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via email only to Joint.Intake@dhs.gov (CC jointintake@cbp.dhs.gov)

Re: Separation of Families via CBP Detention and Processing, and the Agency’s Refusal to Implement a Detainee Locator System

I. Introduction

The American Civil Liberties Union Foundation of San Diego & Imperial Counties and the ACLU Border Rights Center (together, “ACLU”) hereby submit this administrative complaint to the Department of Homeland Security’s Office of Inspector General (“DHS OIG”), regarding U.S. Customs and Border Protection (“CBP”)’s separation of family members via detention.¹ The ACLU requests that DHS OIG undertake a review based on the information contained in this complaint, which is the third in a series of four total complaints addressing the agency’s treatment of detainees in CBP facilities, including Border Patrol stations.²

As with our previous complaints regarding CBP’s mistreatment of pregnant people and sick children,³ this complaint is derived from interviews the ACLU completed between March and July

¹ CBP is the largest law enforcement agency in the United States, with over 60,000 officers. Border Patrol is a subcomponent of CBP. Throughout this complaint, reference to CBP includes Border Patrol.

² Unless otherwise noted, the abuses described here occurred in Border Patrol stations, although some of the people the ACLU interviewed for this project also had been detained by CBP’s Office of Field Operations (“OFO”) at a port of entry. Neither CBP nor Border Patrol provides detainees with clear information regarding where they are detained (or on what authority), and detainees are sometimes transferred between facilities. Thus, it is not uncommon for individuals to express confusion after release when asked where and by whom they were detained. For these reasons, the complaints in this series may include some accounts stemming from CBP OFO custody rather than Border Patrol custody.

³ *CBP’s Long History of Mistreatment of Detained People*, ACLU SAN DIEGO & IMPERIAL COUNTIES, <https://www.aclusandiego.org/legal/blp/cbp-mistreatment-of-detained-people/> (last visited Apr. 13, 2020). *See also* AMERICAN CIVIL LIBERTIES UNION OF SAN DIEGO & IMPERIAL COUNTIES, ET AL., ADMINISTRATIVE COMPLAINT RE: U.S. CUSTOMS AND BORDER PROTECTION AND BORDER PATROL’S ABUSE AND MISTREATMENT OF DETAINED PREGNANT PEOPLE (Jan. 2020), <https://www.aclusandiego.org/wp-content/uploads/2020/01/2020-01-22-OIG-Complaint-1-FINAL-1.pdf>; AMERICAN CIVIL LIBERTIES UNION OF SAN DIEGO & IMPERIAL COUNTIES, ET AL., ADDENDUM TO COMPLAINT OF JANUARY 22, 2020 RE: U.S. CUSTOMS AND BORDER PROTECTION AND BORDER

2019 with people in San Diego and Tijuana who recently had been released from CBP custody.⁴ Our investigation corroborated a well-documented culture of cruelty, willful negligence, and impunity throughout CBP.⁵ It also highlighted the failure of existing agency policies to provide sufficient humanitarian and legal safeguards to protect detainees. Across accounts from recent detainees, four themes emerged: (1) mistreatment of pregnant people, (2) mistreatment and neglect of sick children, (3) family separations, and (4) verbal abuse. As noted, this complaint is the third in a four-part series that will address each theme in turn.

II. CBP Processing and Detention Separates Families

In the spring of 2018, reports that DHS officials were forcibly and systematically separating parents from their young children upon taking custody of asylum-seeking families horrified the

PATROL'S ABUSE AND MISTREATMENT OF DETAINED PREGNANT PEOPLE (Mar. 2020), <https://www.aclusandiego.org/wp-content/uploads/2020/03/2020-03-04-OIG-compl-preg-persons-addendum-appendix-FINAL.pdf>; AMERICAN CIVIL LIBERTIES UNION OF SAN DIEGO & IMPERIAL COUNTIES, ET AL., ADMINISTRATIVE COMPLAINT RE: U.S. CUSTOMS AND BORDER PROTECTION AND BORDER PATROL'S ABUSE AND MISTREATMENT OF DETAINED SICK CHILDREN (Feb. 2020), <https://www.aclusandiego.org/wp-content/uploads/2020/02/2020-02-18-OIG-Complaint-2-FINAL.pdf>.

⁴ During this time period, the ACLU interviewed 103 individuals. The ACLU reviewed a subset of these interviews (i.e., interviews involving accounts of family separation), and selected a small sample of those interviews for inclusion in this complaint.

⁵ See, e.g., John Washington, "Kick Ass, Ask Questions Later": A Border Patrol Whistleblower Speaks Out About Culture of Abuse Against Migrants, INTERCEPT, Sept. 20, 2018, <https://theintercept.com/2018/09/20/border-patrol-agent-immigrant-abuse/>; Sarah Macaraeg, *The Border Patrol Files: Border Patrol Violence: U.S. Paid \$60m to Cover Claims Against the Agency*, GUARDIAN (U.S.), May 1, 2018, <https://www.theguardian.com/world/2018/may/01/border-patrol-violence-us-paid-60m-to-cover-claims-against-the-agency>; Charles Davis, *U.S. Customs and Border Protection Has Killed Nearly 50 People in 10 Years. Most Were Unarmed.*, NEW REPUBLIC, Jan. 4, 2015, <https://newrepublic.com/article/120687/border-patrol-officers-get-impunity-anonymity-immigrant-killings>; Garrett M. Graff, *The Green Monster: How the Border Patrol Became America's Most Out-of-Control Law Enforcement Agency*, POLITICO, Nov./Dec. 2014, <https://www.politico.com/magazine/story/2014/10/border-patrol-the-green-monster-112220>; Carrie Johnson, *Former Border Protection Insider Alleges Corruption, Distortion in Agency*, NAT'L PUB. RADIO, Aug. 28, 2014, <https://www.npr.org/2014/08/28/343748572/former-border-protection-insider-alleges-corruption-distortion-in-agency>.

