. Twitter. <https://twitter.com/wrccommission/status/1458839366403559434>.

²¹ Alleged abuses by U.S. Border Patrol rarely result in serious disciplinary action. See Katy Murdza and Walter Ewing, *The Legacy of Racism within the U.S. Border Patrol*, American Immigration Council (Feb. 10, 2021); Guillermo Cantor and Walter Ewing, *Still No Action Taken: Complaints Against Border Patrol Agents Continue to Go Unanswered*, American Immigration Council (Aug. 2, 2017).



Nonetheless, non-repetition cannot be achieved, even with full, comprehensive, and transparent investigations, without accountability for the individual responsibility and meaningful reform of the institutional deficiencies that led to the widespread violations of the fundamental rights of thousands of children and their parents in the first place. We recommend that the U.S. government establish a commission as a tool to facilitate continuity from investigation to accountability and then, ultimately, non-repetition through institutional reforms and other measures. The U.S. government has previously established similar entities, including redress for Japanese internment through the Office of Redress Administration.

(2) Acknowledgement, Apology, and Memorialization

Although full and public investigations and public accounting of systematic human rights violations are indispensable to ensuring non-repetition of the violations, investigations and accounting alone are insufficient. Investigations and accounting must be accompanied by and inform public acknowledgement of responsibility by the U.S. government, official apologies to the victims, and memorialization of the violations through initiatives such as the creation of archives.

The U.S. government must publicly acknowledge its responsibility for the deliberate and systematic violation of the most fundamental rights of thousands of children and their parents, as well as publicly apologize to these families on whom the government inflicted such harm. These actions would not only powerfully represent but also promote the government's commitment to non-repetition of family separation.

Ensuring the non-recurrence of serious human rights violations is a long game that requires the construction and preservation of historical memory. The United States should draw on the many existing examples of historical memory initiatives remembering and consolidating records of massive human rights violations, including the construction of museums, archives, and monuments,²² to design and promote initiatives to remember family separation and its victims. Moreover, the consideration, design, and implementation of any such initiatives must include meaningful participation from the victims and their families.

(3) Integral Redress of Separated Families

In addition to public accounting and acknowledgement, non-repetition of grave human rights violations requires redress for the victims. The United States must publicly commit to redress for the victims of family separation under Zero-Tolerance and related policies and programs; while it may be impossible to ever make these families whole again, the government's commitments must necessarily go beyond the critical but limited services currently available to affected families through the Interagency Task Force on the Reunification of Families (Task Force) and related litigation.²³

²² See *supra* n. 3 at ¶¶ 144, 154-156.

²³ *Ms. J.P. v. Sessions*, No. LA-CV-1806081-JAK-SKx, 2019 WL 6723686 (C.D. Cal. Nov. 5, 2019). See also <https://www.dhs.gov/publication/seneca-mental-health-services-resources>.



The centrality of comprehensive medical, behavioral health, educational and other services to mitigating the harm inflicted on these families cannot be overstated. To ensure access to these essential supports and prevent any re-separation of families previously separated, we urge the Executive Branch to not only take every available step to champion the passage of legislation providing permanent immigration relief, but also pursue every available avenue for providing permanent immigration status through executive authority.

(4) Preventing and Minimizing Future Family Separations

To guarantee the non-recurrence of systematic human rights violations, the U.S. government must implement forward-looking measures as well as engage in a comprehensive backward-looking examination of the past. The United States can and should develop and implement several measures right now to prevent and minimize family separations in the immigration context. Women's Refugee Commission has issued several reports and joined in numerous recommendations on steps the U.S. government should take to ensure that families are never forcibly and needlessly separated, while also ensuring that any separation that does occur is mitigated and rectified immediately, and we incorporate those recommendations in this comment by reference.²⁴

(a) End family separation at every stage of government custody

First, the government must put an end to migrant family separation practices at every stage of government custody that harm people seeking protection and deter them from seeking safety at our borders. Moreover, DHS must stop making “parental fitness” determinations; such determinations are wholly outside of the agency’s purview and have led to flagrant abuses that result in rights violations as well as in families treated inhumanely and unjustly being separated.

(b) Center family integrity and the best interests of the child

The constitutional right to family integrity, reflected in international law as the right to family life or the protection of the family, must be respected as a central guiding principle in immigration law and policy.²⁵

²⁴ WRC here references past recommendations made, in, e.g. “The Department of Homeland Security’s Family Separation Policy: Perspectives from the Border,” testimony; *Betraying Family Values* (Feb. 12, 2017); *Joint Complaint on Forcible Separation of Families in Customs and Border Protection Custody* (Dec. 11, 2017). Women’s Refugee Commission. Complaint to the DHS Office of Inspector General and Office for Civil Rights and Civil Liberties: *Separation of Families via the ‘Migrant Protection Protocols.’* August 16, 2019. Available at: <https://www.womensrefugeecommission.org/wp-content/uploads/2020/04/Separation-of-families-via-the-Migrant-Protection-Protocols-WRC-complaint-to-DHS.pdf>.

