



Family Separation 2.0: “You aren’t going to separate me from my only child.”

On April 7, 2020, Amnesty International issued a report, *‘We are adrift, about to sink’: The looming COVID-19 disaster in US immigration detention facilities*, documenting how the Trump administration was failing to adequately protect tens of thousands of immigrants and asylum-seekers whom the U.S. Department of Homeland Security’s (“DHS”) Immigration and Customs Enforcement (“ICE”) agency was detaining in over 200 detention centers across the United States.¹

Three of these facilities detain families, including infants as young as 1-year-old who are still breast-feeding. Deceptively named “family residential centers” (FRC), these detention facilities are: the Berks County Residential Center (“Berks”) in Leesport, Pennsylvania; the South Texas Family Residential Center (“Dilley”) in Dilley, Texas; and the Karnes County Residential Center (“Karnes”) in Karnes City, Texas.

While the dangerous conditions in immigration detention remain little changed since Amnesty International published its April report, ICE has now introduced a new element of harm: family separation. Once again, this administration is weaponizing its public health response to COVID-19 to punish and deter people seeking safety.

“It doesn’t matter what you sign because we will do what we want.”

On May 13 and May 14, 2020, ICE presented detained families at Berks, Dilley, and Karnes with an unconscionable – and unnecessary – choice: either separate from their children or stay together in indefinite detention during the COVID-19 pandemic.

Sobbing and scared, families told their lawyers that ICE officers presented them with forms in English that the officers told them to sign, explaining that they could send their children away.² These children are as young as 1-, 2-, and 3-years-old – children learning to walk and talk in detention. One parent reported that ICE told him, *“I have a question to ask you but I know you will not like it.”*³ The father’s reply: *“You aren’t going to separate me from my only child.”*⁴ ICE was not above manipulation, as described by another parent: *“They didn’t force us but they did tell us we could send our daughter away because of the pandemic.”*⁵ Parents understood that they would be deported without their children if they separated from their children.⁶

¹ Amnesty International, *‘We are adrift, about to sink’: The looming COVID-19 disaster in US immigration detention facilities* (April 2020), Index: AMR 51/2095/2020, available at www.amnestyusa.org/wp-content/uploads/2020/04/WeAreAdrift-1.pdf.

² Interview with legal service providers, May 15, 18 and 19, 2020; *O.M.G. v. Wolf*, Exhibit 68, Supplemental Declaration of Shalyn Fluharty at paras. 14-18.

³ Interview with legal service provider, May 15, 2020.

⁴ Interview with legal service provider, May 15, 2020.

⁵ Interview with legal service provider, May 15, 2020.

⁶ Interview with legal service provider, May 18 and 19, 2020; *O.M.G. v. Wolf*, Exhibit 68, Supplemental Declaration of Shalyn Fluharty at paras. 14, 16.

Multiple parents requested the opportunity to speak with their lawyers before making a decision on the form, and were denied that opportunity.⁷ ICE refused to provide either parents or their attorneys copies of the form.⁸ One officer told several mothers that “*it doesn't matter what you sign because we will do what we want.*”⁹

Families told their lawyers that ICE inquired about sponsors for the children. Some mothers reported that ICE told them, “*we came to inform you on the part of ICE that your kids will be turned in to sponsors and you will stay.*”¹⁰ Others were asked to decide whether they wanted to be with their children in detention, or separate from them so they could reside with their sponsors.¹¹ Parents were also asked to confirm information on the sponsors.¹²

Confronted by ICE without their lawyers present and asked to sign forms in a language they could not read, parents reported feeling intimidated and terrified that they were going to be separated from their children.¹³ As one mother told her lawyer, she felt scared that “*they were going to take our children. Our minds couldn't focus to ask questions.*”¹⁴ They reported being mocked and laughed at; one mother was called “*stupid,*” and another was physically pushed out of the room when she refused to sign.

