

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

O.M.G., et al.,)	
)	
<i>Petitioners,</i>)	Case No. 1:20-cv00786-JEB
)	
v.)	
)	
WOLF, et al.,)	The Honorable James E. Boasberg
)	
)	
<i>Respondents.</i>)	

DECLARATION OF DAVID B. THRONSON

I, David B. Thronson, declare as follows:

1. I submit this declaration in support of the Petitioners in *O.M.G., et al. v. Wolf et al.*. I have personal knowledge of the facts set forth herein, and, if called as a witness, I could and would testify competently as follows:

Background and Qualifications

2. I am an attorney admitted to practice in Massachusetts, Michigan, and New York. I currently serve as the Alan S. Zekelman Professor of International Human Rights Law and Director of the Talsky Center for Human Rights of Women and Children at Michigan State University College of Law. Additionally, for Spring 2020, I am a Visiting Professor of Law at the University of Iowa College of Law. I also have served as a Visiting Professor of Law at the University of Michigan Law School from 2017 to the present. I was Associate Dean for Academic Affairs at Michigan State University College of Law from 2013 to 2015 and 2018 to 2019. I served as Associate Dean for Experiential Education at Michigan State University College of Law from 2015 to 2018 and previously served as Associate Dean for Clinical Studies at the William S. Boyd School of Law at the University of Nevada Las Vegas. I am an elected

member of the American Law Institute, where I am in the Member Consultative Group for the project to create the Restatement of Law, Children and the Law. I also am a Fellow of the American Bar Foundation. A copy of my curriculum vitae (CV) is attached to this report.

3. I graduated from Harvard Law School in 1994. The following year I clerked for the Honorable A. Wallace Tashima, then a U.S. District Judge for the Central District of California, in Los Angeles, California. After my clerkship I worked as a Skadden Fellow at The Door's Legal Services Center in New York, New York, from 1995 to 1997, where I founded a program to provide legal representation to immigrant youth. Since 1995, I have directly represented hundreds of children in immigration matters, supervised and mentored at least several hundred lawyers and law students in such representation, and trained lawyers, judges, and other court personnel on issues related to immigrant children.

4. The Michigan State University law clinic in which I have practiced and taught has represented hundreds of unaccompanied children in immigration removal proceedings. From 2013 to 2017, this work was funded by the U.S. Department of Health and Human Services (HHS) Office of Refugee Resettlement (ORR) and administered by the Vera Institute for Justice. The funding covered work before the Immigration Court, immigration agencies including U.S. Citizenship and Immigration Services (USCIS) and its Asylum Division, and any state court representation necessary. This clinic also has conducted Know Your Rights presentations and individual legal screenings for more than a thousand unaccompanied children in ORR's custody. Though ORR currently funds some legal representation of children released from its custody in Michigan, many of those children, like many children around the country, remain unrepresented in their immigration proceedings.

5. In addition to my extensive experience providing legal representation to unaccompanied immigrant children through both government-funded and pro bono models, I have also represented immigrant children living with parents, and immigrant parents in both immigration and family law matters.

6. I have researched and written extensively on issues related to immigration law as it impacts children and families, including publications in major law reviews, both academic and practice-oriented books, and specialized journals for family and juvenile court judges. I have presented on these issues at conferences for academics, attorneys, social workers, and the judiciary in both the state court and Immigration Court systems, as described below and in my CV.

7. A list of my publications from the last ten years is set out below. A complete list of my publications is in the attached CV.

David B. Thronson, *Citizenship and Rights of Children*, in THE OXFORD HANDBOOK OF CHILDREN RIGHTS LAW (Jonathan Todres and Shani King, eds., Oxford University Press, forthcoming 2020).

STEPHEN H. LEGOMSKY & DAVID B. THRONSON, IMMIGRATION AND REFUGEE LAW AND POLICY (Foundation Press, 7th Ed., 2019).

STEPHEN H. LEGOMSKY & DAVID B. THRONSON, TEACHER'S MANUAL FOR IMMIGRATION AND REFUGEE LAW AND POLICY (Foundation Press, 7th Ed., 2019).

David B. Thronson, *The Legal Treatment of Immigrant Children in the United States*, in PROTECTING MIGRANT CHILDREN: IN SEARCH OF BEST PRACTICE (Mary Crock and Lenni Benson, eds., Elgar Publishing 2018).

David B. Thronson, *Children's Rights and U.S. Immigration Law*, in RESEARCH HANDBOOK ON CHILD MIGRATION, (Jacqueline Bhabha, Daniel Senovilla Hernandez, and Jyothi Kanics, eds., Elgar Publishing 2018).

David B. Thronson, *Closing the Gap: DACA, DAPA and U.S. Compliance with International Human Rights Law*, 48 CASE W. RES. J. INT'L L. 127 (2016).

David B. Thronson, *Immigration Enforcement and Its Impact on Immigrant Children and Families*, in IMMIGRANT AND REFUGEE CHILDREN AND FAMILIES: CULTURALLY RESPONSIVE PRACTICE (Alan J. Dettlaff and Rowena Fong, eds., Columbia University Press 2016).

David B. Thronson & Veronica T. Thronson, *Immigration Issues—Representing Children Who Are Not United States Citizens*, in CHILD WELFARE LAW AND PRACTICE: REPRESENTING CHILDREN, PARENTS AND STATE AGENCIES IN ABUSE, NEGLECT AND DEPENDENCY CASES (Donald N. Duquette, Ann M. Haralambie, and Vivek Sankaran eds., 3d ed., National Association of Counsel for Children 2016).

David B. Thronson, *Of Borders and Best Interests: Examining the Experiences of Undocumented Immigrants in U.S. Family Courts*, 11 TEX. HISP. J.L. & POL'Y 45 (2005) (reprinted at 11 Bender's Immigration Bulletin 7 (Jan. 1, 2006); reprinted at 27 IMMIGR. & NAT'LITY L. REV. (2007); reprinted in INTERNATIONAL FAMILY LAW (Ann Laquer Estin, ed., Elgar Publishing 2016)).

David B. Thronson, *Unhappy Families: The Failings of Immigration Law for Families That Are Not All Alike*, in THE NEW DEPORTATIONS DELIRIUM: INTERDISCIPLINARY RESPONSES (Daniel Kanstroom and M. Brinton Lykes, eds., New York University Press 2015).

David B. Thronson, *A Tale of Two Systems: Juvenile Justice Systems and their Impact on Immigrant Youth*, in CHOOSING THE FUTURE FOR AMERICAN JUVENILE JUSTICE (David Tanenhaus and Frank Zimring, eds., New York University Press 2014).

David B. Thronson, *Immigration Enforcement and Family Courts*, in CHILDREN IN HARM'S WAY: CRIMINAL JUSTICE, IMMIGRATION ENFORCEMENT, AND CHILD WELFARE (Susan D. Phillips, Wendy Cervantes, Yali Lincroft, Alan J. Dettlaff & Lara Bruce, eds., The Sentencing Project and First Focus 2013).

David B. Thronson, *Thinking Globally, Acting Locally: The Problematically Peripheral Role of Immigration Law in the Globalization of Family Law*, 22 IOWA J. TRANSNAT'L L. AND CONTEMPORARY PROBLEMS 655 (2013).

David B. Thronson & Veronica T. Thronson, *Introduction: Global Families in Local Courts*, 47 FAM. L.Q. 137 (2013) (as editors for Symposium on Global Families special issue).

David B. Thronson, *Choiceless Choices: Deportation and the Parent-Child Relationship*, 6 NEV. L.J. 1165 (2006) (reprinted at 12 BENDER'S IMMIGRATION BULLETIN 167 (February 15, 2007); reprinted in JUSTICE, POLITICS AND THE FAMILY, Daniel Engster and Tamara Metz, eds., Paradigm Publishers 2013)).