In February 2020, a federal judge held that various aspects of Border Patrol detention conditions in the Tucson sector violate the U.S. Constitution, and ordered the agency to immediately implement a series of changes to safeguard detainees' well-being. See *Doe v. Wolf*, No. 15-cv-00250-DCB, 2020 WL 813774, at *22 (D. Ariz. Feb. 19, 2020) (post-trial order requiring Border Patrol to "provide[] conditions of confinement that meet basic human needs for sleeping in a bed with a blanket, a shower, food that meets acceptable dietary standards, potable water, and medical assessments performed by a medical professional").

American public.⁶ Thousands of families were torn apart.⁷ Although litigation successfully halted that particularly pernicious iteration of “family separation,” other forms of family separation occur as a result of CBP processing and detention each and every day.⁸

When processing and detaining individuals, CBP officials (including Border Patrol agents) unilaterally decide which family members stay together and which are separated—even though these immigration enforcement officers lack the specialized training or qualifications necessary to make such sensitive determinations.⁹ Little information is available regarding these decisions. For instance, although the Border Patrol’s policy lists examples of “family groups” that will be detained as a unit, that list has been redacted and does not appear to be publicly available.¹⁰ Meanwhile, as advocates have noted, DHS appears to have “adopted a very restrictive definition of ‘family’ to mean only parents or legal guardians accompanied by a child or children under the age of 18.”¹¹

⁶ See, e.g., Dara Lind, *The Trump Administration’s Separation of Families at the Border, Explained*, VOX, Aug. 14, 2018, <https://www.vox.com/2018/6/11/17443198/children-immigrant-families-separated-parents>; Aaron Hegarty, *Timeline: Immigrant Children Separated From Families at the Border*, USA TODAY, June 27, 2018, <https://www.usatoday.com/story/news/2018/06/27/immigrant-children-family-separation-border-timeline/734014002/>; Camila Domonoske & Richard Gonzales, *What We Know: Family Separation and ‘Zero Tolerance’ at the Border*, NAT’L PUB. RADIO, June 19, 2018, <https://www.npr.org/2018/06/19/621065383/what-we-know-family-separation-and-zero-tolerance-at-the-border>.

In February 2018, the ACLU filed a class action lawsuit challenging this type of family separation. See *Ms. L v. ICE*, ACLU (Jan. 13, 2020), <https://www.aclu.org/cases/ms-l-v-ice>. The lawsuit resulted in a preliminary injunction prohibiting separation in most cases of parents and their children and requiring the government to reunify parents and children within thirty days. See *Ms. L v. ICE*, 310 F. Supp. 3d 1133 (S.D. Cal. 2018). The ACLU is continuing to litigate to enforce the preliminary injunction. *Id.*; see also, e.g., *Ms. L v. ICE*, 415 F. Supp. 3d 980 (S.D. Cal. 2020) (order on motion to enforce preliminary injunction).

Last fall, advocates also initiated lawsuits to recover money damages for the extreme and lasting trauma DHS family separations have caused. See *A.I.I.L. v. Sessions*, ACLU (Oct. 3, 2019), <https://www.aclu.org/cases/aiil-v-sessions>; Complaint, *C.M. v. United States*, No. 2:19-cv-05217-SRB (D. Ariz., filed Sept. 19, 2019), https://www.americanimmigrationcouncil.org/sites/default/files/litigation_documents/separated_family_members_seek_monetary_damages_from_united_states_complaint.pdf; *Separated Family Members Seek Money Damages from United States*, AM. IMMIGRATION COUNCIL, <https://www.americanimmigrationcouncil.org/litigation/separated-family-members-seek-monetary-damages-united-states> (last visited Apr. 13, 2020).

⁷ See, e.g., John Washington, *Family Separations at the Border Constitute Torture, New Report Claims*, INTERCEPT, Feb. 25, 2020, <https://theintercept.com/2020/02/25/family-separations-border-torture-report/>.

⁸ See, e.g., WOMEN’S REFUGEE COMMISSION, et al., *BETRAYING FAMILY VALUES: HOW IMMIGRATION POLICY AT THE UNITED STATES BORDER IS SEPARATING FAMILIES* (2017) [hereinafter “Betraying Family Values”], <https://www.womensrefugeecommission.org/images/zdocs/BetrayingFamilyValues-Feb2017.pdf>.

⁹ CBP officials are required, under federal law, to ascertain whether a child in their custody is “unaccompanied.” See, e.g., WILLIAM A. KANDEL, CONG. RESEARCH SERV., R43599, *UNACCOMPANIED ALIEN CHILDREN: AN OVERVIEW*, 6 (Oct. 9, 2019), <https://fas.org/sgp/crs/homesec/R43599.pdf>.

¹⁰ U.S. BORDER PATROL, *DETENTION STANDARDS: HOLD ROOMS AND SHORT TERM CUSTODY*, REFERENCE NO. 08-11267, at §§ 3.6, 6.24.12 (Jan. 31, 2008) [hereinafter “Border Patrol Short-Term Custody Policy”], <https://www.documentcloud.org/documents/818095-bp-policy-on-hold-rooms-and-short-term-custody.html>.

¹¹ Brief of Amicus Curiae Women’s Refugee Commission in Support of Petitioner’s Petition for Review and Remand at 15–16, *Usubakunov v. Barr*, No. 18-72974 (9th Cir. July 29, 2019) [hereinafter “WRC Amicus Brief”]. “This

Our investigation identified a number of troubling cases in which CBP processing and/or detention led to family separations, including:

- A woman whose heart condition worsened when, during processing, the Border Patrol separated her and her sister and transferred her sister to a different detention center without any advance notice or opportunity to say goodbye;
- A mother and her two sons (one a minor) apprehended by the Border Patrol and detained in a nearby station; when the mother, who had seriously injured her knee during her journey to the United States, was taken to a hospital for surgery, she was separated from her boys, who were left detained separately at the Border Patrol station. After her return from the hospital, the Border Patrol released the mother and minor son into the United States together, but separated the older son from them and transferred him to U.S. Immigration and Customs Enforcement (“ICE”) detention;¹²
- A grandmother who Border Patrol agents separated from her nine-year-old grandson after agents told her that his birth certificate was insufficient to establish biological familial ties. The grandmother was left anguished and fearful that her grandson would be given up to a U.S. family for adoption; and
- A family of nine which CBP separated into three different family units—notwithstanding the fact that all nine family members initially entered the United States together—and subjected to the so-called “Migrant Protection Protocols.”¹³ The entire family was forcibly removed to Mexico, with each of the three “units” then receiving different

restrictive definition means that DHS does not consider married adults, grandparents and grandchildren, parents and adult children, or aunts and uncles to be ‘family.’” *Id.* at 16. “Consequently, families composed of spouses or partners, adult children, siblings, aunts, uncles, or grandparents traveling together do not receive the designation of a ‘family unit’ and do not receive any special consideration for the preservation of their family.” *Id.*

¹² This family also included a father and two additional minor children, who had been separated from the mother and sons while crossing into the United States. Although the father saw one of his sons through a glass window while detained at the Border Patrol station and tried to explain to agents that his wife and other children were on site, the Border Patrol made no effort to reunite the family, and did not tell the mother that her partner was detained at the same station.