Neither were the forms translated into appropriate languages. As one parent reported, “*The form had a place at the bottom to sign but was in English so we did not know what it said.*”¹⁵ One Indigenous language speaker reported that there was no interpretation provided to her in her native language. When she told the ICE officers that she did not speak Spanish, they called her a “*liar.*”¹⁶

“Parent Does Not Wish to Separate”

On April 24, 2020, Judge Dolly Gee directed, *inter alia*, that “ICE shall continue to make every effort to promptly and safely release” children in its custody to protect them from COVID-19 and to report to court its progress on May 15, 2020.¹⁷ Rather than comply promptly and humanely, ICE waited 19 days to act, when it first approached parents on the evening of May 13, 2020, with the untenable choice to separate from their children or be held together in indefinite detention.¹⁸

In its court filing on May 15, 2020, ICE records again and again the result of its conversations with families: “Parent Does Not Wish to Separate.”¹⁹ This chilling phrase, “Parent Does Not Wish to Separate,” is listed as a principal reason that ICE chose not to release children from detention.

⁷ Interview with legal service providers, May 14, 15, 18, and 20, 2020; *O.M.G. v. Wolf*, Exhibit 68, Supplemental Declaration of Shalyn Fluharty at paras. 17-18.

⁸ Interview with legal service providers, May 14, 15, 18, and 20, 2020.

⁹ Interview with legal service provider, May 18 and 19, 2020.

¹⁰ *O.M.G. v. Wolf*, Exhibit 68, Supplemental Declaration of Shalyn Fluharty at para. 13.

¹¹ Interview with legal service providers, May 14, 15, 18, and 20, 2020.

¹² Interview with legal service providers, May 14, 15, 18, and 20, 2020.

¹³ Interview with legal service providers, May 15, 18, and 19, 2020; *O.M.G. v. Wolf*, Exhibit 68, Supplemental Declaration of Shalyn Fluharty at paras. 14-19.

¹⁴ Interview with legal service provider, May 18 and 19, 2020.

¹⁵ Interview with legal service provider, May 15, 2020.

¹⁶ Interview with legal service provider, May 18 and 19, 2020.

¹⁷ *Flores v. Barr*, No. CV-85-4544-DMG (AGRx), Dkt. No. 784 (C.D. Cal. April 24, 2020).

¹⁸ Letter to Special Master/Independent Monitor, *Flores v. Barr*, 2:85-cv-04544-DMG (AGRx) (C.D. Cal. May 14, 2020), on file with Amnesty International.

¹⁹ *Flores v. Barr*, 2:85-cv-04544-DMG (AGRx), Dkt. No. Document 788-1 (C.D. Cal. May 15, 2020).

While the government disputes that it presented a binary choice,²⁰ this evidence filed with the court, in addition to the families' own words, paint a different reality.²¹ Instead of choosing to release families together, as it has the legal authority to do and in fact historically did, ICE chose to pursue the family separation option during COVID-19.

Under the Cover of COVID-19, Enacting Family Separation 2.0

The Trump administration has previously floated the idea of “binary choice,” or Family Separation 2.0, in 2018 and 2019: parents in detention could separate from their children by releasing them to a sponsor or to the Office of Refugee Resettlement (“ORR”), or stay together as a family in indefinite detention while they await resolution of their asylum claim.²² The reported intent of this policy was to deter families from seeking safety in the United States.

Now, under the cover of COVID-19, the administration is seeking to enact family separation again. While the government claims it has not enacted a formal policy, its actions speak clearer than its words: it presented a binary choice to parents to separate from their children or remain together indefinitely. The pandemic has given ICE pretext to achieve its long-sought policy objectives: to deter, punish, and exclude families seeking asylum.

The *Flores* Settlement Agreement (“*Flores*”), which governs the detention, treatment, and release of migrant children, requires that children be released from detention expeditiously.²³ While *Flores* does not apply to parents directly, it emphasizes the principle of family unity and is based on the principle of the best interests of the child.

