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Submitted via <https://www.regulations.gov>

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Interagency Task Force on the Reunification of Families  
U.S. Department of Homeland Security

Samantha Deshombres, Chief, Regulatory Coordination Division  
Office of Policy and Strategy  
U.S. Citizenship and Immigration Services  
Department of Homeland Security

**Re: Recommendations To Support the Work of the Interagency Task Force on the Reunification of Families (“Notice”); Docket No. [DHS-2021-0051](#)**

Dear Mses. Brané and Deshombres,

The National Immigrant Justice Center (“NIJC” or “we”) defends the rights and dignity of migrants and asylum seekers. NIJC writes to share our recommendations based on decades of work representing clients who have been separated from their families due to policies and practices led by the Department of Homeland Security (DHS), practices that persist today.

### **NIJC’s Interest in this Notice**

NIJC is dedicated to ensuring human rights protections and access to justice for all immigrants, refugees, and asylum seekers. Headquartered in Chicago, NIJC provides legal services to more than 9,000 individuals each year, including many asylum seekers, refugees, torture survivors, children, and families. Since its founding more than three decades ago, NIJC uniquely blends individual client advocacy with broad-based systemic change through policy reform, impact litigation, and public education. Our input is informed by our experience and the interests of our clients, their families, and their communities.

**Family separation is endemic to U.S. immigration policy; the administration should review all programs resulting in separations and take urgent steps to establish family unity as a central tenet of U.S. immigration policy.**

The Task Force on the Reunification of Families (“Task Force”) has requested input on the causes of family separations that occurred “incident to the Zero-Tolerance policy as well as policies, procedures, or regulations that may minimize the separation of migrant parents and

legal guardians and children entering the United States, consistent with law.”<sup>1</sup> The Trump administration’s Zero-Tolerance policy that led to systemic separations of families at the U.S. southern border was premised on cruelty, and was met with widespread protest and condemnation. Physicians for Human Rights called out what family separation truly is: government-sanctioned torture.<sup>2</sup>

The Zero-Tolerance policy, however, was just one program in the myriad of cruel deterrence and enforcement programs that continue to separate parents from their children and cause lasting harm to migrant families. The Biden administration has since denounced this policy and committed to “protect family unity and ensure that children entering the United States are not separated from their families” barring the most extreme circumstances.<sup>3</sup> Nevertheless, families suffered separations at the U.S. southern border well before Zero-Tolerance and *continue* to suffer from separations resulting from deterrence programs championed by the Biden administration. NIJC provides its input based on its representation and services to individuals subjected to a large spectrum of family separation vehicles at DHS’ disposal.

As advocates for separated families, we greatly appreciate the vital work of the Task Force in reuniting families subjected to Zero-Tolerance. Nonetheless, we are bewildered at the Administration’s issuance of a request for recommendations on how to preserve family unity in border processing *while embracing* a series of immigration policies that systemically separate children from their parents and loved ones. This Notice was issued as asylum seeking families grapple with the new iteration of the Remain in Mexico program, returning dozens of asylum seekers daily to dangerous border towns where they face family separations, kidnappings, assault and killings. Haitian mothers and fathers and their children, including young babies, face mass expulsions back to a destabilized and violence-plagued country. In recent weeks, this administration has walked away from settlement negotiations and moved to dismiss claims brought by families seeking compensation for the unimaginable harms they endured as a result of Zero-Tolerance separations.<sup>4</sup> And in the interior of the United States, family separation continues to be a routine part of civil immigration enforcement, without meaningful policies designed to preserve family unity or parental rights.

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<sup>1</sup> See Dep’t of Homeland Sec., *Identifying Recommendations To Support the Work of the Interagency Task Force on the Reunification of Families*, 86 Fed. Reg. 70512 (Dec. 10, 2021). <https://www.federalregister.gov/documents/2021/12/10/2021-26691/identifying-recommendations-to-support-the-work-of-the-interagency-task-force-on-the-reunification>.

<sup>2</sup> See Katie Peeler, *Forced Family Separation Isn’t Just Traumatic. It’s Torture*, Physicians for Human Rights (Mar. 10, 2020), available at <https://phr.org/our-work/resources/forced-family-separation-isnt-just-traumatic-its-torture/>.

<sup>3</sup> See President Biden, *Establishment of Interagency Task Force on the Reunification of Families*, Exec. Order 14,011, § 1, 86 Fed. Reg. 8273, 8273 (Feb. 2, 2021).

<sup>4</sup> See Jonathan Blitzer, *Why Biden Refused to Pay Restitution to Families Separated at the Border*, The New Yorker (Dec. 22, 2021), available at <https://www.newyorker.com/news/news-desk/why-biden-refused-to-pay-restitution-to-families-separated-at-the-border>.

