

Congress of the United States
Washington, DC 20515

May 21, 2020

Acting Secretary Chad Wolf
U.S. Department of Homeland Security
500 12th St. SW
Washington, D.C. 20536

Acting Director Matthew T. Albence
U.S. Immigration and Customs Enforcement
500 12th St. SW
Washington, D.C. 20536

Dear Acting Secretary Wolf and Acting Director Albence:

We write to express our concern over reports that the Administration is haphazardly implementing a new policy in family detention centers, creating the appearance that it is again pursuing a policy of family separation during the COVID-19 global pandemic. Service providers at three Immigration and Customs (ICE) detention facilities—the Berks, South Texas (Dilley), and Karnes County Family Residential Centers—report that parents are being presented with an unimaginable choice: either to remain in detention with their children or to relinquish their children into the custody of the Office of Refugee Resettlement (ORR) or a suitable custodian. Further, ICE appears to have approached parents, including those represented by counsel, with this choice without notifying counsel or any organization that could have provided legal assistance, creating additional confusion and fear among the families. The Department of Homeland Security (DHS) must immediately provide a detailed legal explanation for this new policy, and cease implementation until such explanation is provided to families in detention, counsel, and to Congress.

The *Flores* agreement requires DHS to release minors from its custody “without unnecessary delay,” with exceptions only for minors who pose a threat to others or are likely to abscond.¹ The *Flores* agreement further specifies that minors be released to the “least restrictive setting,” with priority given to a parent or other family member.² Notwithstanding its binding nature, this Administration has an unfortunate track record of repeatedly violating the *Flores* agreement, including by engaging in the long-term detention of families with children.³ In September 2019, the federal judge overseeing the agreement permanently enjoined the Administration’s attempt to withdraw from the agreement by issuing regulations that would permit indefinite detention of migrant children and their parents.⁴ In issuing her decision, Judge Gee reminded the Administration that “[t]he *Flores* Agreement is a binding contract . . . [The

¹ Stipulated Settlement Agreement, *Jenny Lissette Flores v. Reno*, Case No. 85-4544-RJK, ¶ 14. (C.D. CA 1997) [hereinafter “FSA”] (Expedition release is only excused when detention is “required either to secure [the child’s] timely appearance before the INS or immigration court, or to ensure the minor’s safety or that of others.”).. (Expedition release is only excused when detention is “required either to secure [the child’s] timely appearance before the INS or immigration court, or to ensure the minor’s safety or that of others.”).

² *Id.*

³ See e.g. *Flores v. Sessions*, 2:85-cv-04544, Dkt. No. 363 (C.D. Cal., June 27, 2017) (finding that immigrant children were routinely held for longer than 20 days in unlicensed ICE family detention facilities in violation of the *Flores* settlement, and that children and adults were being held in unsafe conditions).

⁴ Maria Sacchetti, *Federal Judge Blocks Trump Administration From Detaining Migrant Children For Indefinite Periods*, WASH. POST (Sept. 27, 2019), https://www.washingtonpost.com/immigration/federal-judge-blocks-trump-administration-from-detaining-migrant-children-for-indefinite-periods/2019/09/27/49a39790-e15f-11e9-b199-f638bf2c340f_story.html.

Administration] cannot simply ignore the dictates of the consent decree merely because [it] no longer agree[s] with its approach as a matter of policy.”⁵

On April 24, 2020, in response to the COVID-19 global pandemic, Judge Gee ordered ICE to conduct individualized release assessments for children in ICE custody.⁶ Reports suggest that ICE has interpreted Judge Gee’s order as grounds for approaching parents and asking them to choose between remaining in detention or releasing their children to suitable sponsors.⁷ Unfortunately, the agency’s chaotic implementation of Judge Gee’s order led advocates and families to believe that the Administration was moving forward with its long-contemplated “binary choice” policy, which uses the threat of an illegal action—indefinite family detention—to force another immoral action—family separation.

Millions of families in this country are already suffering immensely from the physical and economic effects of the COVID-19 pandemic. The Administration must stop using this public health crisis as a means for implementing unlawful and inhumane immigration policies. In these extraordinary times, human suffering need not be compounded by locking up families or instilling fear in the hearts of migrant parents.

Given the gravity of the reports mentioned above, we request responses to the following questions not later than May 28, 2020.

1. Is the Administration forcing migrant parents to choose between waiving their children’s rights under the *Flores* agreement and allowing their children to be taken into ORR custody (“binary choice” policy)? If so, at which ICE Family Residential Centers is this policy being implemented?
2. If any iteration of a “binary choice” policy is being implemented, please explain how it comports with the Administration’s legal obligations under *Flores*. Please also provide any memoranda, internal guidance, or draft regulations related to such a “binary choice” policy or any similar policies.
3. Please provide a detailed explanation as to the Administration’s understanding of its legal obligations under Judge Gee’s April 24, 2020 order. Does ICE believe that Judge Gee’s orders requires parents to decide whether to waive their or their children’s rights under the *Flores* agreement, or allow their children to be released separately to a suitable custodian? Did ICE consider other means of implementing Judge Gee’s order?
4. Did ICE personnel, on May 14, 2020, approach parents in Family Residential Centers with a document for them to sign or initial? What was the purpose of this document? Why were parents asked to sign or initial the document? What were such signature or initials intended to convey? Please provide a copy of this document.