¹³ The so-called “Migrant Protection Protocols” is an unlawful U.S. policy that interferes with people’s statutory and regulatory rights to seek asylum in the United States. *See, e.g.*, DELIVERED TO DANGER, <https://deliveredtodanger.org/> (last visited Apr. 13, 2020); HUMAN RIGHTS FIRST, A YEAR OF HORRORS: THE TRUMP ADMINISTRATION’S ILLEGAL RETURNS OF ASYLUM SEEKERS TO DANGER IN MEXICO (Jan. 2020), <https://www.humanrightsfirst.org/sites/default/files/MPP-aYearofHorrors-UPDATED.pdf>; Jason Kao & Denise Lu, *How Trump’s Policies Are Leaving Thousands of Asylum Seekers Waiting in Mexico*, N.Y. TIMES, Aug. 18, 2019, <https://www.nytimes.com/interactive/2019/08/18/us/mexico-immigration-asylum.html> (describing “Remain in Mexico”—a.k.a. “Migrant Protection Protocols”—program).

master calendar hearing dates. This, in turn, resulted in separate nonrefoulement interviews. The stress of this arbitrary and inefficient separation of family members led the mother in the family to experience hyperventilating, vomiting, headache, and chest pain while awaiting her own nonrefoulement interview.

From these accounts, we have selected two that illustrate how family separation occurs as a result of CBP processing and detention. These accounts have been anonymized: names have been changed, and certain details omitted, to protect the affected individuals. The accounts are, however, reported faithfully and based on lengthy interviews conducted by ACLU staff, usually within days of release from Border Patrol detention.

Jessica's Account

Jessica is a 26-year-old Honduran asylum seeker who made the difficult journey to the United States with Gabriela, her 5-year-old daughter, and Bertha, her 57-year-old mother. The family crossed the border together in May of 2019. They entered the country via the river and were apprehended in or around McAllen, Texas. The three were then detained for four days, along with 200 to 300 others, in one of the Border Patrol's ad-hoc outdoor caged detention areas in Texas.¹⁴

During this time, a large storm occurred. Jessica and her family were forced to sleep outside on the ground without any bedding. They were drenched and covered with mud; wearing only thin sweaters, they suffered from acute cold. When the storm abated, the makeshift facility was moved to the parking lot of a nearby Border Patrol station; there, Jessica and her family slept on cement. Throughout this ordeal, they were not given enough food and did not receive basic necessities (like toothbrushes) or have access to showers.¹⁵

¹⁴ In 2019, Border Patrol set up outdoor encampments across Texas to increase its detention capacity rather than reassessing its hardline policy of detaining all arriving noncitizens without exception. Several of these outdoor encampments were located in the parking lots of existing Border Patrol stations. Another was placed under the Bridge of the Americas in El Paso. See Vanessa Yurkevich & Priscilla Alvarez, *Exclusive Photos Reveal Children Sleeping on the Ground at Border Patrol Station*, CNN, May 14, 2019, <https://www.cnn.com/2019/05/14/politics/border-patrol-mcallen-texas-pictures/index.html>; Nick Miroff, *Border Detention Cells in Texas Are So Overcrowded that U.S. is Using Aircraft to Move Migrants*, WASH. POST, May 11, 2019, https://www.washingtonpost.com/immigration/border-detention-cells-in-texas-are-so-overcrowded-that-us-is-using-aircraft-to-move-migrants/2019/05/11/bb221f70-73d9-11e9-9f06-5fc2ee80027a_story.html; Edwin Delgado, *US Builds Migrant Tent City in Texas as Trump Likens Influx to 'Disneyland'*, GUARDIAN, Apr. 29, 2019, <https://www.theguardian.com/us-news/2019/apr/28/tent-city-migrants-el-paso-texas>. See also, e.g., ACLU BORDER RIGHTS CTR. ET AL., ADMINISTRATIVE COMPLAINT RE: ABUSIVE CONDITIONS IN BORDER PATROL DETENTION FACILITIES IN THE RIO GRANDE BORDER PATROL SECTOR (May 2019), https://www.aclutx.org/sites/default/files/aclu_-_rgv_border_patrol_conditions_oig_complaint_05_17_2019.pdf; ACLU BORDER RIGHTS CTR. ET AL., ADMINISTRATIVE COMPLAINT RE: ABUSIVE CONDITIONS IN MAKESHIFT BORDER PATROL HOLDING FACILITIES AT PASO DEL NORTE PORT OF ENTRY IN EL PASO, TEXAS (Mar. 2019), https://www.aclutx.org/sites/default/files/pdn_border_patrol_abuse_oig_complaint.pdf.

¹⁵ While at this encampment, Border Patrol agents also subjected Jessica to an invasive and humiliating pat-down search that was conducted in front of hundreds of other people detained in the makeshift facility. As onlookers

On day four, Border Patrol agents called Bertha by name and led her away from Jessica and Gabriela. The agents told Jessica to wait behind and did not tell her where Bertha was being taken. Shortly thereafter, agents told Jessica that she and Gabriela would be transferred to another facility. This was the last time Jessica saw her mother. Jessica had no idea why they had been separated or where Bertha had been taken. Jessica was terrified to ask the agents for more information. She explained: “If you ask them, they make fun of you and laugh. They never answer.”

Jessica and Gabriela were then transferred to another Border Patrol detention facility in Texas, where they were detained for four more days. Then, they were transported to a third Border Patrol facility in California (via airplane), where they were detained for three additional days.