The following comment therefore calls on the Task Force to examine all DHS policies and programs that result in family separations and offers recommendations for DHS to change course rather than continue inflicting life-long harm to migrant families.

In particular, we review: (1) the adverse impact of prosecutions under 8 U.S.C. §§ 1325 and 1326, statutes mired in a deeply racist and inhumane history, and their pivotal role in the Zero-Tolerance program; (2) policies that lead to family separations of asylum seekers not included in the *Ms. L vs. ICE* class (Ms. L class exclusions); (3) the continuous infrastructure of Migrant Protection Protocols (MPP), which directly and indirectly results in the separation of families; (4) the parallel role of summary expulsions under Title 42 of the U.S. Code in family separations; and (5) how interior enforcement policies systemically uphold family separation as a collective tool to punish and deter migrants and asylum seekers.

### **(1) Migration-related prosecutions fuel family separations.**

The laws used to prosecute people for entering and reentering the U.S. without permission were passed in the late 1920s during the height of the eugenics movement to further racist and white supremacist ideology.<sup>5</sup> Prosecutions for unauthorized entry (8 U.S.C § 1325) and for unauthorized reentry (8 U.S.C § 1326) continue to have a starkly discriminatory impact on individuals with Hispanic or Latinx origin.<sup>6</sup> Migration-related prosecutions not only lead to family separations but also systematically delay and prevent asylum seekers from making a claim for protection, in violation of U.S. treaty obligations and due process.<sup>7</sup>

The Trump Administration sought to deter asylum seekers through anti-immigrant programs aimed at inflicting harm on families seeking safety in the United States.<sup>8</sup> In the first two months of office in 2017, the Trump administration directed DHS and the DOJ to increase referrals and

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<sup>5</sup> See, e.g., Kelly Lytle Hernández, *Conquest, Rebellion, and the Rise of Human Caging in Los Angeles, 1771–1965*, (UNC Press Books, 2017), at 137. See also Madlin Mekelburg, “Fact-check: When did it become a crime to cross the U.S. border between ports of entry?,” *Statesman* (July 12, 2019), available at <https://www.statesman.com/news/20190712/fact-check-when-did-it-become-crime-to-cross-us-border-between-ports-of-entry>.

<sup>6</sup> See, e.g., Jesse Franzblau, “Landmark Decision Finds ‘Illegal Reentry’ Charges Are Racist In Origin, Discriminatory In Practice,” NIJC (Aug. 26, 2021), available at <https://immigrantjustice.org/staff/blog/landmark-decision-finds-illegal-reentry-charges-are-racist-origin-discriminatory>.

<sup>7</sup> See, e.g., “NIJC Demands Civil Rights Investigation Into Migration-Related Prosecutions’ Systematic Undermining Of Asylum Rights,” NIJC (Dec. 17, 2020), available at <https://immigrantjustice.org/press-releases/nijc-demands-civil-rights-investigation-migration-related-prosecutions-systematic>. See also Human Rights First, *Punishing Refugees and Migrants: The Trump Administration’s Misuse of Criminal Prosecutions* (Jan. 18, 2018), available at <https://www.humanrightsfirst.org/resource/punishing-refugees-and-migrants-trump-administrations-misuse-criminal-prosecutions>.

<sup>8</sup> See, e.g., “A Timeline of the Trump Administration’s Efforts to End Asylum,” NIJC (Jan. 2021), available at <https://immigrantjustice.org/timeline-trump-administrations-efforts-end-asylum>. See also Shaw Drake & Edgar Saldivar, *Trump Administration Is Illegally Turning Away Asylum Seekers*, ACLU (Oct. 30, 2018), available at <https://www.aclu.org/blog/immigrants-rights/trump-administration-illegallyturning-away-asylum-seekers>.

prosecutions for unauthorized entry and reentry violations.<sup>9</sup> The DOJ then issued a memo in April 2017 instructing federal prosecutors to prioritize and increase such prosecutions of non-citizens.<sup>10</sup> In July 2017, the government established a pilot program in CBP’s El Paso sector, to target parents who crossed the border with children for criminal prosecution. Then Attorney General Jeff Sessions announced in April 2018 that the government would institute the “Zero-Tolerance” policy, mandating the prosecution of all persons who crossed the United States border between ports of entry.<sup>11</sup>

At the peak of the implementation of Zero-Tolerance, NIJC represented three women who had fled their Central American homes with their children after surviving years of violence by partners and powerful gangs. All three requested asylum when they crossed the U.S. border, but CBP referred all three for unauthorized entry prosecution and separated them from their children aged eight to 17. All suffered irreversible trauma and lasting harm. Only after finding lawyers, who advocated on their behalf, were they reunited with their children. The anguish these three mothers and their children endured during their separation was felt by thousands of victims of the Zero-Tolerance policy.