⁵ *Flores v. Barr*, 2:85-cv-04544, Dkt. No. 688, 24 (C.D. Cal., Sept. 27, 2019).

⁶ *Id.*, Dkt. No. 784, 18-21 (Apr. 24, 2020).

⁷ The Administration’s filings in the *Flores* case show that parents were presented with this option. *See id.*, Dkt. No. 788-1, 10 (May 15, 2020) (May 2020 interim report submitted by ICE, denying parole on basis that “Parent Does Not wish to Separate”).

5. Did ICE personnel approach parents who were known to be represented by counsel? If so, did ICE notify counsel of record, provide a way for counsel to participate in-person or through electronic means of communication, or otherwise provide a meaningful opportunity for detainees to contact their counsel? If not, why not?
6. Please provide data, disaggregated by nationality, on the number of migrant parents who have been subjected to a “binary choice” policy. Please provide data, disaggregated by nationality, on the number of children removed from ICE custody pursuant to this policy.

Thank you for your attention to this matter. We look forward to your prompt response.

Sincerely,



Jerrold Nadler
Chairman
Committee on the Judiciary



Zoe Lofgren
Chair
Subcommittee on Immigration and Citizenship



Karen Bass
Chair
Congressional Black Caucus



Joaquin Castro
Chairman
Congressional Hispanic Caucus



Judy Chu
Chairwoman
Congressional Asian Pacific American Caucus



Pramila Jayapal
Co-Chair
Congressional Progressive Caucus



Mark Pocan
Co-Chair
Congressional Progressive Caucus

/s/ Ami Bera, M.D.
Member of Congress

/s/ Earl Blumenauer
Member of Congress

/s/ Julia Brownley
Member of Congress

/s/ Tony Cárdenas
Member of Congress

/s/ David N. Cicilline
Member of Congress

/s/ Lou Correa
Member of Congress

/s/ Susan A. Davis
Member of Congress

/s/ Rosa L. DeLauro
Member of Congress

/s/ Val B. Demings
Member of Congress

/s/ Eliot L. Engel
Member of Congress

/s/ Marcia L. Fudge
Member of Congress

/s/ Sylvia R. Garcia
Member of Congress

/s/ Raúl M. Grijalva
Member of Congress

/s/ Alcee L. Hastings
Member of Congress

/s/ Hakeem Jeffries
Member of Congress

/s/ Marcy Kaptur
Member of Congress

/s/ Ro Khanna
Member of Congress

/s/ Ann McLane Kuster
Member of Congress

/s/ Ted W. Lieu
Member of Congress

/s/ Wm. Lacy Clay
Member of Congress

/s/ Jason Crow
Member of Congress

/s/ Peter A. DeFazio
Member of Congress

/s/ Suzan K. DelBene
Member of Congress

/s/ Ted Deutch
Member of Congress

/s/ Adriano Espaillat
Member of Congress

/s/ Jesús G. "Chuy" García
Member of Congress

/s/ Jimmy Gomez
Member of Congress

/s/ Deb Haaland
Member of Congress

/s/ Sheila Jackson Lee
Member of Congress

/s/ Henry C. "Hank" Johnson, Jr.
Member of Congress

/s/ Joseph P. Kennedy, III
Member of Congress

/s/ Ann Kirkpatrick
Member of Congress

/s/ Barbara Lee
Member of Congress

/s/ Alan Lowenthal
Member of Congress

/s/ Carolyn B. Maloney
Member of Congress

/s/ Gregory Meeks
Member of Congress

/s/ Debbie Mucarsel-Powell
Member of Congress

/s/ Joe Neguse
Member of Congress

/s/ Alexandria Ocasio-Cortez
Member of Congress

/s/ Chellie Pingree
Member of Congress

/s/ Mike Quigley
Member of Congress

/s/ Lucille Roybal-Allard
Member of Congress

/s/ Mary Gay Scanlon
Member of Congress

/s/ Albio Sires
Member of Congress

/s/ Darren Soto
Member of Congress

/s/ Thomas R. Suozzi
Member of Congress

/s/ Mark Takano
Member of Congress

/s/ Dina Titus
Member of Congress

/s/ David Trone
Member of Congress

/s/ James P. McGovern
Member of Congress

/s/ Grace Meng
Member of Congress

/s/ Grace F. Napolitano
Member of Congress

/s/ Eleanor Holmes Norton
Member of Congress

/s/ Ilhan Omar
Member of Congress

/s/ Ayanna Pressley
Member of Congress

/s/ Jamie Raskin
Member of Congress

/s/ Linda T. Sánchez
Member of Congress

/s/ Jan Schakowsky
Member of Congress

/s/ Adam Smith
Member of Congress

/s/ Jackie Speier
Member of Congress

/s/ Eric Swalwell
Member of Congress

/s/ Mike Thompson
Member of Congress

/s/ Norma J. Torres
Member of Congress

/s/ Juan Vargas
Member of Congress

/s/ Filemon Vela
Member of Congress

/s/ Peter Welch
Member of Congress

/s/ Frederica S. Wilson
Member of Congress

cc: The Honorable Jim Jordan, Ranking Member, Committee on the Judiciary
The Honorable Ken Buck, Ranking Member, Subcommittee on Immigration and
Citizenship