Finally, after *eleven days* in Border Patrol custody, Jessica and Gabriela were released to the San Diego Migrant Family Shelter, operated by Jewish Family Service.¹⁶

When our investigator first spoke with Jessica, she had been separated from Bertha for eight days, had no knowledge of her mother’s location, and was acutely concerned about her mother’s health. Only much later did Jessica learn that Bertha had been sent to an ICE detention center, and then deported from the United States back to Honduras.

Carolina’s Account

Carolina is a 24-year-old Guatemalan asylum seeker who arrived in the United States with her mother, father, and minor sister in April 2019. Upon apprehending the family, the Border Patrol transported them all to the Brown Field station in San Diego, California. There, Carolina, her mother, and her sister were separated from Carolina’s father.

After her first night in Border Patrol custody, Carolina was separated from her mother and sister as well. Although the family members all remained at the Brown Field station, they were kept

watched, Border Patrol agents made Jessica lift up her shirt and inserted their hands between the underwire of Jessica’s bra and her bare breasts. Agents also pulled out the waistline of Jessica’s pants and looked down her pants, then aggressively patted down her inseam area.

¹⁶ The duration of this detention is an egregious violation of both CBP policy (which sets a presumptive 72-hour cap on detention) and Border Patrol policy (which sets a 12-hour limit on detention). *See* U.S. CUSTOMS AND BORDER PROTECTION, NAT’L STANDARDS ON TRANSPORT, ESCORT, DETENTION, AND SEARCH, at § 4.1 (Oct. 2015) [hereinafter “TEDS”], <https://www.cbp.gov/sites/default/files/assets/documents/2020-Feb/cbp-teds-policy-october2015.pdf>; Border Patrol Short-Term Custody Policy, *supra* note 10, § 6.2.1.

in separate cells and not able to speak with one another. Border Patrol agents told Carolina that this separation was “due to her age.”¹⁷

Carolina spent a total of *nine days* at Brown Field station, followed by *two additional days* in another Border Patrol facility (the name of which Carolina did not know). After being separated from her mother and sister, Carolina had no further contact with any of her family members during the eleven days she was in Border Patrol custody. While in Border Patrol custody, Carolina became very ill; as a result of her separation from her family, Carolina endured this illness alone—without her mother, father, or sister’s presence to give her any comfort or sense of security.¹⁸

The Border Patrol then transferred Carolina to ICE custody. Carolina was detained for nearly three additional months (first in San Luis, Arizona, and then in Otay Mesa, California). From San Luis, Carolina was able to call a family member in the United States and let them know she was alive. That family member then contacted Carolina’s mother, father and minor sister, who had been forcibly returned to Mexico pursuant to the “Migrant Protection Protocols.” Prior to receiving that call, Carolina’s immediate family had spent seventeen days without knowing Carolina’s whereabouts.

Unlike her immediate family members, Carolina was released from immigration detention and welcomed at the San Diego Migrant Family Shelter operated by Jewish Family Service. Carolina passed a credible fear interview and was permitted to stay in the United States while her immigration case remains pending before the immigration court. Denied that opportunity, Carolina’s immediate family—who fled identical harm—are now trapped in Mexico for the duration of their immigration proceedings. Carolina and her family communicate via phone, unsure as to when—if ever—they will see each other again and be reunited as a family.

III. Family Separation Causes Significant Harms

Sadly, Jessica’s and Carolina’s accounts are not unique. CBP policy proclaims that the agency “will maintain family unity to the greatest extent operationally feasible, absent a legal requirement or

¹⁷ See also *supra* note 11 and accompanying text.

¹⁸ While detained at Brown Field station, Carolina developed a serious case of bronchitis; her symptoms included fever, throat pain, earaches, and ear bleeding. She was unable to eat. Carolina endured these symptoms for five days before the Border Patrol finally transported her to a nearby hospital for a medical evaluation. The doctor who examined Carolina prescribed a medication for her to take twice each day; back at the Brown Field station, however, Border Patrol agents gave Carolina her medicine only once each day, in the afternoon.

Upon transfer to ICE detention in San Luis, Carolina underwent a medical screening, during which she was weighed. At that time, Carolina learned that she had lost approximately eight pounds during her eleven days in Border Patrol custody.

an articulable safety or security concern that requires separation.”¹⁹ Yet, for years, advocates have documented CBP processing- or detention-related family separations where *no* operational obstacles, legal mandates, or safety or security concerns exist.²⁰ These separations, in turn, cause a myriad of concrete harms to vulnerable individuals.²¹ Family separations also undermine due process in the U.S. immigration system by preventing consistent, efficient, and fair adjudications.

First, family separations intensify trauma for already vulnerable populations. Asylum-seeking families often endure horrific circumstances as they endeavor to reach the relative safety of the United States.²² When these families are then separated upon arrival, family members understandably experience acute anxiety, worry, and distress. One 2015 study of detained asylum-seeking families found that “forced family separation only exacerbates the trauma of being detained, while increasing the risk of depression, anxiety, and post-traumatic stress.”²³ Once separated, family members experience extreme barriers to locating and communicating with loved ones. As explained further below, CBP does not operate a detainee locator system, which makes it virtually impossible for family members to find one another while in CBP custody. Moreover, the relevant federal agencies—CBP, ICE, and the U.S. Department of Health and Human Services’ Office of Refugee

¹⁹ TEDS, *supra* note 16, § 1.9.

²⁰ *See, e.g.*, WOMEN’S REFUGEE COMMISSION, ADMINISTRATIVE COMPLAINT RE: SEPARATION OF FAMILIES VIA THE “MIGRANT PROTECTION PROTOCOLS” (Aug. 2019) [hereinafter “WRC Family Separation Complaint”], <https://www.womensrefugeecommission.org/rights/resources/document/download/1830>; LEIGH BARRICK, AM. IMMIGRATION COUNCIL, DIVIDED BY DETENTION: ASYLUM-SEEKING FAMILIES’ EXPERIENCES OF SEPARATION (Aug. 2016) [hereinafter “Divided by Detention”], https://www.americanimmigrationcouncil.org/sites/default/files/research/divided_by_detention.pdf.

