



August 16, 2022

Secretary Alejandro Mayorkas
U.S. Department of Homeland Security
301 7th Street, SW
Washington, D.C. 20528

Via email

Re: Follow-up Regarding Ongoing Separation of Families at the Southern Border:
[REDACTED], A [REDACTED] (hereinafter "Lucy")

Secretary Mayorkas,

We write on behalf of the ACLU of San Diego & Imperial Counties ("ACLU"), Jewish Family Service of San Diego ("JFS"), and UCLA Center for Immigration Law and Policy ("CILP") regarding ongoing separation of families at the southern border. Specifically, we write to seek accountability for Lucy, whose recent experience exemplifies the devastating consequences for families separated at our border.¹

The separation that Lucy's family experienced began on February 14, 2022, when we are informed a U.S. Border Patrol agent violently assaulted her, leaving her injured and traumatized. The altercation resulted in criminal charges *against Lucy* and her 18-year-old son that were later *dismissed at the federal government's request*. In pursuing this unnecessary and ultimately unavailing prosecution, federal agents separated Lucy from her 10-year-old daughter. To make matters worse, the federal government never facilitated Lucy's reunification with her daughter after it dismissed the charges against her. Instead, the government continued to incarcerate Lucy for even longer pursuant to removal proceedings, prolonging the family's separation. In all, the federal government needlessly separated Lucy from her children, including her 10-year-old daughter, for five months. Lucy's traumatic experience implicates the glaring inadequacy of policies meant to address separation of families at the hands of U.S. Customs and Border Protection ("CBP") and U.S. Immigration and Customs Enforcement ("ICE").

¹ JFS provides critical services to individuals and families seeking asylum in the Tijuana/San Diego border region, including high-volume direct representation in immigration proceedings and operation of the San Diego Rapid Response Network (SDRRN) Migrant Shelter in San Diego. Through the SDRRN and the California Welcoming Taskforce, ACLU and JFS, together with other local partners, have coordinated regional responses to the Biden Administration's changes to border policies impacting people seeking asylum in our region.

This is not the first time we have shared our concerns about ongoing separation of families at the border. Over one year ago, on July 13, 2021, ACLU and JFS wrote to your office about troubling patterns of separations of asylum-seeking families at the border resulting from the enforcement of the Title 42 expulsion order and inconsistent custody determinations among members of family units that travel together (“July 13 letter”).² The July 13 letter detailed numerous instances of separations among adult members of the same family that unnecessarily disrupted the sanctity of family unity, including many that interfered with the relationships between young children and their caregivers. The letter articulated a series of urgent, common-sense, and practical recommendations aimed at preventing separation of families that are consistent with U.S. laws that govern the rights of unaccompanied children. In the year that has elapsed since the July 13 letter, CBP has continued to unjustly separate families, causing grave harm and undermining the United States asylum system. As detailed below, ICE also facilitates separation by detaining parents pursuant to removal proceedings for prolonged periods. Unfortunately, the U.S. Department of Homeland Security (“DHS”) has to date declined to adopt the changes necessary to prioritize and preserve family unity, resulting in further harm to families seeking asylum. We hope that Lucy’s case spurs the agency to action.

I. Lucy’s case exemplifies the profound harms that can occur when the DHS continues practices that separate families.

In July 2022, CILP, ACLU, and JFS encountered a mother in distress at the ICE Imperial Regional Detention Facility. Five months earlier, Lucy had been separated from her 10-year-old daughter, Mariela,³ 18-year-old son, Anner, and 18-year-old stepson, Fabio. By the time we met Lucy, the federal government had:

- Separated her from Mariela for over four months, including a period of about one month and a half during which Lucy had no information about her daughter’s whereabouts or wellbeing (during the period of their separation, Mariela was shuffled around in the custody of Border Patrol, an ORR shelter, and a relative);
- Separated her from Fabio in a manner marked by international borders, as he had been deported; and
- Prevented her from visiting or speaking directly with Anner, despite them both being jailed in the same detention center for a period of their separation.

Lucy and her three children fled violence in El Salvador to seek asylum in the United States. On February 14, 2022, Border Patrol agents approached a group of individuals including Lucy’s family near a train station in Calipatria, California. Lucy ran and sought to wake her

² ACLU of San Diego & Imperial Counties & Jewish Family Service of San Diego, *Forced Splitting of Protection-Seeking Families at the Southern Border* (July 13, 2021), https://www.aclu-sdic.org/sites/default/files/field_documents/2021_07_09_fam_sep_letter_final.pdf. Upon receipt, DHS assigned the letter an Office of Civil Rights and Civil Liberties investigation number.