ICE has historically exercised its legal authority to release parents with their children on humanitarian parole.²⁴ Under the current administration, however, ICE has chosen instead to undermine *Flores* and federal courts' clear orders emphasizing children's release by forcing parents to make an impossible and cruel choice: either separate from their children and be detained indefinitely by themselves, or remain together in indefinite detention where the risk of exposure to COVID-19 is magnified.

The administration's binary choice ignores the law and distorts *Flores* and the long-held practice of releasing families together. It is unnecessary and designed to deter and punish families for seeking safety. It also undermines the principle of family unity underpinning the *Flores* Settlement Agreement.

Family separation produced by this coercive policy violates multiple human rights, including the right to family unity, the right to liberty, and the requirement to prioritize the best interests of the

²⁰ See https://twitter.com/DHS_Wolf/status/1262802751634931714.

²¹ See Camilo Montoya-Galvez, “ICE asked migrant parents whether they wished to be separated from their children,” *CBS News* (May 17, 2020), available at www.cbsnews.com/news/ice-asked-migrant-parents-whether-they-wished-to-be-separated-from-their-children-agency-tells-court.

²² Gabby Orr and Nancy Cook, “Top Aides Appear to Contradict Trump on Family Separation,” *Politico* (April 10, 2019), available at www.politico.com/story/2019/04/10/trump-family-separation-binary-choice-1266675; Nick Miroff, Josh Dawsey, and Maria Sacchetti, “Trump administration weighs new family-separation effort at border,” *The Washington Post* (October 12, 2018), available at www.washingtonpost.com/local/immigration/trump-administration-weighs-new-family-separation-effort-at-border/2018/10/12/45895cce-cd7b-11e8-920f-dd52e1ae4570_story.html.

²³ Stipulated Settlement Agreement, *Jenny Lissette Flores v. Reno*, Case No. 85-4544-RJK (C.D. CA 1997), available at www.aclu.org/sites/default/files/assets/flores_settlement_final_plus_extension_of_settlement011797.pdf.

²⁴ INA § 212(d)(5)(A), 8 U.S.C. § 1182(d)(5)(A); 8 C.F.R. § 212.5.

child.²⁵ In some instances, family separation can violate the right to freedom from torture and other ill-treatment. Amnesty International previously found that under the policy of family separations enacted in 2017 and 2018, some cases of forcible separation of families satisfied the definitions of torture under U.S. and international law.²⁶ The United Nations (UN) Special Rapporteur on Torture has denounced any authorities' "deliberate separation of family members" who are seeking asylum at borders, calling it "*refoulement* in disguise," which is "designed to coerce them to 'voluntarily' return to their country-of-origin" regardless of their protection needs.²⁷

The detention of children is never in their best interests, and their separation from parents is only lawful in exceptional circumstances, such as when a child faces imminent harm. The UN Refugee Agency (UNHCR) has categorically called on all states to end the practice of immigration detention of children, and to maintain family unity through alternatives to detention. The UN Special Rapporteur on Torture has likewise stated that the detention of children is never in a child's best interests, and can constitute ill-treatment if the detention is due to their or their parents' immigration status.²⁸

All of this is entirely avoidable: ICE has the authority – and especially in the pandemic, the obligation – to release families together. ICE can parole or release parents for urgent humanitarian reasons or significant public benefit.²⁹

There is surely no more urgent humanitarian reason or significant public benefit than protecting the health of families in ICE's care and custody during a pandemic. Instead, ICE is doubling down on Family Separation 2.0, inflicting fear and uncertainty upon families and endangering public health.