In June 2018, an order from a federal judge in *Ms. L vs. ICE* forced the end of the Trump administration’s policy of prosecuting every parent for border crossing. However, family separations resulting from unauthorized entry and reentry prosecutions persisted.<sup>12</sup> In January 2020, the U.S. District Court of the Southern District of California ruled in *Ms. L* that the administration could continue to separate families based on their criminal history, including for unauthorized reentry offenses.<sup>13</sup>

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<sup>9</sup> White House Executive Order 13767, *Border Security and Immigration Enforcement Improvements*, Federal Register, Vol. 82, No. 18 (Jan. 25, 2017), <https://www.govinfo.gov/content/pkg/FR-2017-01-30/pdf/2017-02095.pdf>. See also U.S. Secretary of Homeland Security, *Implementing the President’s Border Security and Immigration Enforcement Improvements Policies* (Wash., DC: U.S. Department of Homeland Security, Feb. 20, 2017), available at [https://www.dhs.gov/sites/default/files/publications/17\\_0220\\_S1\\_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf](https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf).

<sup>10</sup> See Office of the Attorney General, *Renewed Commitment to Criminal Immigration Enforcement* (Washington, DC: Department of Justice, April 11, 2017), <https://www.justice.gov/opa/press-release/file/956841/download>. In addition, on May 10, 2017, the Attorney General directed federal prosecutors to charge and pursue the most serious, readily provable offense. See Office of the Attorney General, *Department Charging and Sentencing Policy, Memorandum for All Federal Prosecutors* (Wash., DC: Department of Justice, May 10, 2017), <https://www.justice.gov/opa/press-release/file/965896/download>.

<sup>11</sup> See Office of the Attorney General, *Zero-Tolerance for Offenses Under 8 U.S.C. § 1325(a)*, Memo for Federal Prosecutors Along the Southwest Border, (Wash., DC: Department of Justice, April 6, 2018), <https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry>.

<sup>12</sup> See Laura Peña and Efrén C. Olivares, *The Real National Emergency: Zero Tolerance & the Continuing Horrors of Family Separation at the Border*, The Texas Civil Rights Project (Feb. 2019), available at <https://texascivilrightsproject.org/wp-content/uploads/2019/02/FamilySeparations-Report-FINAL.pdf>.

<sup>13</sup> See *Ms. L. et al. v. U.S. Immigration and Customs Enforcement et al.*, Case No.:18cv0428 DMS. available at <https://www.courthousenews.com/wp-content/uploads/2020/01/FamilySeparation-injORDER.pdf>. See also “Statement of the National Immigrant Justice Center (NIJC), U.S. House Judiciary Committee Hearing Oversight of Family Separation and U.S. Customs and Border Protection,” National Immigrant Justice Center (July 25, 2019), available at <https://docs.house.gov/meetings/JU/JU00/20190725/109852/HHRG-116-JU00-20190725-SD014.pdf>.

While the human rights atrocities resulting from the Zero-Tolerance policy brought public attention to the plight of families fleeing to the United States to escape persecution, less public focus has been placed on those who face criminal prosecutions for coming to this country to reunite with families with deep roots in the U.S. NIJC carried out an investigation from May 2019 to April 2020 into rights violations stemming from migration-related prosecutions, including separating families, obstructing the right to asylum, denying due process protections, and dehumanizing and racist treatment. The findings illustrated how prosecutions keep families divided and penalize parents for seeking to be with their children.<sup>14</sup>

The Biden administration took a notable step toward progress with the rescission of the Trump administration's Zero-Tolerance directive,<sup>15</sup> and with the ban on family separation for unauthorized entry convictions or prosecutions.<sup>16</sup> However, the Biden administration has continued to rely on Section 1326 prosecutions,<sup>17</sup> and has again started to refer a significant number of people for Section 1325 prosecutions.<sup>18</sup> Documents obtained through FOIA show that CBP has continued its "Consequence Delivery System," in which people are referred for prosecution as part of the spectrum of penalizing enforcement programs designed to deter migration.<sup>19</sup> Moreover, in July 2021, CBP announced it was launching its "Repeat Offender initiative," under which single adults who have previously been apprehended and deported under Title 8 will be referred for prosecution.<sup>20</sup> The announcement of the new initiative demonstrates that, rather than end Title 42 expulsions that cause the high rate of repeat crossings, the administration is choosing to prosecute more asylum seekers for unauthorized reentry.