²⁵ Family unity as a protected right can be found in: Final Act of the 1951 U. N. Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Recommendation B.; U.N. International Covenant on Civil and Political Rights, art. 23, (March 23, 1976); U.N. Convention on the Rights of the Child, art. 9 (September 2, 1990); General Comment 6 to the Convention, “Treatment of Unaccompanied and Separated Children Outside their Country of Origin” (CRC 2005). The U.S. Supreme Court has held that the right to family unity is “perhaps the oldest of the fundamental liberty interests recognized by [the Supreme] Court. *Troxel v. Granville*, 530 U.S. 57, 65 (2000). Further, the Supreme Court has held that a parent’s right to the care and custody of his or her child “has been



Adherence to this principle must reflect the fundamental nature of the right to family integrity, rather than subordinate family unity to DHS “operational feasibility” or claims that separations are consistent with law as discretionarily applied by DHS or DOJ. As such, family integrity and the best interests of the child must be primary considerations in all decisions related to noncitizens, regardless of citizenship status of their family members, that are made by DHS, DOJ, the Department of Health and Human Services (HHS), and the Department of State (DOS). Ensuring the primacy of these considerations is consonant with the fundamental nature of the individual rights implicated by these principles and enshrined in both U.S. and international law.

- ❖ The **definition of family** should recognize familial configurations including but not necessarily limited to families consisting of parents/legal guardians and minor children, families consisting of spouses, families consisting of siblings (including where siblings consist of minor children and adults) and families including non-parental caregivers of minor children, such as grandparents and aunts/uncles. This means that DHS should center family unity as the primary factor in charging and detention decisions, and families should be allowed to remain together throughout the immigration process, wherever possible.
- ❖ The **best interests of the child** is defined by the Subcommittee on Best Interests of the Interagency Working Group on Unaccompanied and Separated Children and specifies that consideration of a child’s best interests requires analysis of several widely accepted elements, particularly the child’s safety and well-being, expressed interests, health, family integrity, liberty, development, and identity.²⁶

There are several steps that the four agencies constituting the Task Force (DHS, DOJ, HHS, and DOS) can take immediately to prevent future separations and ensure that family integrity and the best interests of the child are duly recognized as fundamental rights that must anchor all agency action.

- ❖ **DOJ and DHS:** DOJ should issue policy guidance exercising prosecutorial discretion to abstain from charging and prosecuting noncitizens under 8 U.S.C. §§ 1325 and 1326. This exercise of prosecutorial discretion is necessary considering the racial and xenophobic animus driving the passage of these laws and the subsequent disparate racial impact and discriminatory and arbitrary application of these laws—of which Zero Tolerance is an emblematic example—in the nearly 100 years since.²⁷ Similar to its reversal on defending the Defense of Marriage Act (DOMA),²⁸ DOJ should abstain from enforcing these unjust statutes until their congressional repeal or judicial invalidation. DHS should suspend referrals of non-citizens to DOJ for prosecution under 8 U.S.C. §§ 1325 and 1326. DHS and DOJ should work to vacate prior convictions for unlawful entry or reentry for parents subjected to the Zero-Tolerance policy.

deemed essential, [a] basic civil right of man, and rights far more precious than property rights.” *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972).

²⁶ Subcommittee on Best Interests of the Interagency Working Group on Unaccompanied and Separated Children, [Framework for Considering the Best Interests of Unaccompanied Children](#) at p. 5 (May 2016).

²⁷ See, e.g., National Immigrant Justice Center, [A Legacy of Injustice: The U.S. Criminalization of Migration](#) (July 2020).

²⁸ See [Statement of the Attorney General on Litigation Involving the Defense of Marriage Act](#) (Feb. 3, 2011).