³ This document uses a pseudonym in order to protect the identity of Lucy’s 10-year-old daughter.

sleeping son, Anner, and subsequently attempted to turn herself in to one of the Border Patrol agents. Thereafter, an altercation ensued between the agent and Lucy. We understand that the incident involved the agent punching Lucy in the mouth, hitting her in the stomach, and slamming her body against a train. At one point during the altercation, Lucy understood the agent to command that she stand up, but she was unable to do so due to her injuries. The agent then grabbed her by her hair and slammed her body against the ground, pressing his knee deep into her back. Terrified for her life, Lucy tried but was unable to defend herself and get away. Throughout the attack, the agent additionally berated Lucy before taking the whole family into custody. Mariela, Anner, and Fabio witnessed the entire assault.

After the arrest, Border Patrol agents took the family to a nearby Border Patrol station, where they separated Lucy and Mariela from Anner and Fabio. Then, agents denied Lucy and her daughter proper water and sanitation for their first day in custody—even restricting toilet access. When Lucy insisted on basic necessities for her daughter, agents mocked her, reenacting how they had assaulted her. The next day, federal agents forced Mariela to watch them handcuff her mother, humiliating Lucy in front of her daughter and strangers. Lucy overheard the officials tell Mariela that her mother was a criminal, and that Mariela should not be like her mother. As the officials took Lucy out of the cell, she could see and hear Mariela crying and wailing for her mother. Lucy overheard a Border Patrol agent tell other unknown adults to watch over Mariela since her mother would be sent away.

Lucy was transferred to federal criminal custody in San Luis, Arizona and, unbeknownst to her, Anner was transferred to federal criminal custody in El Centro, California, Fabio was sent to detention centers in Arizona, Mississippi, and Louisiana, and Mariela was sent to a group shelter presumably in the custody of the Office of Refugee Resettlement (“ORR”). While in federal custody in San Luis, Lucy was taken offsite to a hospital for treatment of her injuries. Lucy was later transferred to two additional federal jails, eventually ending up in the U.S. Marshals’ facility run by GEO Group in El Centro. For about one-and-a-half months, Lucy had no information whatsoever regarding the whereabouts of her 10-year-old daughter, and for about two and a half months, Lucy had no information about either of her sons. When she asked guards about her family members, they callously told Lucy that her children had likely already been deported. The agony of not knowing if her children were safe drove Lucy to consider taking her life.

In February, the U.S. Attorney’s office filed criminal charges against Lucy, initially alleging that Lucy—a *4-foot, 9-inch-tall woman who weighs under 120-pounds*—forcibly *assaulted, resisted, opposed, impeded, intimidated*, and interfered with the *armed male Border Patrol agent who assaulted her*. The U.S. Attorney’s office later petitioned the court to dismiss the case in May 2022, which the court granted. The government similarly charged Anner and later dismissed the case against him.⁴ During the time that Lucy and Anner’s cases were pending, DHS

⁴ Both Lucy and Anner were charged with violation of Title 18 U.S.C. 111(a)(1).

deported Fabio to El Salvador, presumably pursuant to Title 42, separating him from his mother and siblings for the foreseeable future.⁵

After the dismissal, instead of being reunified with Mariela, Lucy and Anner were both transferred to long-term ICE custody at the Imperial Regional Detention Facility, where they were jailed nearly two additional months. Despite being locked up in the same building, we are informed that Lucy and Anner were denied in-person, video, or telephonic visitation the entire time they were in ICE custody, in contravention of ICE's Performance-Based National Detention Standards.⁶

It was not until July 12, 2022, after JFS filed and escalated parole applications for Lucy and Anner that ICE released them, without any discussion with Lucy about her rights to reunification with Mariela. Lucy and Anner's separation continued when ICE released them at different locations and times on July 12, 2022, in Imperial, California, with no way to contact each other or their sponsor, rather than reunify and release them together. Lucy's counsel facilitated her reunification with Anner in the late evening of July 12, 2022, and with Mariela on July 13. At no point did CBP, the U.S. Attorney's Office, ICE, or ORR attempt to reunify Lucy with Mariela, even after the dismissal of the criminal case.

II. Separating families causes irreparable harm.

The destructive consequences of family separation are well-documented. As we explained in detail in the July 13 letter, family groups provide each other desperately needed support in the wake of harm they have fled. The forced separation of individual members within family groups by DHS deprives them of this crucial support structure when they need it most, exacerbating their trauma and risking long-term and potentially permanent separation of their families. Unsurprisingly, such experiences severely impact the emotional and physical wellbeing of children and adults alike, sometimes resulting in long-term posttraumatic stress, anxiety, depression, aggression, and suicidal ideation.⁷ For many, the trauma is compounded by consequences of separation that continue to manifest throughout removal proceedings, including through isolation

⁵ Despite being detained for about three months, Fabio never saw a judge or underwent a fear interview to his knowledge. He did not receive or sign any paperwork from ICE regarding his removal, and the automated EOIR system reflects "No case found for this A-Number."