David B. Thronson & Frank P. Sullivan, *Family Courts and Immigration Status*, 63 JUV. & FAMILY CT. J. 1 (2012).

David B. Thronson, *Clashing Values and Cross Purposes: Immigration Law's Marginalization of Children and Families*, in CHILDREN WITHOUT A STATE: THE SCOPE OF CHILD STATELESSNESS IN THE 21ST CENTURY (Jacqueline Bhabha, ed., MIT Press 2011).

David B. Thronson, *Entering the Mainstream: Making Children Matter in Immigration Law*, 37 FORDHAM URB. L.J. 393 (2010).

David B. Thronson, *Thinking Small: The Need for Big Changes in Immigration Law's Treatment of Children*, 14 U.C. DAVIS J. JUV. L. & POL'Y 239 (2010) (reprinted at 31 IMMIGR. & NAT'LITY L. REV. 79 (2010)).

Katherine Brady & David B. Thronson, *Immigration Issues—Representing Children Who Are Not United States Citizens*, in NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN, CHILD WELFARE LAW AND PRACTICE: REPRESENTING CHILDREN, PARENTS AND STATE AGENCIES IN ABUSE, NEGLECT AND DEPENDENCY CASES (Donald N. Duquette and Ann M. Haralambie eds., 2d ed., National Association of Counsel for Children 2010).

8. I have been invited to train judges, including Immigration Judges, on issues involving children. At the invitation of officials from the U.S. Executive Office for Immigration Review (EOIR) I presented on a panel entitled *Children's Issues: Relief and Repatriation* at the EOIR 2015 Legal Training Program for Immigration Judges. Among the other judicial trainings that I have conducted on matters of immigrant children and families are trainings convened by the National Council of Juvenile and Family Court Judges, the National Center for State Courts, the Conference of Chief Justices, the Federal Judicial Center, the Michigan Judicial Institute, and the National Consortium on Racial and Ethnic Fairness in the Courts.

9. Beginning in 2013, I participated in meetings of the Interagency Working Group on Separated and Unaccompanied Children convened in Washington, D.C. The working group was designed to improve coordination of responses to unaccompanied immigrant children across multiple federal agencies. Key officials from EOIR, HHS, and the U.S. Department of Homeland Security (DHS) have participated in this working group, along with academics and leaders from organizations serving immigrant children. Through a subcommittee of this working group, I have

assessed and critiqued the EOIR, HHS, and DHS policies and practices as they relate to identifying and acting in the best interests of immigrant children.

10. Through my practice, research, writing, training, and other activities I am knowledgeable about the processes that result in children appearing in immigration proceedings, the conduct of those immigration proceedings, and the substantive and procedural issues involved in seeking immigration relief for children. I am experienced with the various roles and responsibilities that adhere to legal counsel for children in immigration proceedings and I am deeply aware of the actual and potential consequences of children appearing in immigration proceedings without legal representation.

11. I previously testified by deposition as an expert witness in *F.L.B. v. Lynch* (previously *J.E.F.M. v. Holder*), No. 2:14-cv-01026-TSZ (W.D. Wash.).

12. I will not be compensated for my work preparing this declaration.

13. In preparing this declaration, I reviewed the Emergency Verified Petition for a Writ of Mandamus and Complaint for Declaratory and Injunctive Relief (Dkt. 1), Petitioners' Motion for a Temporary Restraining Order and Request for Emergency Hearing (Dkt. 4), Emergency Motion for Entry of an Administrative Order to Preserve the Status Quo of the parties, (Dkt. 6) and Respondents' Opposition to Petitioners' Motion for a Temporary Restraining Order (Dkt. 19).

14. I have organized this report into three parts. First, I discuss the serious harm the Plaintiff Children will face if they are not released with their parents due to the COVID-19 Pandemic. Second, I discuss the unique position of the Plaintiff Children in the United States' immigration framework, and how protections afforded to them under the law will be weakened due to the challenges posed by COVID-19. Lastly, I discuss how the United States Government has the

discretion to release Plaintiff Children with their families. As I explain below, it is my conclusion that the COVID-19 pandemic has created an untenable situation that will cause serious harm to Plaintiff Children and that present circumstances created by the COVID-19 pandemic weaken the Plaintiff Children's access to legal counsel and their ability to clear the already significant hurdles they face in obtaining immigration relief.

I. Plaintiff Children Will Face Serious Harm if Defendants Refuse to Release Them With Their Parents as a Result of the COVID-19 Pandemic.

15. Children and adolescents who arrive in the United States and seek asylum are a uniquely vulnerable population. For the overwhelming majority, the persecution suffered by the child or adolescent has taken the form of violence—either through physical violence the child or adolescent suffered themselves or through exposure to violence against family, friends, or others within their social group. The trauma leads to enduring emotional, behavioral, cognitive, social, and physical problems. The current COVID-19 pandemic will adversely affect this unique population by: A) exacerbating well-established neurobiological, cognitive, and psychological harms; B) increasing, exponentially, the effects of these neurobiological, cognitive, and psychological harms through exposure or infection to COVID-19; and C) traumatizing this vulnerable population through witnessing, and potentially being separated from, nurturing parents, grandparents, and close family members who contract COVID-19.

A. The COVID-19 Pandemic Threat Exacerbates the Well-Established Neurobiological, Cognitive, and Psychological Harms Experienced by Children in Detention.

16. Asylum-seeking children, and immigrant children who qualify for other forms of humanitarian immigration relief (hereinafter “asylum-seeking children”), by definition, have left an unsafe environment. And most, or all, children who seek asylum or humanitarian immigration relief in the United States are victims who have suffered from trauma prior to their

arrival.¹ The home countries of asylum-seeking children often have high rates of gang violence, sexual assault, family violence, child abuse and exploitation, homicide, and criminal enterprises that expose children to threats to join a gang, to enter into prostitution, to endure forced labor, to be part of human trafficking, and to participate in political violence.² To illustrate the extreme nature of these traumatic events, over 25% of asylum-seeking children have witnessed the killing of one or both of their parents, lived on the streets, or been kidnapped by rebels.³

17. Beyond existential threats, asylum-seeking children often become exposed to violence against others as well, such as violence against family, friends, or those within their social groups.⁴ In effect, these threats to themselves and others mean asylum-seeking children are more at risk of experiencing traumatic events than other subgroups within the population.

18. Asylum-seeking children are more vulnerable and are unable to process their traumatic events to the same extent adults may be able to because children do not have fully developed brains.⁵ Many areas of the brain that develop at a later age are “linked to higher-order, complex skills such as decision-making function and inhibition,”⁶ in addition to emotional regulation, future and planning skills, and impulse control. The Supreme Court has repeatedly recognized the fundamental physical differences in cognition between children and adults. *See Miller v.*

¹ See K. Perreira, *Painful Passage: Traumatic Experiences and Post-Traumatic Stress among Immigrant Latino Adolescents and their Primary Caregivers*, 47 INT’L MIGRATION REV. 976 (2013); see also U.N. High Comm. for Refugees Report, *Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection* (2014); National Child Traumatic Stress Network, *Unaccompanied Migrant Children* (2014), http://www.ntsnn.org/sites/default/files/assets/pdfs/um_children.pdf.

² American Immigration Council, *A Guide to Children Arriving at the Border: Laws, Policies and Responses* (2015), <https://www.americanimmigrationcouncil.org/research/guide-children-arriving-border-laws-policies-and-responses>.

³ J. Huemer et al., *Mental Health Issues in Unaccompanied Refugee Minors*, CHILD AND ADOLESCENT PSYCHIATRY & MENTAL HEALTH 3 (2009).

⁴ *Id.*

⁵ L. Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, 28 DEVELOPMENTAL REV. 78 (2008); see also S. Blakemore, *Imaging Brain Development: The Adolescent Brain*, 61 NEUROIMAGE 397 (2012).