Referrals for migration-related prosecutions continue to violate rights of migrants and tear families apart. *In September 2021, for example, an asylum-seeking father named Edgar who was*

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<sup>14</sup> NIJC's survey defined family members as relative by blood (including parents, aunts, uncles, cousins, nieces, nephews), spouse, or co-parent of children. More than 80 percent of the people interviewed had family members in the United States and indicated they were trying to rejoin them. Thirty-three percent said they had children in the United States with whom they were hoping to reunite. More than half had lived in the United States before their prosecutions. See Jesse Franzblau et al., *A Legacy Of Injustice: The U.S. Criminalization Of Migration*, NIJC (July 23, 2020), <https://immigrantjustice.org/research-items/report-legacy-injustice-us-criminalization-migration>.

<sup>15</sup> See Office of the Attorney General, Memo for All Federal Prosecutors from the Acting Attorney General, *Rescinding the Zero-Tolerance Policy for Offenses Under 8 U.S.C. § 1325(a)*, U.S. Department of Justice (Jan. 26, 2021), available at <https://www.justice.gov/ag/page/file/1360706/download>.

<sup>16</sup> Rafael Bernal, "DHS formally bans family separations for illicit border crossings," *The Hill* (May 28, 2021), available at <https://thehill.com/latino/556060-dhs-formally-bans-family-separations-for-illicit-border-crossings>.

<sup>17</sup> The Biden administration charged more than 10,000 charges for unauthorized reentry from January to September 2021; compared to 12,775 charges from January to September 2020 under the Trump administration. See Offices of the United States Attorneys, U.S. Department of Justice, *Prosecuting Immigration Crimes Report (PICR)*, <https://www.justice.gov/usao/resources/PICReport> [last visited January 7, 2021].

<sup>18</sup> *Id.* There were 248 people charged for Section 1325 offenses from October 1st to December 31st of 2021.

<sup>19</sup> See e.g., U.S. Customs and Border Protection (CBP), San Diego Sector, Consequence Delivery System (June 2021).

<sup>20</sup> See U.S. Customs and Border Protection (CBP), Operational Update, July 2021, available at <https://www.cbp.gov/newsroom/national-media-release/cbp-releases-july-2021-operational-update>.

*prosecuted for unauthorized reentry was murdered in Tijuana, after he served four months in prison in the U.S. for his Section 1326 conviction. Because he was transferred from California to Texas to serve his time, his California immigration lawyer could no longer represent him. DHS officials convinced him to abandon his asylum claim, telling him he was “never going to get asylum anyways.” He left behind his partner and a baby daughter who was born three weeks prior to his death.*<sup>21</sup>

## **Recommendations**

The laws used to prosecute entry and reentry violations are rooted in xenophobia, continue to discriminate along racial and ethnic lines, and should not form the basis for any legitimate government policy today. De-prioritizing and phasing out such prosecutions is an essential step toward ending systemic injustices, protecting fundamental human rights, and preventing family separations.

DHS should:

- Suspend all referrals for prosecutions for unauthorized entry or reentry violations;<sup>22</sup>
- Terminate all programs that target asylum seekers for prosecution, including ending the CBP’s Repeat Offender Initiative;
- Until DHS suspends all referrals for prosecutions, the administration should apply the principle and spirit of the ban on family separation for unauthorized entry convictions or prosecutions and exercise prosecutorial discretion to prevent any referrals for unauthorized entry or reentry prosecutions that lead to family separations;
- Vacate prior unauthorized entry or reentry convictions for parents subjected to Zero-Tolerance and unauthorized reentry prosecutions.

**(2) Exclusions from the “Ms. L class” have resulted in the separations of thousands of families on the basis of criminal or gang-related allegations that have no bearing on parental fitness.**

The Trump administration formally abandoned its family separation program in June 2018. However, the government continued to systematically separate families well after the termination of the Zero-Tolerance policy. In *Ms. L vs. ICE*, the U.S. District Court for the Southern District of California certified a class of parents who were separated from their children at the border

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<sup>21</sup> NIJC received information about Edgar’s case from Federal Defenders in San Diego who shared it with permission of Edgar’s family.