Family Separation 2.0: Endangering Families, Endangering Public Health

The longer ICE detains families, the more it places them, facility staff, and surrounding communities at risk. There are approximately 184 children in family detention, with one boy detained for 283 days.³⁰

²⁵ Arbitrary and punitive separations of children from their parents are never in the best interests of the child, and violates U.S. and international law. All 50 states, the District of Columbia, and U.S. territories require consideration of a child's best interests in decisions about the child's custody, while the best interests standard has been increasingly incorporated into immigration law and policy. For discussion of the human rights standards, see Amnesty International, *'You Don't Have Any Rights Here': Illegal Pushbacks, Arbitrary Detention & Ill-treatment of Asylum-seekers in the United States* (2018), Index: AMR 51/9101/2018, at p. 27, available at www.amnestyusa.org/wp-content/uploads/2018/10/You-Dont-Have-Any-Rights-Here.pdf.

²⁶ Amnesty International, *'You Don't Have Any Rights Here': Illegal Pushbacks, Arbitrary Detention & Ill-treatment of Asylum-seekers in the United States* (2018), Index: AMR 51/9101/2018, at pages 27-32, available at www.amnestyusa.org/wp-content/uploads/2018/10/You-Dont-Have-Any-Rights-Here.pdf.

²⁷ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (February 26, 2018), available at www.ohchr.org/Documents/Issues/Torture/A_HRC_37_50_EN.pdf.

²⁸ For discussion of the human rights standards, see Amnesty International, *'You Don't Have Any Rights Here': Illegal Pushbacks, Arbitrary Detention & Ill-treatment of Asylum-seekers in the United States* (2018), Index: AMR 51/9101/2018, at p. 33, available at www.amnestyusa.org/wp-content/uploads/2018/10/You-Dont-Have-Any-Rights-Here.pdf.

²⁹ INA § 212(d)(5)(A), 8 U.S.C. § 1182(d)(5)(A); 8 C.F.R. § 212.5.

³⁰ *Flores v. Barr*, 2:85-cv-04544-DMG (AGRx), Dkt. No. Document 788-1 (May 15, 2020); *O.M.G. v. Wolf*, Exhibit 68, Supplemental Declaration of Shalyn Fluharty at para. 3; Letter to Special Master/Independent Monitor, *Flores v. Barr*, 2:85-cv-04544-DMG (AGRx) (C.D. Cal. May 14, 2020), on file with Amnesty International.

Two federal judges have found that ICE is not adequately protecting children in immigration detention from COVID-19.³¹ As of mid-May, families continue to report that they have insufficient soap and sanitizer, and that facility staff do not consistently wear masks or physically distance. Inadequate medical care continues, with the families' health issues minimized and appropriate care not provided. Communal bathrooms continue to be used, and families congregate in large groups in social spaces. Mothers at one facility reported eating in the dining hall with approximately forty people at a time, with eight or more of them at a table. Another mother estimated that there were approximately sixty people in the gym at one time on one day.³²

Families are scared. They speak of their constant fear that because they are locked away, it is only a matter of time before someone in detention contracts COVID-19 given the inadequate protections, and when they do, the consequences could be fatal. They fear the inadequate medical care they would receive: if ICE already does not take their health concerns seriously, whether a fever or cough or other illness, how could they expect ICE to protect them during COVID-19.

Their fear seems reasonable, based on ICE's own reporting of confirmed cases. As of May 18, 2020, there were 1,073 confirmed cases of COVID-19 among those in ICE custody, out of 2,172 people in immigration detention who had been tested. This means that nearly 50 percent of people tested have been confirmed to have COVID-19, yet only 8 percent of people have been tested out of a population of approximately 28,000 in immigration detention.³³ Public health experts recently concluded that, unless ICE takes drastic measures to reduce the detention population, anywhere between 72 percent to nearly 100 percent of detainees in many ICE facilities could contract COVID-19, overwhelming local hospital capacity and endangering both detainees and the larger community.³⁴

It is unconscionable that ICE would continue to keep families locked up and expose them to even higher risk of contracting COVID-19 during a pandemic – or that ICE would consider separating them, leaving parents exposed to COVID-19 and children suffering trauma of family separation. Medical professionals, medical associations, child welfare organizations, and courts have documented the serious and lasting harm to children arising from forcible separation from their parents, and from being held in detention even for short periods of time, let alone indefinitely.³⁵

Conclusion and Recommendations

ICE's refusal to release parents with their children is not only inhumane, it is also unreasonable, endangers public health, and violates their human rights.