⁶ P. Pechtel & D. Pizzagalli, *Effects of Early Life Stress on Cognitive and Affective Function: An Integrated Review of Human Literature*, 214 PSYCHOPHARMACOLOGY 55 (2011).

Alabama, 567 U.S. 460 (2012); see also *Graham v. Florida*, 560 U.S. 48 (2010); *Roper v. Simmons*, 543 U.S. 551 (2005). Put differently, science shows, and courts have recognized, that children have less cognitive, psychosocial, and emotional development to process trauma than adults.⁷

19. As a result, the effects of trauma on asylum-seeking and humanitarian relief-seeking children can have far-reaching and devastating psychiatric consequences. It can trigger feelings of anxiety, helplessness, and hypervigilance.⁸ It can present itself clinically, as shown in a survey of school-children who were recent immigrants that determined 32% had clinical symptoms of Post-Traumatic Stress Disorder (PTSD) and 16% had symptoms of depression.⁹

20. Asylum-seekers and victims seeking humanitarian relief suffering from PTSD often display physiological changes to brain systems. In fact, one of the hallmark symptoms of PTSD is avoidance of reminders of past traumas. PTSD has been linked to memory deficits, extreme sensitivity, dysfunctional arousal, attention problems, and disruptions in goal-based attention.¹⁰ Interpersonal traumatic experiences such as bullying have been found to render “significant

⁷ T. Moore & D. Pepler, *Correlates of Adjustment in Children at Risk*, 157–84 in *CHILDREN EXPOSED TO MARITAL VIOLENCE: THEORY, RESEARCH, AND APPLIED ISSUES* (G.W. Holden, R.A. Geffner & E.N. Jouriles eds., 1998); C. Cox et al., *A Longitudinal Study of Modifying Influences in the Relationship Between Domestic Violence and Child Maltreatment*, 18 J. FAM. VIOLENCE 5 (2003); C. Widom, *Child Abuse, Neglect, and Violent Criminal Behavior*, 27 CRIMINOLOGY 251 (1989); L. Steinberg, *Youth Violence: Do Parents and Families Make a Difference?* NAT’L INST. JUST. J. (April 2000) at 30; D. Farrington, *Understanding and Preventing Bullying*, 17 CRIME & JUST. 381(1993); A. Baldry, *Bullying in Schools and Exposure to Domestic Violence*, 27 CHILD ABUSE & NEGLECT 713-32 (2003).

⁸ J. Kolbo et al., *Children Who Witness Domestic Violence: A Review of Empirical Literature*, 11 J. INTERPERSONAL VIOLENCE 281 (1996); B.B. Robbie Rossman et al., *Symptomatology and Adaptive Functioning for Children Exposed to Normative Stressors, Dog Attack, and Parental Violence*, 36 J. AM. ACAD. CHILD ADOLESCENT PSYCHIATRY 1089 (1998); M.Dutton et al., *Intimate Partner Violence, PTSD, and Adverse Health Outcomes*, 21 J. INTERPERSONAL VIOLENCE 955 (2006).

⁹ L. Jaycox et al., *Violence Exposure, Posttraumatic Stress Disorder, and Depressive Symptoms Among Recent Immigrant Schoolchildren*, 41 J AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 1104 (2002).

¹⁰ L. Kira et al., *Does Bullying Victimization Suppress IQ? The Effects of Bullying Victimization on IQ in Iraqi and African American Adolescents: A Traumatology Perspective*, 23 J. OF AGGRESSION, MALTREATMENT & TRAUMA 431 (2014).

direct effects on increased PTSD symptoms and significant direct and indirect negative effects on perceptual reasoning, processing speed, and working memory.”¹¹

21. The effects of trauma extend beyond psychiatric disorders; trauma harms a child’s development.¹² The impact of long-term or continuing trauma triggers “fight or flight” responses in a child’s brain that chemically reduce the activity in areas of the brain where executive functions are developed.¹³ Research has shown the importance of executive function in social interactions and goal-oriented behaviors, including planning and organization.¹⁴ Thus, children who experience trauma will be developmentally behind children of the same age without a history of trauma.¹⁵ Asylum-seeking children and other forms of humanitarian immigration relief have often experienced multiple forms of ongoing trauma including traumatic events in their home countries, trauma during their immigration to the U.S., victimization occurring in the U.S., trauma associated with immigration enforcement and immigration detention, and now additional trauma associated with fears for themselves and their parents or close family members due to COVID-19.

22. Moreover, asylum-seeking girls are uniquely vulnerable to the effects of trauma because some have suffered sexual assault in their home countries. In that regard, immigrant girls are twice as likely to have suffered from sexual assault than their nonimmigrant peers.¹⁶ The effect of trauma associated from sexual assault can often produce physical issues, such as cognitive

¹¹ M. De Bellis et al., *Neuropsychological Findings in Pediatric Maltreatment: Relationship of PTSD, Dissociative Symptoms, and Abuse/Neglect Indices to Neurocognitive Outcomes*, 18 CHILD MALTREATMENT 171 (2013).

¹² L. Hecht Schafran, *Domestic Violence, Developing Brains, and the Lifespan New Knowledge from Neuroscience*, 53 JUDGES’ J. 32 (2014).

¹³ *Id.* at 33.

¹⁴ J. Best et al., *Executive Functions after Age 5: Changes and Correlates*, 29 Developmental Rev. 180 (2009).

¹⁵ V. Vasilevski & A. Tucker, *Wide-Ranging Cognitive Deficits in Adolescents Following Early Life Maltreatment*, 30 NEUROPSYCHOLOGY 239(2016).

¹⁶ R. Decker & J. Silverman, *Sexual Violence Against Adolescent Girls, Influences of Immigration and Acculturation*, 13 VIOLENCE AGAINST WOMEN 498, 507 (2007).

deficits, depression, PTSD, severe anxiety, high obesity rates, chronic gastrointestinal problems, and sexual development issues, as well as adverse outcomes associated with executive decision-making such as dropping out of high school, drug and alcohol abuse, and teenage motherhood.¹⁷

23. The science is clear: traumatic stress, abuse, neglect, chaos, and other adverse childhood experiences alter a child's brain leading to enduring emotional, behavioral, cognitive, social and physical problems.¹⁸ Abundant studies from diverse fields—developmental and clinical psychology, psychiatry, education, child welfare, psychophysiological—have documented that these noxious experiences cause abnormal organization and functioning of important neurobiological systems and compromise functional capacities mediated by those systems.¹⁹

24. In short, asylum-seeking and humanitarian relief-seeking children have a high likelihood to have experienced trauma, to have an inability to process this trauma, and to suffer psychiatric disorders and developmental delays because of this trauma.

25. The trauma experienced by asylum-seeking children results in impairment to emotional development, memory, cognition, and executive function—all of which may be needed while applying for immigration relief including but not limited to asylum.²⁰ For example, asylum and humanitarian relief-seeking children whose cases end up before an immigration judge will have been required to retell their history of abuse multiple times and retell it again in a formal court setting before an immigration judge. This process is painful even for adult victims, but it is much more difficult, emotionally harmful, and traumatic for child victims, compounding the negative effects already suffered. In fact, one of the hallmark symptoms of PTSD is avoidance of

¹⁷ P. Trickett et al., *The Impact of Sexual Abuse on Female Development: Lessons From a Multigenerational, Longitudinal Research Study*, 23 DEV. & PSYCHOPATHOLOGY 453 (2011).

¹⁸ See, e.g., J. Scott, et al., *A Quantitative Meta-Analysis of Neurocognitive Functioning in Posttraumatic Stress Disorder*, 141 PSYCH. BULLETIN 105 (2015).

¹⁹ *Id.*

²⁰ *Id.*

reminders of past traumas.²¹ Asylum and humanitarian relief-seeking children, with immature and impaired executive functioning, are being forced to do what goes against their instincts.