²¹ *See generally* Betraying Family Values, *supra* note 8.

²² *See, e.g.*, Gabriel H. Sanchez, *These Pictures Show the Dangerous and Sometimes Fatal Journey Immigrant Children Make to the US*, BUZZFEED, June 27, 2019, <https://www.buzzfeednews.com/article/gabrielsanchez/dangerous-fatal-migrant-journey-children-trending-mexico>; Valeria Luiselli, *Riding ‘the Beast’: Child Migrants Reveal Full Horror of Their Journeys to America*, GUARDIAN (U.S.), Oct. 5, 2017, <https://www.theguardian.com/inequality/2017/oct/05/riding-the-beast-child-migrants-reveal-full-horror-of-their-journeys-to-us>; UNICEF, BROKEN DREAMS: CENTRAL AMERICAN CHILDREN’S DANGEROUS JOURNEY TO THE UNITED STATES (Aug. 2016), <https://www.justice.gov/eoir/file/888441/download>.

²³ *Divided by Detention*, *supra* note 20, at 14 n.46 (citing KATHLEEN O’CONNOR, ET AL., UNITARIAN UNIVERSALIST SERVICE COMMITTEE, NO SAFE HAVEN HERE: MENTAL HEALTH ASSESSMENT OF WOMEN AND CHILDREN HELD IN U.S. IMMIGRATION DETENTION 9 (Oct. 2015), https://www.uusc.org/sites/default/files/mental_health_assessment_of_women_and_children_u.s._immigration_detention.pdf). In October 2016, an ICE Advisory Committee concluded that “DHS’s immigration enforcement practices should operationalize the presumption that detention is generally neither appropriate nor necessary for families – and that detention or the separation of families for purposes of immigration enforcement or management are never in the best interest of children.” REPORT OF THE ICE ADVISORY COMMITTEE ON FAMILY DETENTION CENTERS at 2 (Oct. 7, 2016), <https://www.ice.gov/sites/default/files/documents/Report/2016/acfrc-report-final-102016.pdf>.

Resettlement (“ORR”)—“do not have shared databases ... although there is a process for those agencies to share data, information relating to separated family members often is not transmitted.”²⁴

Second, and relatedly, family separations interfere with individuals’ legal rights to seek asylum and other forms of immigration relief in the United States. Asylum-seeking families may have only one copy of key documentation necessary to corroborate the factual bases for asylum claims. When family members are separated, only one person retains access to this crucial evidence, even though that evidence may be relevant to all family members’ claims. Obtaining additional copies of key documents is virtually impossible for people in CBP custody, especially given the lack of access to resources like copiers, scanners, or translators.²⁵

Likewise, separation from family members impedes access to corroborating testimony necessary to establish credibility and eligibility for asylum and other forms of immigration relief. This problem is especially acute when one family member has a better understanding of the full reasons the family fled their home country (as may be the case, for example, of a parent separated from their partner and/or children). “Most [asylum-seeking] families have no other advocate beside themselves” in immigration court.²⁶ Nor are these concerns only applicable to minors separated from adult family members. Adults separated from family members may also be unable to pursue their asylum claims successfully, especially if they suffer from cognitive or other disabilities.²⁷

²⁴ WRC Amicus Brief, *supra* note 11, at 17; *see also, e.g.*, U.S. DEP’T HEALTH AND HUMAN SERVS., OFFICE OF INSPECTOR GENERAL, ISSUE BRIEF: SEPARATED CHILDREN PLACED IN OFFICE OF REFUGEE RESETTLEMENT CARE, OEI-BL-18-00511, 2 (Jan. 2019), <https://oig.hhs.gov/oei/reports/oei-BL-18-00511.pdf> (emphasizing, in the context of children separated from family members, “the lack of an existing, integrated data system to track separated families across HHS and DHS”).

²⁵ *See, e.g.*, WRC Family Separation Complaint, *supra* note 20, at 4.

²⁶ *Id.* at 17; *see also, e.g.*, *Access to Attorneys Difficult for Those Required to Remain in Mexico*, TRAC, July 29, 2019, <https://trac.syr.edu/immigration/reports/568> (data showing that 1.2 percent of asylum seekers in the “Remain in Mexico”/“Migrant Protection Protocols” program had representation as of June 2019); Samantha Balaban, et al., *Without a Lawyer, Asylum-Seekers Struggle With Confusing Legal Processes*, NPR, Feb. 25, 2018, <https://www.npr.org/2018/02/25/588646667/without-a-lawyer-asylum-seekers-struggle-with-confusing-legal-processes>; INGRID EAGLY, ESQ. & STEVEN SHAFER, ESQ., AM. IMMIGRATION COUNCIL, ACCESS TO COUNSEL IN IMMIGRATION COURT (Sept. 2016), https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf (generally discussing low level of representation in immigration court).

²⁷ *See, e.g.*, Order re Plaintiffs’ Motion for Partial Summary Judgment and Plaintiffs’ Motion for Preliminary Injunction on Behalf of Seven Class Members at 8, *Franco-Gonzalez et al. v. Holder et al.*, No. Cv-10-02211 DMG (DTBx) (C.D. Cal., Apr. 23, 2013), ECF No. 592, <https://www.aclu.org/legal-document/franco-gonzalez-v-holder-decision> (granting summary judgment and preliminary injunction to plaintiffs based, in part, on how plaintiffs “are unable to meaningfully access the benefit offered—in this case, full participation in their removal and detention proceedings—because of their [mental] disability.”); Gregory Pleasants, *National Qualified Representation Program*, VERA INST., <https://www.vera.org/projects/national-qualified-representative-program/learn-more> (last visited Apr. 13, 2020) (Without representation, “detained, unrepresented immigrants with mental and developmental disabilities face[] outcomes in their immigration proceedings that [are] often both unfair and inaccurate. These same immigrants [are] also

Third, family separations inhibit the fair and efficient functioning of U.S. immigration law. As Carolina’s case demonstrates, family members who are separated from one another often experience inconsistent decisions on their asylum claims—even when those claims stem from identical facts. “Presenting the facts and evidence of their case together, before the same judge, and in the same location” most often “create[s] the best conditions of adjudicators to understand [a] family’s claim and thus rule fairly.”²⁸

There is wide variation in both the timelines and outcomes of asylum cases before immigration judges across geographic regions of the United States.²⁹ And, as other advocates have observed, “[a]t a time when the immigration courts face an unprecedented, crushing caseload and respondents’ cases linger for years in the courts, multiple judges should not be required to hear the same claim and the same evidence in cases of immediate family members.”³⁰

For these reasons, CBP’s practice of separating family members in agency custody must end.

at heightened risk for prolonged immigration detention, with some detained for years with no progress in immigration proceedings.”).