³¹ *Flores v. Barr*, No. CV-85-4544-DMG (AGRx), Dkt. No. 784 (C.D. Cal. April 24, 2020); *O.M.G. v. Wolf*, 1:20-cv-00786-JEB, March 30, 2020 Minute Order (D.D.C. March 30, 2020).

³² Interviews with legal service providers, May 12, 18, and 19, 2020; *O.M.G. v. Wolf*, Exhibit 68, Supplemental Declaration of Shalyn Fluharty at paras. 4-7.

³³ ICE Guidance on COVID-19: Confirmed Cases, available at www.ice.gov/coronavirus#wcm-survey-target-id (last visited May 18, 2020).

³⁴ "Modeling COVID-19 and impacts on U.S. Immigration and Enforcement (ICE) detention facilities," *Journal of Urban Health* (2020), available at <https://whistleblower.org/press/study-projects-significant-impact-on-immigrants-and-local-health-care-if-ice-detention-populations-are-not-decreased/>.

³⁵ See Amnesty International, *You Don't Have Any Rights Here: Illegal Pushbacks, Arbitrary Detention & Ill-treatment of Asylum-seekers in the United States* (2018), Index: AMR 51/9101/2018, at p. 34, available at www.amnestyusa.org/wp-content/uploads/2018/10/You-Dont-Have-Any-Rights-Here.pdf.

ICE must not create unnecessary harm by separating children from their parents but must instead release families together in the interest of public health while they continue to pursue their claims for protection and other immigration relief.

ICE must cease plans to implement Family Separation 2.0 and prioritize the health and well-being of children and families in its public health response to COVID-19, instead of using the pandemic against them.

ICE has the legal authority to release families together, which it historically has done. Given the particular urgency presented by COVID-19, there is no reason not to release parents with their children.

Amnesty International USA calls on ICE to release families together and immediately, employing community-based case management approaches where necessary and appropriate. Children must be released expeditiously, in line with federal court orders and the *Flores* Settlement Agreement, and with their parents in order to prevent family separation and uphold family unity.

Amnesty International USA calls on Congress to publicly condemn and urgently investigate the government's attempts to force detained families into this false choice and to call on ICE to immediately free detained families together.

Amnesty International USA is campaigning for the immediate release of all families together and has developed case actions on three of the families in detention – Paola* (20) and Jose* (1), Ana* (22) and Victoria* (3), and Karla* (43) and Katherine* (15), who came here seeking safety from violence and persecution, and were instead thrown behind bars.³⁶ Now, in the midst of a global pandemic, and suffering from ongoing medical issues, they are exposed to a deadly virus and increased risk of contracting COVID-19 and fear for their safety.

Amnesty International USA spoke with legal service providers representing the families multiple times from May 12 to 21, 2020, and reviewed public statements, media reporting, and court filings to prepare this update. Amnesty International has previously reported on family separation in, *'You Don't Have Any Rights Here': Illegal Pushbacks, Arbitrary Detention & Ill-treatment of Asylum-seekers in the United States*.³⁷

Published May 21, 2020

³⁶ *Pseudonyms. Case actions available at <https://act.amnestyusa.org/page/59764/action/1>.

³⁷ Amnesty International, *'You Don't Have Any Rights Here': Illegal Pushbacks, Arbitrary Detention & Ill-treatment of Asylum-seekers in the United States* (2018), Index: AMR 51/9101/2018, available at www.amnestyusa.org/wp-content/uploads/2018/10/You-Dont-Have-Any-Rights-Here.pdf.