26. The novel coronavirus COVID-19 presents another type of physical threat to asylum and humanitarian relief-seeking children and those they love. COVID-19 has no preference for age of who it will infect.²² While children have shown less probability of mortality, news reports have shown COVID-19 still can cause mortality in children as young as infants.²³ The Center for Disease Control (“CDC”) has reported that even if younger people may not suffer high-mortality, the amount of younger people being hospitalized by the illness has drastically exceeded earlier estimates.²⁴ Unlike other threats, COVID-19 is silent, invisible. For an asylum-seeking child, combatting an unseen threat that is highly contagious like COVID-19 can produce the same anxiety, helplessness, and hypervigilance as the other traumatic events these children have experienced in their lives.

27. Further, the CDC has reported that children are ideal conduits of the COVID-19, unwittingly infecting older, more-vulnerable populations.²⁵ This can produce traumatic situations like where a young asylum-seeking child becomes hurt and angry when a parent is not exhibiting the same nurturing interactions due to illness, or where an older asylum-seeking child becomes overwrought with the idea of passing the virus to their loved ones. The threat of

²¹ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, (“DSM-V”) 271 (5th ed. 2013).

²² CDC, *Coronavirus Disease 2019: Frequently Asked Questions*, https://www.cdc.gov/coronavirus/2019-ncov/faq.html#anchor_1584386215012 (last visited Mar. 29, 2020).

²³ S. St. Clair & C. Reyes, *Illinois Gov. J.B. Pritzker announces 13 more deaths linked to the coronavirus, including the stunning loss of an infant*, CHI. TRIB. (Mar. 29, 2020), <https://www.chicagotribune.com/coronavirus/ct-coronavirus-pritzker-presser-saturday-20200328-1gz3i2aoljgnvmu62yiamfjtje-story.html>.

²⁴ R. Miller, *Yes, COVID-19 can be serious for younger adults, too, CDC report shows*, USA TODAY (Mar. 19, 2020), <https://www.usatoday.com/story/news/health/2020/03/19/coronavirus-illnesses-can-serious-young-adults-cdc-report/2874271001>.

²⁵ CDC, *Coronavirus Disease 2019: Caring for Children*, https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/children.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fprepare%2Fchildren.html (last visited Mar. 29, 2020).

COVID-19 undeniably has similar characteristics to prior traumatic events experienced by asylum-seeking children.

28. The threat of being more likely to contract COVID-19 is all the more significant because of the underlying trauma experienced by asylum and humanitarian relief-seeking children—impairments not merely derived from psychological fear and anxiety, but neurobiological impairments that fundamentally alter the structure of the brain.²⁶ Asylum-seeking children need time to heal and grow to develop fully the executive functions limited by these impairments; to overcome the developmental immaturity and interference of emotional dysregulation caused by past trauma.²⁷ The increased risk that continued confinement poses for asylum-seeking children, increased likelihood that they will contract and not be able to prevent being infected with COVID-19, robs them of much needed time to heal and grow while instead exacerbating trauma related to underlying impairments.

29. As the COVID-19 pandemic has spread across all fifty states and the United States has become the worldwide leader of infected persons, asylum-seeking children are at increased risk now of contracting COVID-19—this is not a future harm. The trauma associated with the increased risk of living in what amounts to an incubator for COVID-19 exacts a current toll by exacerbating the effects of previous trauma suffered by asylum-seeking children.

B. COVID-19 Exposure or Infection in Detention Will Result in Exponentially Negative Impacts on Neurobiological Health and Well-Being.

30. Asylum-seeking and humanitarian relief-seeking children have suffered trauma and often multiple forms of recurring traumas. These children are already playing catch-up to their peers who have suffered no past trauma. For example, research about the development of the

²⁶ D. Silove et al., *Policies of Deterrence and the Mental Health of Asylum Seekers*, 284 J. AM. MED. ASSN. 604 (2000).

²⁷ *Id.*

hippocampus, a structure closely associated with memory, anxiety-related behavior, and emotional regulation, suggests that exposure to stress shrinks or hampers the growth of the hippocampus.²⁸ This developmental alteration explains some of the memory difficulties of people who have experienced significant trauma. Childhood and adolescent exposure to trauma has also been negatively correlated to the growth of the corpus callosum—the brain structure that connects the brain regions that regulate various aspects of cognitive functioning.²⁹ Thus, not surprisingly, adolescents with histories of severe maltreatment have shown “significant impairments on measures of executive function and attention, working memory, learning, visuospatial function, and visual processing speed.”³⁰

31. The conditions asylum-seeking children face in detention puts them more at risk of infection than their peers during this COVID-19 pandemic. With no known antiviral treatment or vaccine, medical professionals can only treat the symptoms of COVID-19, not the underlying disease, meaning the primary prevention strategies involve social distancing and hygiene.³¹ The conditions at the immigration detention centers including family residential centers belie these prevention strategies with a lack of testing, hygiene products like hand-sanitizer or Clorox, or space to social distance.³² This creates an environment much like other COVID-19 hotspots such as cruise ships, nursing homes, and jails.³³ Simply put, the asylum and humanitarian relief-seeking children in detention are more likely to be infected by COVID-19 than their peers who do not reside in detention conditions that make transmission of the virus much easier.

²⁸ *Id.*

²⁹ Pechtel & Pizzagalli, *supra* note 6 (“In both non-human and human research, exposure to [early life stress] has been associated with decreases in corpus callosum size.”).

³⁰ Vasilevski & Tucker, *supra* note 15.

³¹ CDC, *Coronavirus Disease 2019: Caring for Yourself at Home*, <https://www.cdc.gov/coronavirus/2019-ncov/if-you-are-sick/caring-for-yourself-at-home.html> (last visited Mar. 29, 2020).

³² Complaint ¶¶ 101–147.

³³ *Id.*

32. If asylum-seeking children are more likely to be exposed or infected with COVID-19, the result becomes further trauma and developmental delays. As a result, asylum-seeking children, who already have experienced trauma that could induce developmental delays, will now have these delays compounded, potentially leading to development exponentially behind their peers.

33. The result of multiple or continuous trauma compared to one isolated trauma has vastly more severe medical consequences. An analysis of data from groups of children whose exposure to trauma had been continuous or had occurred at different points revealed that “[c]hildren maltreated in multiple developmental periods had more externalizing and internalizing problems and lower IQ scores than children maltreated in only one developmental period.”³⁴ That is, children exposed to continuing or repeated traumas—including the types of trauma suffered by asylum and humanitarian relief-seeking children—had even worse outcomes than children whose maltreatment was isolated.³⁵

34. Asylum-seeking children exposed to COVID-19 in detention could suffer continual trauma, such as hearing rumors about why another detainee never returned, hearing about the impossibly long lines to see a doctor and/or to receive basic helpful products like children’s Tylenol, seeing the risk associated with touching every uncleaned door knob or communal table, seeing the risk associated with entering every uncleaned common space, and being unable to physically distance yourself from others. Being trapped in a detention facility that is either unwilling or unable to take precautionary measures against COVID-19 would be nerve-racking for most individuals, but uniquely harmful to children and youth with past trauma histories.

³⁴ S. Jaffee & A. Maikovich-Fong, *Effects of Chronic Maltreatment Timing on Children's Behavior and Cognitive Abilities*, 52 J. CHILD PSYCH. & PSYCHIATRY 184 (2011).

³⁵ *Id.*

35. The current projections for a vaccine that could control this pandemic range from 12 to 18 months.³⁶ This means the continuous trauma suffered by potential exposure to asylum-seeking children could last for months or even years. Further, the virus has hobbled the global economy, creating a shortage of personal protective equipment, hygienic supplies, and medical equipment necessary to provide even a modicum of safety against COVID-19.³⁷ Current reports show that medical professionals on the frontline fighting this pandemic struggle to receive these supplies to limit their risk of exposure, so it is unrealistic to believe that a detention facility would acquire these supplies anytime soon. Thus, the increased risks of exposure to COVID-19 to asylum-seeking children living in a detention facility unequipped with even the basic tools to combat this virus could continue for the duration of the pandemic.