⁶ ICE, *Performance-Based National Detention Standards 2011* (Rev. Dec. 2016), at 390 Section I, 396 Section I.2, <https://www.ice.gov/doclib/detention-standards/2011/pbnds2011r2016.pdf>.

⁷ Women's Refugee Comm'n, Lutheran Immigr. and Refugee Serv., and Kids in Need of Def., *Betraying Family Values: How Immigration Policy at the United States Border is Separating Families* at 12 (Jan. 10, 2017) [hereinafter *Betraying Family Values*], <https://reliefweb.int/sites/reliefweb.int/files/resources/BetrayingFamilyValues-Feb2017.pdf>; Teicher, Martin H., *Childhood trauma and the enduring consequences of forcibly separating children from parents at the United States border*, BMC Med., Aug. 22, 2018, at 16:146, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6103973/>.

and unavailable or obstructed communication with family while in ICE detention, practical obstacles that significantly delay or prevent reunification, and limited access to counsel that, in turn, limits relief from deportation for which the person may be eligible.⁸

In addition to the human suffering inflicted, these separations also have significant consequences in removal proceedings, resulting in disparate outcomes with life-altering effects. For family members whose asylum cases are connected, separation obstructs family members' opportunities to present necessary corroborating witness testimony or access critical evidence in presenting their claims for relief, which may violate their constitutional and statutory rights to present evidence and can result in inconsistent case timelines and outcomes that permanently sever family relationships.⁹

III. Current and past responses are insufficient.

We are aware of the efforts to remedy past family separations under the Biden Administration's Family Reunification Task Force, which is explicitly tasked with reunifying families separated by deterrent practices under the *previous* presidential administration. Advocates have made clear that it is critical the Task Force also focus on *preventing ongoing separations*. We are additionally in receipt of Assistant Secretary Millona's January 27, 2022, response to the July 13 letter, which focused only on the Biden Administration's Family Reunification Task Force and recited some rights of unaccompanied children pursuant to the Trafficking Victims Protection Reauthorization Act ("TVPRA") of 2008. Secretary Millona's letter does not address the problems and solutions we identified in the July 13 letter, which concern separations of family members that travel together and do not interfere with the rights of unaccompanied children. Finally, we have reviewed the July 14, 2022, ICE Directive 11064.3: "Interests of Noncitizen Parents and Legal Guardians of Minor Children or Incapacitated Adults," which outlines limited safeguards for cases in which ICE *decides to separate children from their parents*, but fails to outline measures that prevent or remedy such separations altogether.¹⁰

We are also aware of the July 29, 2022 court-approved comprehensive settlement agreement entered into by DHS and class counsel in *Flores v. Garland*, No. 2:85-cv-4544-DMG-AGR (C.D. Cal.), a case concerning the treatment of accompanied and unaccompanied minors in CBP custody in the Rio Grande and El Paso Sectors. The settlement requires that children be detained together with their accompanying relatives unless doing so is not operationally feasible.

⁸ *Id.*

⁹ *Id.* at 13; American Immigr. Council, *Divided by Detention: Asylum-Seeking Families' Experiences of Separation*, n.3, at 14 (Aug. 2016), https://www.americanimmigrationcouncil.org/sites/default/files/research/divided_by_detention.pdf.

¹⁰ ICE Directive 11064.3, *Interests of Noncitizen Parents and Legal Guardians of Minor Children or Incapacitated Adults* (July 14, 2022), <https://www.ice.gov/doclib/news/releases/2022/11064.3.pdf>.

However, in addition to its limited geographic applicability, the settlement does not address retaining family unity at the time of release from CBP custody, the subject we are now addressing.

We are encouraged that under President Biden's leadership, the federal government has made strides to end and remedy practices that intentionally separated children from their parents at the border. We also recognize the benefit of basic safeguards that permit visitation and attendance at family court hearings while separated parents are in ICE custody, like those outlined in the July 14 ICE Directive. However, these modest measures are wholly insufficient to *prevent* ongoing separations resulting from unnecessary DHS actions, and to remedy them thereafter. Thus, they are insufficient to protect against the well-documented harm caused by separations. Unless and until DHS implements prevention-based policies against family separation, the separations and corresponding havoc and trauma they wreak on impacted families will persist.