- ❖ **DHS and HHS:** Rescind the application of Title 42. The U.S. government’s unlawful practice of expulsions under Title 42 of the U.S. Code have resulted in hundreds of thousands of individuals and family members being summarily returned across the border or by plane to their home country without an ability to exercise their legally protected right to seek asylum in the United States. While WRC appreciates the government’s exclusion of unaccompanied children from its application of Title 42, the fact that Title 42 remains in place for all adults and families directly leads to family separation, as families desperate for protection sometimes reach the impossible decision to send children onward to the U.S. alone. To ensure non-repetition of family separation at the border, the U.S. must not only focus on ending the policies that led to the Zero Tolerance Policy, but also current policies like expulsions under Title 42 that – even without an explicit intent – lead to family separation.
- ❖ **DHS:** Reverse the expansion and stop implementation of the “Migrant Protection Protocols,” better known as Remain in Mexico (RMX). RMX, originally initiated under the Trump administration but recently reinstated and expanded after an earlier termination under the current administration, has a well-documented history of causing family separation.²⁹ In some cases, only some members of a family traveling together are enrolled in the program, meaning that some are returned to Mexico under RMX while others are expelled under Title 42, or detained in U.S. detention, with no recourse for reunification. WRC appreciates that policy guidance for the newest iteration of Remain in Mexico states clearly that “families will not be separated” for the purpose of enrollment in the policy but note that the guidance uses a definition of family unit that includes only parents and legal guardians with minor children.³⁰ This means there is no guidance to explicitly keep together other types of family members, such as spouses, siblings, cousins, or others. WRC does not believe that there is any lawful, safe or humane way to implement Remain in Mexico and urges the administration to reverse the expansion and stop the implementation of this policy. WRC further recommends that DHS to adopt a more expansive definition of family to ensure family unity in any ongoing implementation of RMX.
- ❖ **DHS:** The Department of Homeland Security should issue guidance to all officials to 1) consider family unity as a primary factor in all charging decisions, 2) consider the best interests of the child, (as defined above), in all processing, custody, removal, and repatriation decisions, and 3) preference release from custody over detention.
- ❖ **White House, DHS, HHS, DOJ:** DHS, together with HHS, DOJ, White House officials, and all relevant sub-components represented, should convene a stakeholder working group to meet at minimum quarterly, and with participation from civil society stakeholders with direct experience serving or interacting with individuals who have been separated from family members at the border,

²⁹ Women's Refugee Commission. Complaint to the DHS Office of Inspector General and Office for Civil Rights and Civil Liberties: *Separation of Families via the 'Migrant Protection Protocols.'* August 16, 2019. Available at: <https://www.womensrefugeecommission.org/wp-content/uploads/2020/04/Separation-of-families-via-the-Migrant-Protection-Protocols-WRC-complaint-to-DHS.pdf>.

³⁰ DHS, Guidance regarding the Court-Ordered Reimplementation of the Migrant Protection Protocols (Dec. 2, 2021) https://www.dhs.gov/sites/default/files/publications/21_1202_plcy_mpp-policy-guidance_508.pdf.



including those with expertise in child welfare and expertise in immigration law and policy as well as participation from those who experienced family separation to the extent possible. The group's purpose should be to share information; inform policy development and implementation, and transparency and oversight; and should include topics such as identifying, tracking, and reporting family separation incidents and mechanisms for purposes of tracking the physical locations of separated family members to expedite contact and reunification.

- ❖ **DHS:** DHS should direct CBP to work with non-profit, non-government organizations to develop a CBP access directive similar to the standing ICE access directive.³¹ Establishing regular stakeholder access and routine third-party monitoring and visitation of CBP facilities through the development of a CBP access directive is an essential step in working to reverse the culture of impunity within the agency, as well as the widespread practices of dehumanization and cruelty against migrants and to ensure that individuals receive proper care and treatment and that their rights are respected in CBP short-term custody.
- ❖ **DHS:** While this comment focuses largely on separations occurring at or near the U.S. border of family members who have recently arrived in the United States, we urge the Task Force to also consider family separations occurring due to interior enforcement as it considers its recommendations. Despite some positive steps under the Obama administration, non-citizen families subject to immigration enforcement in the interior of the United States remain at serious risk, due to inadequate protections and policies, not only of separation at the point of apprehension, but also more permanent separation when a parent, guardian, or caregiver is unable to make care arrangements for a child, or unable to participate in potential family court proceedings that may arise out of the separation.³² The Task Force would be missing a serious opportunity to also make critical recommendations to prevent and mitigate family separation in the interior. These recommendations should include, at minimum, that DHS direct officials 1) to exercise broad prosecutorial discretion to minimize apprehensions of family members, 2) to assume a presumption of liberty so that a parent, legal guardian, or caregiver is not separated from family members due to detention, 3) to ensure the ability of a parent, legal guardian, or caregiver to make care arrangements for any dependents if separated, 4) to ensure the ability of a parent, legal guardian, or caregiver to make decisions about joint repatriation with dependents in the case of removals, and 5) to ensure the ability of separated parents, guardians, and caregivers who were removed without the above protections to be considered for parole back into the United States to reunite with family members and plan for next steps.