36. Asylum-seeking children infected by COVID-19 could suffer life-altering trauma, such as being unable to breathe, being taken to the hospital, being treated by medical professionals in personal protective equipment, being alone because a parent or guardian was not allowed in the hospital room, being hooked up to a ventilator, and being scared of death. For example, the experience of being severely infected with this illness would be harrowing for most individuals – but uniquely harmful to children and adolescents with past trauma. The inadequate health care at family detention centers exacerbates the risks when an asylum-seeking child becomes infected with COVID-19, because they have not adopted current best practices in medical, mental health, and trauma fields.³⁸ For instance, the current Family Residential Standard on Medical Care

³⁶ World Health Organization, *WHO Director-General's opening remarks at the media briefing on COVID-19* (Mar. 27, 2020), <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19--27-march-2020> (“A vaccine is still at least 12 to 18 months away.”).

³⁷ M. Ranney et al., *Critical Supply Shortages – The Need for Ventilators and Personal Protective Equipment during the Covid-19 Pandemic*, *THE NEW ENGLAND J. OF MED.* (Mar. 25, 2020), <https://www.nejm.org/doi/full/10.1056/NEJMp2006141>.

³⁸ ACFRC, *Report of ICE Advisory Committee on Family Residential Centers* (2016), <https://www.ice.gov/sites/default/files/documents/Report/2016/acfrc-report-final-102016.pdf>.

states that detainees can “freely request health care services,” and requires triage within 24 hours.³⁹ In practice, the wait time can be much longer, and detainees may never be treated for medical symptoms.⁴⁰ The bottom line is that during a pandemic with a virus like COVID-19 that can rapidly deteriorate the healthiest person’s immune system, 24 hours to receive medical attention means asylum-seeking children have less access to healthcare to combat this illness than non-detained individuals.

37. The continuous and repeated nature of trauma presents exponentially more risk than a one-time occurrence. This means an asylum-seeking individual who experienced trauma in their home country now faces a significantly greater impact from COVID-19 exposure or infection.

38. The government inaccurately articulates that asylum-seeking children have suffered no harm because they have not been exposed or infected with COVID-19.⁴¹ This misses the point. Asylum-seeking and humanitarian relief-seeking children are being currently harmed because the immigration detention centers have inadequate protections to limit exposure or treat them when infected. It is undeniable that future risks cause *immediate* mental and physical reactions including harm.

C. Childhood Experiences, Including Those Attendant to Immigration Detention, Will Compound and Further Traumatize Children Forced to Witness Parents Suffer from Illness and Children Contracting the Illness Themselves.

39. In general, children anticipating harm and/or watching their caregiving parents, family members, and/or guardians suffer from an illness produces trauma. The pain and anxiety of

³⁹ U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, ICE/DRO RESIDENTIAL STANDARD 4.3 MEDICAL CARE (Dec. 21, 2007), http://www.ice.gov/doclib/dro/family-residential/pdf/rs_medical_care.pdf.

⁴⁰ See, e.g. Human Rights Watch, *Systemic Indifference: Dangerous and Substandard Medical Care in US Immigration Detention* (May 8, 2017), <https://www.hrw.org/report/2017/05/08/systemic-indifference/dangerous-substandard-medical-care-us-immigration-detention>; see also Human Rights Watch, *Code Red: The Fatal Consequences of Dangerously Substandard Medical Care in Immigration Detention* (Jun. 20, 2018), <https://www.hrw.org/report/2018/06/20/code-red/fatal-consequences-dangerouslysubstandard-medical-care-immigration>.

⁴¹ Gov’t Opp., Dkt 19, at 8–10, 21.

anticipating or actually watching a loved one vomiting from gastrointestinal issues, struggling to breathe even while lying in bed, and riling in pain from a fever would affect the most well-adjusted adult. But as discussed-above, asylum-seeking and humanitarian relief-seeking children who have suffered prior trauma often already have developmental disabilities that stunt emotional growth—leaving them less equipped to process caregiving parents, family members, and/or guardians suffering from an illness.⁴²

40. The routes of transmission, contagiousness, and illness progression of COVID-19 create a danger of separation uniquely harmful to asylum and humanitarian relief-seeking children with past trauma. Separation of children who have experienced trauma from their caregiving parents, family members, and/or guardians can worsen trauma impacts. For instance, a study of students who had fled Cambodia as children during the Khmer Rouge regime found that “[p]sychiatric effects were more common and more severe when the students did not reside with a family member.”⁴³ In a similar vein, a recent discussion of research specifically related to unaccompanied children, one study noted that a “[I]ack of parental support, which can provide an important regulating influence following traumatic exposure, may place unaccompanied children at particular risk for developing psychopathology.”⁴⁴ Likewise, a study of Iraqi refugees found that, in general, symptoms of traumatic stress and depression were greater for youth who experienced more potentially traumatic events, but that “[y]outh endorsed higher levels of depression symptoms when they reported less supportive relationships, regardless of the amount

⁴² K. Perreira, *supra* note 1.

⁴³ J.D. Kinzie et al., *The Psychiatric Effects of Massive Trauma on Cambodian Children*, 25 J. AM. ACAD. OF CHILD PSYCHIATRY 370 (1986).

⁴⁴ C. Baily, *The Psychosocial Context and Mental Health Needs of Unaccompanied Children in the United States Immigration Proceedings*, 13 GRADUATE STUDENT J. OF PSYCH. 4 (2011) (citations omitted).

of traumatic event exposure.”⁴⁵ Thus, the research shows the need of a supportive and nurturing interpersonal network to minimize the impact and heal from the psychological consequences of such traumatic past.⁴⁶

41. The most common route of transmission and the contagiousness of COVID-19 requires separation of someone infected with COVID-19 from others. The CDC states that COVID-19 is most likely spread through droplets in the air.⁴⁷ To mitigate this type of transmission, the CDC recommends people stay 6 feet apart, and it recommends that those with the illness wear a mask to prohibit the spread of these droplets.⁴⁸ For example, an asylum-seeking child who has caregiving parents, family members, and/or guardians with COVID-19 must physically separate themselves to prevent transmission of this illness while watching their loved one from a distance have to wear protective gear often not required in other illnesses. This separation would occur even if the loved one had a mild case of COVID-19. The physical separation that preventing the spread of COVID-19 mandates runs directly contrary to what children who have experienced trauma need which often includes being physically close to a nurturing, comforting caregiver.

42. The CDC unfortunately states that those with older age are more likely to have a severe case of COVID-19.⁴⁹ Many asylum and humanitarian relief seeking children traveled to the United States with and are in the care of their loved ones who are close family members, a parent, grand parent, aunt or uncle. These caretakers are older and a greater risk from COVID-

⁴⁵ C. Trentacosta et al., *Potentially Traumatic Events and Mental Health Problems Among Children of Iraqi Refugees: The Roles of Relationships with Parents and Feelings About School*, 86 AM. J. OF ORTHOPSYCHIATRY 384 (2016).

⁴⁶ Immigration Psychology Working Group, *Vulnerable but Not Broken*, at 50-51 (2018), available at <http://niwaplibrary.wcl.american.edu/pubs/vulnerable-but-not-broken>.

⁴⁷ CDC, *Coronavirus Disease 2019: How Coronavirus Spreads*, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html> (last visited Mar. 29, 2020).

⁴⁸ *Id.*

⁴⁹ CDC, *Coronavirus Disease 2019: People Who Need to Take Extra Precautions*, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/index.html> (Mar. 29, 2020).