IV. Recommendations

By attempting to roll back inhumane border policies, DHS, under your guidance, has taken important initial steps towards affirming the importance of family unity and rebuilding the asylum process at the southern border. Those steps appear to acknowledge the misery imposed by the prior policies and practices, and the critical need to redress the harms they caused. But there remains substantial room for continued work to address and prevent ongoing separation of families. In that spirit, we urge DHS to adopt the following recommendations to remedy the harms caused to Lucy's family as a result of their separation, and to reduce instances of such separations in the future:

1. Stipulate to a grant of asylum to Lucy, Mariela, and Anner, in recognition of their eligibility for such relief, as demonstrated when Lucy and Anner passed their credible fear interviews, and in recognition of the unnecessary trauma imposed by the separation on their family, and in order to reduce their exposure to additional trauma caused by reliving the events leading up to the separation;
2. Grant Fabio humanitarian parole and facilitate his lawful entry into the United States to seek asylum together with his family;
3. Investigate and hold accountable the Border Patrol agents involved in the attack against Lucy that resulted in injuries and trauma, criminal charges, and her prolonged separation from her children, including her 10-year-old daughter;
4. Expand the priorities of the Biden Administration's Family Reunification Task Force to include investigation and prevention of ongoing incidents of family separation;
5. In recognition of the fluidity of criminal charges exemplified in Lucy's case, and in recognition of the sanctity of family unity, DHS should decline to refer for criminal prosecutions cases that would necessarily result in separation, absent a showing of extraordinary danger to the child;
6. In all instances of separation predicated on criminal charges against someone originally apprehended by DHS that have not yet resulted in a conviction, regardless of the agencies

having custody over the parent and child, DHS must ensure timely and regular communication between the parent and child as well as reasonably timed updates to the parent about the whereabouts and wellbeing of the child at regular intervals, beginning as soon as possible after the separation, and in no case later than 24 hours after the separation;

7. In all instances of separations caused by the pursuit of criminal charges against someone originally apprehended by DHS, upon final disposition of the prosecution and, if applicable, completion of any corresponding sentence, ensure all relevant DHS agencies immediately enable reunification, including by facilitating expeditious release from ICE custody for all family members, in recognition of the sanctity of family unity and the harm that ongoing separation causes to the involved children and adults alike; and
8. Expand the applicability of the terms of the *Flores* settlement agreement approved on July 29, 2022, which is currently only applicable in the Rio Grande Valley, across the entire southern border, including Section B, “Family Unity,” which provides for an expanded definition of “family members” in the context of custody arrangements in CBP facilities. *See* Order Granting Final Approval of Settlement Agreement in CBP Settlement Agreement, *Flores v. Garland*, No. 2:85-cv-4544-DMG-AGR (C.D. Cal. July 29, 2022); CBP Settlement Agreement, *Flores v. Garland*, No. 2:85-cv-4544-DMG-AGR (C.D. Cal. May 21, 2022).

We additionally reiterate and underscore the urgency of the pertinent recommendations included in the July 13 letter:

9. Preserve family unity by adopting a definition of what constitutes a family to include relationships among parents and their adult children, no matter their age; couples who are in common-law marriages without marriage certificates, as well as pregnant people and their partners; siblings; and extended family members, including grandparents, aunts, and uncles;¹¹
10. Direct DHS agents and officials who encounter applicants for admission at the U.S. southern border, in consultation with child welfare professionals, to document all relationships among family units, as defined above, that travel to the southern border together;
11. Direct all DHS agents and officials who make custody determinations pertaining to applicants for admission at the U.S. southern border that when they recommend parole or release for any members of a family unit traveling together, they extend those determinations to all adult members of that family unit (nothing in this recommendation would have any effect on the rights or processing of unaccompanied minor children under applicable laws, including the TVPRA); and

¹¹ This recommendation is aligned with the Family Unity clause of the May 2022 *Flores* settlement. *See* CBP Settlement Agreement at 14, *Flores v. Garland*, No. 2:85-cv-4544-DMG-AGR (C.D. Cal. May 21, 2022).

12. Immediately halt Title 42 expulsions and implement COVID-19 safety protocols concurrent with provision of federal resources and coordination by DHS agencies with non-governmental organizations in the U.S.

Adoption of these recommendations is critical to address the grave harm to Lucy and her family, as well as to prevent other families from being unnecessarily subjected to the trauma caused by their forced separation at the southern border. It will also mark one more step towards a just asylum process that welcomes people with dignity and humanity.

/s/ Monika Y. Langarica

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Cc: DHS OIG; DHS CRCL; DHS Assistant Sec. of Partnership and Engagement; Biden Administration Family Reunification Taskforce; *Flores* Class Counsel.

Enc.: July 13 Letter from ACLU SDIC and JFS; January 27 Response from DHS Assistant Sec. Millona.