(c) Ensure oversight to prevent or speedily resolve rare and exceptional family separations

Not least due to the ongoing separations of migrant families by border authorities pursuant to DHS guidance implementing the *Ms. L* preliminary injunction, but also given the additional forms of or

³¹ <https://www.ice.gov/doclib/ero-outreach/pdf/access-directive-stakeholder.pdf>

³² See, e.g., Julia Preston, "The True Costs of Deportation," *The Marshall Project*, June 18, 2020, <https://www.themarshallproject.org/2020/06/22/the-true-costs-of-deportation>.



circumstances leading to separation described above, the government must establish an effective and robust oversight structure with the ultimate goal of preventing family separations.

As a threshold matter, DHS should not separate any child from their parent or legal guardian who has been apprehended or taken into custody at or near the border unless there is clear evidence of serious and imminent physical harm to the child unrelated to the family's migration journey, or that the parent or guardian has engaged or plans to engage in trafficking of the child.³³ **WRC reiterates our strong view that DHS is not a child welfare agency and does not have the necessary authority able to make determinations of "parental fitness" or custody determinations.** Critically, DHS must not employ a presumption of serious and imminent physical harm to a child based on a parent or legal guardian's past criminal history.

History and current practice, particularly the application of DHS guidance implementing the *Ms. L* preliminary injunction, demonstrate that DHS law enforcement personnel inevitably and systematically abuse their discretionary authority to separate children from their parents and legal guardians, notwithstanding the momentous and harmful consequences. It is imperative that CBP engage state-licensed child welfare professionals in the screening to inform CBP's determinations under the Trafficking Victims Protection Reauthorization Act (TVPRA) or any other screenings and processing relating to family unity.

Crucially, determinations to separate by DHS cannot constitute child welfare or parental rights determinations, nor can they be considered terminations of parental rights or determinations of parental fitness. DHS is neither a child welfare agency nor does it have authority to make child custody determinations or infringe on parental rights. Rather, jurisdiction for these matters rests in U.S. state courts of competent jurisdiction, and all instances of family separation should be referred to the appropriate state child welfare authorities. As such, DHS must develop and implement mechanisms and protocols to facilitate both the universal referral of all determinations resulting in family separation to state child welfare authorities and the participation in such proceedings of any party in DHS custody.

Moreover, DHS, DOJ, HHS, and DOS must establish policies to meaningfully ensure immediate support for location, regular contact – including by video – and speedy reunification of separated family members in the rare instances where temporary separation may occur, as well as access to administrative and judicial appeals processes, appointed counsel, and complete, accurate, and transparent tracking and recordkeeping. Again, WRC refers here to recommendations iterated in prior reports and testimony.³⁴ For example, when WRC visited ICE detention facilities in 2019 and inquired about processes to ensure that individuals entering a facility following on a border apprehension were preemptively asked about family separation, it did not appear that there was any nationwide process or guidance that would ensure these family members would be identified or have access to recourse and reunification. Potentially separated family members must be systematically asked about separation, with a clear course of action on the part of the U.S. government to help someone in custody locate their child or other family member, regularly

³³ Or where the agency determines, after providing an opportunity for DNA testing if requested by the parent/legal guardian, that the accompanying adult is not the biological parent or legal guardian.

³⁴ See, e.g., *Betraying Family Values* (2017).



facilitate ample contact between them by video and phone, and facilitate their speedy reunification. WRC has made recommendations on this point on numerous occasions, as cited above.

(d) Institute policy review process to identify and eliminate policies resulting in family separation

Finally, the government should institute a review process for any existing or new immigration policy that will evaluate the possibility that the policy will result in family separation, including as a collateral consequence of the policy. Should a likelihood of family separations be identified, the policy must be revised or withdrawn. A review process that evaluates the possibility of family separation would facilitate adherence to the principle of family unity and the non-repetition of policies like Zero-Tolerance and related programs.

(5) Task Force's Report on Non-Repetition Recommendations Is Only a First Step

As detailed above, much remains to be addressed and accomplished to effectively guarantee that the United States government will never again design and implement a policy to deliberately and systematically tear children from their parents. For this reason, we make a final recommendation for the government to accompany the Task Force's delivery of its report recommending non-repetition measures with a public commitment to, following due review, implement these measures. Such a commitment is essential to ensuring that the unconscionable cruelty of family separation is truly not repeated.

Sincerely,

Katharina Obser
Director, Migrant Rights and Justice Program
Women's Refugee Commission