19. In severe cases, a COVID-19 patient suffers from respiratory failure, requiring treatment in a hospital. Because of the influx of patients with COVID-19 and the extreme contagiousness of the illness, hospitals have been creating policies prohibiting visitors—not only visitors for COVID-19 patients but even other routine visitors such as spouses of women who are giving birth in other wings of the hospital. And reports have shown that patients hospitalized with COVID-19 often require weeks of care. This means an asylum or humanitarian relief-seeking child with a loved one suffering with severe COVID-19 would be separated without any contact for a substantial period of time further amplifying the child’s trauma, anxiety, fear, and PTSD.

43. But the separation in the most severe cases can be even more devastating than just a substantial period of time involved in the separation because the caretaker might die while separated. The World Health Organization (“WHO”) has estimated the mortality rates of COVID-19 to be as high as 4%, which is ten times more deadly than the flu.⁵⁰ The mortality rate, similar to those suffering from severe cases, increases with age.⁵¹ This means asylum-seeking and humanitarian relief-seeking children’s loved ones may be more at risk to die from COVID-19. With an inability to visit loved ones in the hospital with COVID-19 and an inability to congregate for a funeral because of “shelter-in-place” laws and the current CDC guidelines about social distancing, the worst-case scenario for severe cases would be the last time an asylum-seeking child sees their loved one, dead or alive, would be the moment they are—hopefully—whisked away to the hospital for treatment.⁵² For a well-adjusted adult, this worst-case scenario would be cataclysmic. For an asylum or humanitarian relief-seeking child whose

⁵⁰ WHO, Coronavirus disease (COVID-19) Pandemic, <https://www.who.int/emergencies/diseases/novel-coronavirus-2019> (last visited Mar. 29, 2020).

⁵¹ *Id.*

⁵² CDC, *Emergency Preparedness and Response: Stay Put – Learn How to Shelter in Place*, <https://emergency.cdc.gov/shelterinplace.asp> (last visited Mar. 29, 2020).

psychiatric effects from past trauma can become exacerbated without the presence of a loved-one, this worst-case scenario will likely be devastating with lifelong severe irreparable consequences.

44. The science shows the need for asylum-seeking children suffering from past trauma to have a supportive and nurturing interpersonal network to minimize the impact of as well as to heal from the psychological consequences of a traumatic past.⁵³ By having asylum-seeking children and their loved ones forced to live in an environment that increases the likelihood of contracting COVID-19, the likelihood increases that this asylum-seeking child will not have this supportive and nurturing interpersonal network they need to heal.

II. COVID-19 Pandemic Further Undermines Already Inadequate Protections Under U.S. Immigration Laws to Vindicate the Rights of Children as a Vulnerable Population Entitled to Additional Safeguards.

45. The Plaintiff Children are an already vulnerable class that is inadequately protected by the current immigration system. They are treated the same as adults, and not guaranteed guardians ad litem or a right to free counsel. Those limited protections that children have under the settlement of *Flores v. Reno* are often ignored by the government. *See* Stipulated Settlement Agreement, *Flores v. Reno*, Case No. CV 85-4544-RJK(Px) (C.D. Cal. Jan. 17, 1997); *see also*, *e.g.*, *Flores v. Barr*, 407 F.Supp.3d 909 (C.D.Cal. 2019) (finding government regulations irreconcilable with the settlement); Order re Pls.’ *Ex Parte* Appl. for Restraining Order and Order to Show Cause re Preliminary Inj. at 5, *Flores et al. v. Barr, et al.*, Case No. 2:85-cv-04544-DMG-AGR, (C.D. Cal. Mar. 28, 2020), ECF No. 740 (finding that plaintiffs had shown “serious questions as to the merits of their claim that ICE has breached the [Flores Settlement

⁵³ J.D. Kinzie et al., *supra* note 43.

Agreement] with regard to the provision of safe and sanitary conditions and appropriate medical care and living accommodations in the context of the COVID-19 outbreak”).

46. The COVID-19 pandemic further erodes what little protection they have by imposing various limits on their access to legal counsel, representatives, family, and friends.

A. Children Have Few Procedural Protections Under the Immigration and Nationality Act (INA), and Many of Those That Do Exist Will Not Be Implemented in a Pandemic.

47. Children are a unique, and uniquely vulnerable population that society routinely seeks to protect through special legal regimes. Child migrants, whether experiencing migration due to violence, abuse, low-wage labor or forced migration such as trafficking, are particularly vulnerable. However, a review of the United States’ record of legal protections for immigrant children shows that what should be a comprehensive protective scheme is instead a smattering of narrow yet hard-won carve outs and grounds for relief that leave children vulnerable to the current harsh use of detention and attempts to narrow asylum eligibility. The narrowness of these carve-outs is especially apparent during a pandemic.

48. U.S. immigration laws generally treat adults and children, whether accompanied or unaccompanied, the same in regard to the substantive immigration law governing relief from removal, applicability of grounds of inadmissibility, and removal procedures.⁵⁴ While some limited procedural differences are applied to certain children, these differences do not make the process simpler, and in some instances add to the complexity of proceedings. Under the William Wilberforce Trafficking Victims Protection Reauthorization Act, (TVPRA) (P.L. 110–457) the Secretary of Health and Human Services is authorized to appoint independent Child Advocates,

⁵⁴ Memorandum from MaryBeth Keller, Chief Immigration Judge, Exec. Office for Immigration Review, to All Immigration Judges et al., Exec. Office for Immigration Review at 3 (Dec. 20, 2017) (reiterating that “the best interest of the child” is not a legal standard under the INA).

guardians *ad litem*, to child trafficking victims and other vulnerable, unaccompanied children. 8 U.S.C. § 1232 (c)(6). Nonetheless, the United States does not provide guardians *ad litem* to most children in immigration detention or guarantee a right to free counsel to detained minors.

49. The Ninth Circuit Court of Appeals' 2004 decision in *Flores-Chavez v. Ashcroft*, 362 F.3d 1150 (9th Cir. 2004) demonstrates one of the few junctures in the deportation process where different procedural rules apply to children. Under 8 C.F.R. § 103.8(c)(2)(ii), to initiate a removal proceeding for a child under 14 years of age, DHS must serve the Notice to Appear "upon the person with whom the incompetent or the minor resides; whenever possible, service shall also be made on the near relative, guardian, committee, or friend." In *Flores-Chavez*, the court extended the regulation to include children age 15-17, interpreting regulations requiring a responsible adult to guarantee any child's appearance at future removal hearings to mean that the government must send hearing notices to that adult as well as to the child. *See* 362 F.3d at 1155-56. At multiple stages of litigation, the government pressed the surprising position that the government need not notify a responsible adult of the hearing date of the child whose attendance they had pledged to ensure. Moreover, since 2004, the government has refused to extend this commonsense protection to children who are between the ages of 15-17 beyond the Ninth Circuit. Indeed, the government routinely effectuates service on young children by serving the directors of ORR-funded facilities.

50. From both personal experience and conversations with practitioners who work in the field, I am aware that DHS frequently fails to comply with *Flores-Chavez*. However, without an attorney a child is unable to vindicate his or her right to seek termination of removal proceedings for lack of proper notice, whether under *Flores-Chavez* or the governing immigration regulations. The government's vigorous defense of a position the Court said made "no sense,"

refusal to apply the rule nationwide, and failure to implement the rule effectively, all demonstrate the oppositional and hyper-technical approach that has characterized U.S. policy toward immigrant children.

51. While regulations provide that Immigration Judges “shall not accept an admission of removability from an unrepresented respondent who is incompetent or under the age of 18 and is not accompanied by an attorney or legal representative, a near relative, legal guardian, or friend,” 8 C.F.R. § 1240.10(c), in fact Immigration Judges routinely question unrepresented child respondents about the factual allegations in the Notice To Appear (NTA). As I wrote in 2002:

In practice, INS officers interrogate the child outside the court, where there are no safeguards in place to prevent abuse or coercion. Resulting “facts” culled from these interviews, such as the child’s reported birthplace and manner of entry, are then entered onto the court record, through documents or testimony, and the Immigration Judge makes the legal determination of removability. Far from aiding children, this special “protection” guarantees that children will be interrogated by immigration officers in a setting which provides the least protection from coercive practices.