In fact, the Board of Immigration Appeals itself lists the “identification and appearance of a family member or close friend who can assist the respondent and/or his legal representative” as a potential “safeguard” to protect individuals who are not sufficiently competent to navigate immigration proceedings. *Matter of M-A-M-*, 25 I. & N. Dec. 474, 483 (BIA 2011). Federal regulations contemplate similar forms of assistance. *See, e.g.*, 8 C.F.R. § 1240.4 (providing that an “attorney, legal representative, legal guardian, near relative, or friend” may “appear on behalf of” a respondent whose mental incompetency makes it “impracticable” for him or her to “be present” at a hearing); 8 C.F.R. § 1003.25(a) (permitting an immigration judge to waive the presence of a mentally incompetent respondent who is represented by an individual from one of the preceding categories); 8 C.F.R. § 1240.10(c) (prohibiting an immigration judge from accepting an admission of removability from an incompetent respondent unless accompanied by an “attorney, legal representative, a near relative, legal guardian, or friend,” and requiring a “hearing on the issues”).

²⁸ Divided by Detention, *supra* note 20, at 22.

²⁹ SOUTHERN POVERTY LAW CTR. & IMMIGRATION LAW LAB, THE ATTORNEY GENERAL’S JUDGES: HOW THE U.S. IMMIGRATION COURTS BECAME A DEPORTATION TOOL, at 10 (June 2019), https://www.splcenter.org/sites/default/files/com_policyreport_the_attorney_generals_judges_final.pdf (“Radical variations in case outcomes across the country demonstrate that courts are failing to apply immigration law in an impartial and uniform way.”); U.S. GOV’T ACCOUNTABILITY OFF., GAO-17-72, VARIATION EXISTS IN OUTCOMES OF APPLICATIONS ACROSS IMMIGRATION COURTS AND JUDGES, at 13 (Nov. 2016), <https://www.gao.gov/assets/690/680976.pdf> (“EOIR Data indicate that outcomes of completed asylum applications varied over time and across immigration courts and judges.”).

³⁰ Brief of Amicus Curiae Univ. of Houston Law Ctr. at al. in Support of Respondent at 11, *Matter of* [Redacted], No. [Redacted] (BIA 2017), www.law.uh.edu/faculty/ghoffman/2017%2004%2026%20amicus%20brf%20for%20BIA%20Univ%20Houston%20Law%20Ctr.pdf. *See also, e.g.*, Marissa Esthimer, *Crisis in the Courts: Is the Backlogged U.S. Immigration Court System at Its Breaking Point?* MIGRATION INFO. SOURCE, Oct. 3, 2019, <https://www.migrationpolicy.org/article/backlogged-us-immigration-courts-breaking-point>; John Yang, *How a ‘Dire’ Immigration Court Backlog Affects Lives*, PBS NEWSHOUR, Sept. 18, 2017, <https://www.pbs.org/newshour/show/dire-immigration-court-backlog-affects-lives>; Priscilla Alvarez, *Immigration Court Backlog Exceeds 1 Million Cases, Data Group Says*, CNN, Sept. 18, 2019, <https://www.cnn.com/2019/09/18/politics/immigration-court-backlog/index.html>; Denise Lu & Derek Watkins, *Court Backlog May Prove Bigger Barrier for Migrants Than Any Wall*, N.Y. TIMES, Jan. 24, 2019, <https://www.nytimes.com/interactive/2019/01/24/us/migrants-border-immigration-court.html>.

IV. CBP Refuses to Implement a Detainee Locator System, Exacerbating Harms

A detainee locator system allows family members, lawyers, and other advocates to pinpoint exactly where a particular person is being held.³¹ Typically, the use of such a system requires knowledge of the detainee’s country of origin and “alien number” (“A number”), or their exact full name, country of origin and date of birth. Unlike ICE, CBP has never implemented a detainee locator system, nor does it facilitate visitation or communications with family or lawyers. CBP’s refusal to do these things aggravates the harms that stem from the agency’s practice of separating family members through processing and detention. Although ICE’s system is far from perfect, advocates and families rely on it to locate their clients and loved ones.

In December 2017, CBP released a report to Congress in which the agency claimed to have analyzed “the possibility of [a detainee locator] system and determined that [it] is not operationally feasible.”³² Our review of CBP’s claims, however, indicate that the agency’s position is unjustified.³³

First, CBP argues that a detainee locator system is unnecessary, emphasizing the allegedly “short term” nature of CBP detention.³⁴ CBP policy states that detainees “should generally not be held for longer than 72 hours in CBP hold rooms or holding facilities.”³⁵ Border Patrol policy is more restricted still, stating “[w]henver possible, a detainee should not be held for more than 12

³¹ As CBP has recognized, “[t]he intent of creating a [detainee locator system] is to provide the general public with an accessible system that would allow the public to conduct online Internet-based queries to locate persons detained by CBP for administrative and/or criminal violations.” U.S. CUSTOMS AND BORDER PROTECTION, ONLINE DETAINEE LOCATOR SYSTEM (FY2017 Report to Congress), ii (Dec. 4, 2017) [hereinafter “CBP Detainee Locator Report”], https://www.dhs.gov/sites/default/files/publications/CBP%20-%20Online%20Detainee%20Locator%20System_0.pdf.