David B. Thronson, *Kids Will Be Kids? Reconsidering Conceptions of Children’s Rights Underlying Immigration Law*, 63 OHIO ST. L.J. 979, 1000-01 (2002) (footnotes and citations omitted); *see also Matter of Amaya*, 21 I. & N. Dec. 583, 587 (BIA 1996) (holding that although the regulation forbids Immigration Judges from accepting admissions to charges of removability, Immigration Judges may nonetheless accept factual admissions from children as sufficient to establish removability). If “the immigration judge is satisfied that no issues of law or fact remain, the immigration judge may determine that removability as charged has been established by the admissions of the respondent.” 8 C.F.R. § 1240.10(c). Thus, Immigration Judges routinely establish removability through children’s own admissions, even those of young children.

52. I am aware of this occurring as recently as March 2020, when the Government piloted a program in Houston to video stream the hearings of children in custody.⁵⁵ The children appeared in a Houston courtroom while the judge appeared by video from Atlanta and used telephonic interpreters. In at least one case during this pilot program, the Immigration Judge attempted to take pleadings from an unrepresented child.

53. The importance of the *Flores* settlement to this Declaration is that it is another example of a hard-won yet insufficient protection, one that has generated an ample, decades-long record that the defendant, the Department of Homeland Security, is not to be trusted with the care of children and their families during a pandemic. Infamously, recently in June 2019, counsel for the government at oral argument would not concede that “safe and sanitary” means guaranteeing detained children soap and a toothbrush.⁵⁶ The *Flores* plaintiffs’ pleadings, filed on March 26, 2020, pointed out recent failures and documented the outbreak of the disease in congregate child detention settings. The *Flores* process has made detention somewhat safer for many children, but it cannot make detained children safe in the present conditions.

54. On March 28, 2020, Judge Gee in the Central District of California who continues to oversee litigation related to the *Flores* settlement, found that plaintiffs had shown “serious questions as to the merits of their claim that ICE has breached the [Flores Settlement Agreement] with regard to the provision of safe and sanitary conditions and appropriate medical care and living

⁵⁵ Lomi Kriel, *New Trump Administration Policies Fast-Track Some Children’s Immigration Court Hearings, Including Video Pilot in Houston*, HOUSTON CHRONICLE (Mar. 3, 2020), <https://www.houstonchronicle.com/news/houston-texas/houston/article/New-Trump-administration-policies-fast-track-some-15105573.php>.

⁵⁶ See Ken White, *Why a Government Lawyer Argued Against Giving Immigrant Kids Toothbrushes: The sheer effrontery of the government’s argument may be explained, but not excused, by its long backstory*, ATLANTIC (June 23, 2019) available at <https://www.theatlantic.com/ideas/archive/2019/06/why-sarah-fabian-argued-against-giving-kids-toothbrushes/592366/>.

accommodations in the context of the COVID-19 outbreak.” Order re Pls.’ *Ex Parte* Appl. for Restraining Order and Order to Show Cause re Preliminary Inj. at 5, *Flores et al. v. Barr, et al.*, Case No. 2:85-cv-04544-DMG-AGR, (C.D. Cal. Mar. 28, 2020), ECF No. 740. The court further found that plaintiffs demonstrated “a strong likelihood of succeeding on their claim that both ICE and ORR have breached the FSA in their failure to release minors to suitable custodians in a prompt manner and to record their continuous efforts towards minors’ release.” *Id.* The court explained:

[m]edical experts fear the exceptionally rapid transmission of COVID-19 in detention facilities, where medical resources such as physicians, testing kits, and protective equipment are constrained; people are unable to practice social distancing; shared facilities are not frequently or properly sanitized; soap and hand sanitizer are not provided or easily accessible to detainees quarantine or isolation units are scarce; and there are frequent opportunities for an infected person to enter or leave the facility. For migrant children in detention, who are already more likely to have mental health concerns or may be separated from their family members, the trauma of undergoing solitary quarantine for the virus or simply not receiving adequate information about the potential for infection is likely to exacerbate existing mental health concerns.

Id. at 6 (internal citations omitted). The court ordered heightened inspections of ICE and ORR facilities (*id.* at 9), required explanations of any delays in releasing a child from ICE and ORR custody (*id.* at 11), ordered an “orderly, yet prompt, disposition of minors’ claims of suitable placement,” (*id.* at 13) and waived all bonds (*id.* at 13). The *Flores* process has made detention somewhat safer for many children, but it cannot make them safe in detention under the present and unprecedented COVID-19 conditions.

B. The COVID-19 Pandemic Further Erodes the Minimal Protections Afforded to Children by Impeding Access to Counsel and Community Support.

55. The COVID-19 pandemic further erodes the minimal protections available to children under the INA.

56. At least thirty-one counties in Texas, and several major cities, including Austin, San Antonio, Houston, Dallas, and Fort Worth, have issued “stay-at-home” or “shelter-in-place”

orders. Similarly, the Governor of Pennsylvania has issued “stay-at-home” orders for numerous counties, including Berks County, where the Berks detention center is located, and numerous counties where volunteers might normally provide assistance to detainees. The purpose of these orders is to slow the spread of COVID-19 and prevent hospitals from being overwhelmed by limiting people’s contact with each other and restricting them to their homes except for essential activities. These “stay-at-home” and “shelter-in-place” orders deter individuals from appearing in immigration court as a relative, guardian, or friend. The orders also directly affect the work of organizations that provide legal assistance, because staff are now working from home and some law offices have been completely closed. The access to counsel issues are palpable as the Governors’ orders make it nearly impossible for lawyers and advocates in covered counties to work in their offices or assist their clients in meaningful ways

57. Legal Orientation Programs (“LOPs”) at detention centers have generally been suspended. Organizations that do Know Your Rights (“KYR”) presentations at detention centers have switched to video presentations.

58. All in-person legal visits by attorneys and representatives at the Berks detention center have been suspended since March 20, 2020.⁵⁷ At Dilley and Karnes, as well as other facilities, ICE is requiring attorneys and representatives to wear personal protective equipment (“PPE”) to have contact visits with detained individuals.⁵⁸ Most attorneys and representatives do not own PPE, nor can they acquire it at this time due to nationwide shortages. Non-contact visits through glass or by telephone are still possible without PPE, but this is generally an ineffective way to interview children who have experienced trauma. Preparing children to testify at a hearing on applications such as asylum, a type of hearing which tends to be legally and factually

⁵⁷ Resp’ts’ Opp’n to Pet’rs’ Mot. for a TRO at 5, ECF No. 19.

⁵⁸ *Id.*

complicated, is particularly difficult without multiple, in-person meetings that allow building trust and take significant amounts of time. Moreover, lawyers are reporting lengthy waits in crowded waiting rooms for the window visits, making it harder and more dangerous during the COVID-19 pandemic to meet with their clients. As a result, I understand that the Dilley Pro Bono Project (DPBP), which has maintained a daily on-site presence at the Dilley detention center since the facility opened in December 2014, ceased in-person visitation with clients in response to the COVID-19 pandemic on March 18, 2020.⁵⁹

59. While some detention facilities are offering remote communications as an option for attorneys, remote communications with clients is never preferred, can be impossible with children, and is often impeded by technical issues or other logistical scheduling miscommunications. Legal representation of children requires more time than the representation of adults because children often lack understanding of the context and consequences of removal proceedings.⁶⁰ In the last year, children at Berks, for example, have ranged in ages from four months to twelve years. Even if a child appears mature beyond his or her years, the apparent maturity is often due to the trauma and adversity he or she has had to endure from a young age.⁶¹ Further, establishing trust with children takes longer. Many of the children at the detention centers have experienced physical, psychological, or sexual abuse, and may find it difficult to talk about their experiences to a stranger.⁶² As the American Bar Association recognized, “interviewing the Child telephonically or virtually may hinder the establishment of a trusting

⁵⁹ D Decl. of Shalyn Fluharty ¶ 3, ECF No. 1-4; Declaration of Allison Herre ¶ 4, ECF No. 1-5.

⁶⁰ See generally *Representing Children in Immigration Matters*, KIDS IN NEED OF DEF., <https://supportkind.org/wp-content/uploads/2015/04/Representing-Children-In-Immigration-Matters-FULL-VERSION.pdf> at 7 (last visited Mar. 29, 2020).

⁶¹ *Id.* at 2.

⁶² *Id.* at 40.

relationship.”⁶³ Without in-person meetings, it will be virtually impossible for children to obtain adequate legal representation.

60. Even assuming that representatives are able to interview detained children and prepare them to testify, whether in-person or remotely, the stay-at-home orders have resulted in the closure of many legal offices. This means that legal staff are not available to help compile evidence, interview witnesses, prepare applications, and submit documents, making the entire process much more difficult and time-consuming for a representative. By interfering with attorneys’ abilities to do their jobs, the COVID-19 pandemic undermines access to counsel.

61. Moreover, the COVID-19 pandemic has resulted in closures of state court offices and other offices and businesses instrumental in the immigration relief process, including those offices needed to procure birth certificates, provide translation of documents, notarize documents, and provide other documentary evidence supporting the immigration relief the child is requesting.

62. Furthermore, immigration judges are not always willing to grant motions for telephonic appearances by attorneys who wish to avoid crowded courtrooms during the pandemic. Nor is there an established way for attorneys to appear by video. If a judge holds a hearing by video, the attorney must normally choose to be present with the client in the detention center or to be present in the courtroom. Immigration judges also are dissuaded from granting continuances, *see, e.g., Matter of L-A-B-R-*, 27 I&N Dec. 405, 405 (A.G. 2018), and have denied them even when the request is based on an illness. This makes it harder for attorneys to fulfill their professional

⁶³ *Standards for the Custody, Placement, and Care; Legal Representation; and Adjudication of Unaccompanied Alien Children in the United States*, AM. BAR ASS’N (Aug. 2018), https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/standards_for_children_2018.pdf at 20.

responsibilities to clients while also taking care of their health. I am personally aware of a recent case in which an attorney who had been ordered to self-isolate owing to her own COVID-19 symptoms was denied an uncontested continuance in a detained asylum case, and handled the matter via telephone while ill.

III. The Government Can And Should Exercise Statutorily Available Discretion to Release Plaintiff Children With Their Families.

63. Defendants have, as a matter of law, explicit authority to release Plaintiff Children with their parents. DHS has the statutory authority to release, parole or otherwise afford discretionary relief to detainees. Under the Immigration and Nationality Act, the Attorney General may “in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States.”⁶⁴ Beyond the statute, the regulations governing parole make clear that parole is appropriate to use as a tool for releasing noncitizens in the wake of COVID-19. The regulations identify several categories of people eligible for parole, including but not limited to: (1) those with serious medical conditions in which continued detention would not be appropriate; (2) pregnant women; (3) minors; and (4) those whose continued detention is not in the public interest.⁶⁵ Continued detention of noncitizen families undermines these regulations.

64. There are more than one dozen forms of prosecutorial discretion in federal immigration law. These forms have been outlined in several guidance documents issued by DHS and INS, including a memorandum published in 1976 by then-INS General Counsel Sam Bernsen (the

⁶⁴ INA § 212(d)(5).

⁶⁵ 8 CFR § 212.5 (2011).

“Bernsen Memo”),⁶⁶ a 2000 memorandum published by then-INS Commissioner Doris Meissner (the “Meissner Memo”),⁶⁷ a 2011 memorandum by then-ICE Commissioner John Morton (the “Morton Memo”),⁶⁸ and more recently a 2014 memorandum by then-DHS Secretary Jeh Johnson (the “Johnson Memo”).⁶⁹ The memoranda list at least 15 types of prosecutorial discretion, including deciding whom to detain or release. The current administration has made significant adjustments to the use of discretion, but importantly it has at no point rescinded the aforementioned memoranda⁷⁰ and significantly it has announced to the public that immigration enforcement will not be taken against anyone during COVID-19 unless they pose a risk to public safety or to are subject to mandatory detention for criminal reasons under the statute.⁷¹ Parents and children in our country’s detention centers fall in neither of these priorities and must be released from immigration detention. Indeed, a failure to release is an abuse of discretion.

65. A review of the INA also makes clear that Congress authorizes DHS to use its discretion. Section 103 delegates the administration and enforcement of immigration law to DHS, 8 U.S.C.

⁶⁶ Memorandum from Sam Bernsen, General Counsel, Immigration and Naturalization Service, to Commissioner, Immigration and Naturalization Service, Legal Opinion Regarding Service Exercise of Prosecutorial Discretion (July 15, 1976) (on file with U.S. Immigration and Customs Enforcement), <https://www.ice.gov/doclib/foia/prosecutorial-discretion/service-exercise-pd.pdf>.

⁶⁷ Memorandum from Doris Meissner, Commissioner of Immigration and Naturalization Service, to Regional Directors, District Directors, Chief Patrol Agents, Regional and District Counsel, Immigration and Naturalization Service, on Exercising Prosecutorial Discretion, (Nov. 17, 2000) (on file with author).

⁶⁸ Memorandum from John Morton, Director, U.S. Immigration and Customs Enforcement, to All Field Office Directors, All Special Agents in Charge, All Chief Counsel, U.S. Immigration and Customs Enforcement, on Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens, (June 17, 2011) (on file with U.S. Immigration and Customs Enforcement), <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>.

⁶⁹ Memorandum from Jeh Charles Johnson, Secretary of U.S. Department of Homeland Security, to Thomas S. Winkowski, Acting Director, U.S. Immigration and Customs Enforcement, R. Gil Kerlikowske, Commissioner, U.S. Customs and Border Protection, Leon Rodriguez, Director, U.S. Citizenship and Immigration Services, and Alan D. Bersin, Acting Assistant Secretary for Policy, U.S. Department of Homeland Security, on Policies for the Apprehension, Detention and Removal of Undocumented Immigrants, (Nov. 20, 2014) (on file with the U.S. Department of Homeland Security), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf.

⁷⁰ Sivaprasad Wadhia, Shoba, BANNED: IMMIGRATION ENFORCEMENT IN THE TIME OF TRUMP (NYU Press, 2019).

⁷¹ ICE Guidance on COVID-19, available at <https://www.ice.gov/coronavirus>.

§ 1103(a)(1) (2011), and Section 242 prohibits judicial review of three specific acts of prosecutorial discretion (commencement of proceedings, adjudication of cases, and execution of removal orders), *id.* § 1252(g).

66. In sum, DHS has ample legal authority to release noncitizens from immigration detention, which is civil in nature, for humanitarian reasons or in the public interest. By refusing to exercise that statutory and inherent authority in favor of detainees DHS is showing deliberate indifference toward the vulnerabilities of detained children and families in light of the lethal implications of COVID-19.

Conclusion

67. The challenges posed by the COVID-19 pandemic are unique. Children in family detention centers will suffer both physically and mentally during the current COVID-19 pandemic, and this present suffering will be exacerbated by an outbreak in the detention center. Moreover, the practices and restrictions put in place at family detention centers and immigration courts have already severely limited the children's access to counsel. These extraordinary challenges require DHS to revisit its legal responsibilities and maximize its use of discretion under the law.

I declare under penalty of perjury of the laws of the State of Michigan and the United States that the foregoing is true and correct to the best of my knowledge and belief.

Dated: March 30, 2020



David B. Thronson