³² *Id.*

³³ CBP’s position is particularly perplexing against the backdrop of numerous watchdog agencies’ recommendations following the harrowing chaos at the height of the Trump administration’s family separations in 2018. *See, e.g.*, DHS OIG, DHS LACKED TECHNOLOGY NEEDED TO SUCCESSFULLY ACCOUNT FOR SEPARATED FAMILIES, OIG-20-06, at 8 (Nov. 25, 2019), <https://www.oig.dhs.gov/sites/default/files/assets/2019-11/OIG-20-06-Nov19.pdf>; CONG. RESEARCH SERV., R45266, THE TRUMP ADMINISTRATION’S “ZERO TOLERANCE” IMMIGRATION ENFORCEMENT POLICY, at 24 (Feb. 26, 2019), <https://fas.org/sgp/crs/homsec/R43599.pdf>; KATHRYN A. LARIN, ET AL., U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-19-368T, UNACCOMPANIED CHILDREN: AGENCY EFFORTS TO IDENTIFY AND REUNIFY CHILDREN SEPARATED FROM PARENTS AT THE BORDER, at 9 (Feb. 7, 2019), <https://www.gao.gov/assets/700/696788.pdf>; DHS OIG, SPECIAL REVIEW – INITIAL OBSERVATIONS REGARDING FAMILY SEPARATION ISSUES UNDER THE ZERO TOLERANCE POLICY, OIG-18-84, at 9–11 (Sept. 27, 2018), <https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-84-Sep18.pdf>; SARAH HERMAN PECK, CONG. RESEARCH SERV., 7-5700, FAMILY SEPARATION AT THE BORDER AND THE *Ms. L.* LITIGATION, at 4 (July 31, 2018), <https://fas.org/sgp/crs/misc/LSB10180.pdf>.

³⁴ CBP Detainee Locator Report, *supra* note 31, at 2.

³⁵ *See* TEDS, *supra* note 16, § 4.1.

hours.”³⁶ Yet—as evident from the accounts included in this four-part complaint series—CBP often detains people for periods that *far exceed* the maximum time periods permitted under agency policy and federal law.³⁷ For example, a July 2019 DHS OIG report found that, of 8,000 individuals detained by Border Patrol in the Rio Grande Valley, 3,400 (42.5 percent) were held in excess of 72 hours.³⁸ More troubling still: 1,500 individuals (18.75 percent) were detained for *more than ten days*.³⁹ Consistent with these reports, the ACLU’s investigation likewise indicated that CBP officials frequently exceed detention time limits. Most individuals we interviewed had spent at least four or five days in CBP custody. One individual we spoke with had been detained for *eighteen* days.⁴⁰

CBP must not be allowed to disappear people for days or weeks on end without providing some publicly accessible information regarding detainees’ whereabouts.

CBP also claims that information contained in a detainee locator system “would become outdated quickly”; because “some individuals may be transferred rapidly from one station to another, it may be difficult to reflect such a transfer accurately.”⁴¹ But, as the largest federal law enforcement agency in the United States, CBP already has systems to log individuals it detains and

³⁶ See Border Patrol Short-Term Custody Policy, *supra* note 10, § 6.2.1.

³⁷ See *supra* note 3 (citing to first two complaints in this series); see also, e.g., GUILLERMO CANTOR, PH.D., AM. IMMIGRATION COUNCIL, DETAINED BEYOND THE LIMIT: PROLONGED CONFINEMENT BY U.S. CUSTOMS AND BORDER PROTECTION ALONG THE SOUTHWEST BORDER, at 5–6 (Aug. 2016), https://www.americanimmigrationcouncil.org/sites/default/files/research/detained_beyond_the_limit.pdf (finding, for period between September 1, 2014 and August 31, 2015, that 67 percent of total number of individuals detained in CBP facilities across the southwest border were held for 24 hours or longer, 29 percent for 48 hours or longer, and 14 percent for 72 hours or longer).

³⁸ DEP’T OF HOMELAND SEC., OFFICE OF INSPECTOR GENERAL, OIG-19-51, MANAGEMENT ALERT – DHS NEEDS TO ADDRESS DANGEROUS OVERCROWDING AND PROLONGED DETENTION OF CHILDREN AND ADULTS IN THE RIO GRANDE VALLEY, at 2–3 (July 2, 2019), https://www.oig.dhs.gov/sites/default/files/assets/2019-07/OIG-19-51-Jul19_.pdf.

³⁹ *Id.* at 2–3. See also, e.g., OVERCROWDING AND PROLONGED DETENTION AT CBP FACILITIES: HEARING BEFORE THE H. COMM. ON THE JUDICIARY, 116th Congress (2019), <https://judiciary.house.gov/legislation/hearings/overcrowding-and-prolonged-detention-cbp-facilities>.

⁴⁰ This individual’s account was featured in the ACLU’s first complaint, addressing CBP’s abuse and mistreatment of pregnant people. See AMERICAN CIVIL LIBERTIES UNION OF SAN DIEGO & IMPERIAL COUNTIES, ET AL., ADMINISTRATIVE COMPLAINT RE: U.S. CUSTOMS AND BORDER PROTECTION AND BORDER PATROL’S ABUSE AND MISTREATMENT OF DETAINED PREGNANT PEOPLE (Jan. 2020), *supra* note 3, at 3.

As we have explained in our earlier complaints, CBP facilities lack bedding, showers, and staff trained to interact with or assist traumatized or otherwise vulnerable populations. People held in these facilities endure freezing temperatures, inedible food (spoiled or frozen), insufficient potable water, overcrowding, and deprivation of medicine and basic hygienic supplies. See *id.* at 3–4 & n.12 (collecting sources documenting CBP detention conditions). In light of these structural deficiencies and inhumane conditions, it is the ACLU’s position that **these facilities are categorically unsuitable and inappropriate for any period of detention beyond the time required for initial processing, which should in no case exceed 12 hours.**

⁴¹ CBP Detainee Locator Report, *supra* note 31, at 2.

releases, and undoubtedly has the resources required to accurately track detainees' whereabouts. Indeed, if CBP cannot, at bare minimum, keep track of detainees, then the agency should not be in the business of detaining *anyone*.

Second, CBP claims that the "location of detained persons and of CBP activities constitutes law enforcement-sensitive information that should not be public."⁴² This is illogical, since the locations of Border Patrol stations are available on CBP's own website.⁴³ Likewise, the location of ports of entry is a matter of public record. There is no legitimate law enforcement function associated with the effective disappearance of people for days (or weeks) on end. Family members, advocates, and lawyers have a right to know where their loved ones and clients are held. This basic information is not "law enforcement sensitive."⁴⁴

Third, CBP asserts that "members of the public generally will not have a legitimate reason to locate" detainees, because "CBP does not allow for relatives or other people to come and visit [detainees] while they are being processed or held at a station."⁴⁵ Yet the fact that CBP does not permit people to *visit* detainees does not justify a refusal to facilitate a person's efforts to *locate* a specific detainee.⁴⁶ Without the ability to timely locate and contact separated family members, individuals' due process rights will be undermined, as they may be unable to prepare and present their claims for relief. Additionally, separated family members have an interest in knowing whether their loved ones are in CBP custody (versus transferred, deported, or missing).

⁴² *Id.*

⁴³ See, e.g., *San Diego Sector, California*, <https://www.cbp.gov/border-security/along-us-borders/border-patrol-sectors/san-diego-sector-california> (last visited Apr. 13, 2020); *Imperial Beach Station*, <https://www.cbp.gov/border-security/along-us-borders/border-patrol-sectors/san-diego-sector-california/imperial-beach-station> (last visited Apr. 13, 2020).

⁴⁴ CBP claims that a detainee locator system "could help smugglers to determine the exact location of targeted apprehensions, thereby allowing them to adjust their targeted routes to avoid these areas." CBP Detainee Locator Report, *supra* note 31, at 2. This is a total non-sequitur: the detainee locator system would specify where an individual is *detained*, not where that person was *apprehended*.

⁴⁵ *Id.* at 3.

⁴⁶ The Administrative Procedure Act and other legal provisions provide a broad statutory right to counsel in administrative proceedings, which at least one district court has relied on to hold that there is a right of access to counsel for those in CBP custody. See *Doe v. Wolf et al.*, No. 19-cv-2119-DMS (AGS), 2020 WL 209100, at *1 (S.D. Cal., Jan. 14, 2020) (order granting motion for classwide preliminary injunction, holding that "Petitioners have met their burden and that the Administrative Procedures Act [], specifically 5 U.S.C. § 555(b), provides a right to retained counsel in these circumstances."); AM. IMMIGRATION COUNCIL, CBP RESTRICTIONS ON ACCESS TO COUNSEL, https://www.americanimmigrationcouncil.org/sites/default/files/foia_documents/access_to_counsel_cbp_foia_factsheet.pdf (last visited Apr. 13, 2020) (citing 5 U.S.C. § 555(b) and 8 C.F.R. § 292.5(b) and several agency policy documents to show right to access to counsel in CBP custody).

In summary: CBP routinely detains individuals in excess of the upper time limits set in agency policy, “disappearing” vulnerable people into a veritable black hole. The agency’s parallel practice of separating family members, also in apparent contravention of agency policy, causes significant personal and systemic harms. Change on both fronts is essential and overdue.

V. Recommendations

The ACLU asks DHS OIG to (a) conduct an immediate review of CBP’s separation of family members through processing and detention and the agency’s refusal to implement a detainee locator system, and (b) issue recommendations to improve CBP and Border Patrol detention policies. At a minimum, we call upon DHS OIG to:

- (1) Recommend that CBP immediately **implement a telephonic and online detainee locator system** (searchable by either (a) full name and A number OR (b) full name, country of origin, and date of birth) for all individuals in CBP custody.
- (2) Recommend that CBP **refrain from detaining family units and instead prioritize their prompt release.**⁴⁷ Alternatively, and at a minimum, assess CBP’s **definition of “family” and recommend changes** (including consideration of a **more inclusive approach to “family”**) to **minimize family separation during CBP processing and detention.**⁴⁸
- (3) **Evaluate information sharing practices**—both (a) between DHS and other key governmental departments (notably HHS) and (b) within DHS—to ensure that government agencies **generate and maintain timely and accurate information** regarding detained family members.
- (4) Recommend that DHS and its components work with HHS and the Department of Justice to ensure an **inter-agency process to help reunite separated family members.**⁴⁹ At a minimum, this inter-agency process should include mechanisms, such as an inter-agency

⁴⁷ DHS OIG should ensure that family separation via CBP processing and/or detention is not avoided by instead subjecting family members to prolonged ICE detention.

⁴⁸ This is a minimum or “floor” recommendation. For years, advocates have called for family unity determinations to be made by trained professionals (including but not limited to licensed child welfare specialists), rather than DHS enforcement officials. *See* *Betraying Family Values*, *supra* note 8, at 7; *see also supra* note 9 and associated text. The ACLU echoes these calls.

⁴⁹ Certain government mechanisms for family reunification in specific circumstances already exist (for example, the sponsorship process, ICE’s Detention Reporting and Information hotline, and ORR’s hotline and address for email inquiries). These mechanisms, however, are inadequate to timely or completely rectify all instances of family separation resulting from CBP processing and detention.

hotline, to help detained family members locate and connect regularly and meaningfully with loved ones from whom they have been separated.

- (5) Recommend that DHS work with the Executive Office for Immigration Review to ensure that family members have meaningful and equitable opportunities to **request consolidation of their immigration cases and receive fair, efficient immigration adjudications.**⁵⁰
- (6) Recommend that CBP policies and practices be revised to **prohibit any period of detention beyond the time required for initial processing, which should in no case exceed 12 hours.**⁵¹
- (7) Assess **whether CBP oversight and disciplinary mechanisms are sufficient** to ensure that CBP officials are held accountable for all instances of detainee abuse, neglect, or other mistreatment, and to ensure that dangerous, abusive, or otherwise unfit CBP employees are removed promptly from duty.

Thank you for your time and careful attention to this submission. We look forward to your timely response.

Sincerely,

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⁵⁰ Although an individual can move for consolidation, this technical process favors people who have access to immigration lawyers. Our recommendation, by contrast, is that DHS and EOIR streamline the process by which an individual can request consolidation of their case with their family members'—without requiring, e.g., motion practice.

⁵¹ This would ensure that CBP's TEDS and other agency policies are consistent with the presumptive maximum detention period set out in Border Patrol's Short-Term Custody Policy, *see supra* note 10, at § 6.2.1.