<sup>22</sup> Organizations working on criminal justice reform have for years called on the Biden administration to suspend criminal prosecutions for unauthorized entry and reentry. *See, e.g.*, Jesse Franzblau, “NIJC Joins 100+ Organizations Calling On The Biden Administration And Congress To Decriminalize Migration,” NIJC (Nov. 20, 2020), *available at* <https://immigrantjustice.org/staff/blog/nijc-joins-100-organizations-calling-biden-administration-and-congress-decriminalize>.

pursuant to the Trump administration’s immigration policies, and prohibited the government from separating migrant parents and their minor children. Nonetheless, the Court allowed for separations to occur in cases where the government determined that the “parent was unfit or presented a danger to his or her child or had a criminal history or communicable disease.”<sup>23</sup>

DHS exploited this loophole to continue to separate thousands who the government determined fell outside of the Ms. L class. According to the Ms. L court documents, in the year following the issuance of the Court’s June 2018 preliminary injunction, the government separated an estimated 1,000 migrant families at the border.<sup>24</sup> Documents later disclosed through Freedom of Information Act (FOIA) litigation, along with testimonies from victims of family separation, show that DHS regularly separated children from their parents on the basis of suspected and often erroneous gang affiliation, and/or criminal histories that had no bearing on a parent’s fitness.<sup>25</sup> Data released on 3,109 cases of separations carried out from February 2018 to March of 2019 showed that 383 of those separations took place after the June 20, 2018 Executive Order that purported to end the Zero-Tolerance policy.<sup>26</sup> After March 2019, that figure jumped to more than 700 separations.<sup>27</sup> After June 2018, DHS stopped citing the Zero-Tolerance policy, but ratcheted up separations based on suspected criminal histories in the “US or home country.”<sup>28</sup>

Since June 2018, NIJC has represented more than 100 separated children and parents, including asylum seekers separated from their children because DHS alleged that the mother was a gang member and excluded them from the Ms. L class.<sup>29</sup> In nearly all these cases, the women were victims of severe gang violence and NIJC was eventually able to disprove the allegations of gang

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<sup>23</sup> See Ms. L.; et al., *Petitioners-Plaintiffs, v. U.S. Immigration and Customs Enforcement (“ICE”); et al., Respondents-Defendants*, Case No.: 18cv0428 DMS (MDD) (Jan. 13, 2020), available at [https://www.aclu.org/sites/default/files/field\\_document/order\\_ms\\_l\\_order\\_on\\_motion\\_to\\_enforce\\_pi.pdf](https://www.aclu.org/sites/default/files/field_document/order_ms_l_order_on_motion_to_enforce_pi.pdf).

<sup>24</sup> *Id.*

<sup>25</sup> See Jesse Franzblau, *Family Separation Policy Continues, New Documents Show*, NIJC (June 22, 2019), available at <https://immigrantjustice.org/staff/blog/family-separation-policy-continues-new-documents-show>. See also U.S. House Judiciary Committee Hearing, Oversight of Family Separation and U.S. Customs and Border Protection Short-Term Custody under the Trump Administration, *Statement of the National Immigrant Justice Center (NIJC)* (July 25, 2019), available at <https://www.congress.gov/116/meeting/house/109852/documents/HHRG-116-JU00-20190725-SD014.pdf>.

<sup>26</sup> See American Immigration Council, *Newly Released Documents and Personal Testimonies Provide Evidence of Systematic Family Separations a Year After the End of Zero-Tolerance Policy* (June 22, 2019), available at <https://www.americanimmigrationcouncil.org/news/newly-released-documents-and-personal-testimonies-provide-evidence-systematic-family>

<sup>27</sup> See Lomi Kriel and Dug Begley, *Trump administration still separating hundreds of migrant children at the border through often questionable claims of danger*, Houston Chronicle (June 24, 2019), available at <https://www.houstonchronicle.com/news/houston-texas/houston/article/Trump-administration-still-separating-hundreds-of-14029494.php>.

<sup>28</sup> See American Immigration Council, *Newly Released Documents and Personal Testimonies Provide Evidence of Systematic Family Separations a Year After the End of Zero-Tolerance Policy*.

<sup>29</sup> See Ms. L., et al., *Petitioners-Plaintiffs, v. U.S. Immigration and Customs Enforcement (“ICE”), et al., Respondents-Defendants*, U.S. Southern District of California, Declaration of Lisa Koop, Case No. 18-cv-00428-DMS-MDD, July 20, 2010.

membership.<sup>30</sup> Mothers have shared their stories about how Border Patrol separated them from their children on the basis of erroneous allegations:<sup>31</sup>

*Maria's reason for separation is listed in government records as "parent has a criminal history (U.S. or home country)." It was not until a month after the separation, however, that Maria was told that the reason for the separation was based on allegations of a criminal record in her home country. NIJC lawyers working on her case had to obtain official documents from El Salvador confirming that she in fact had no criminal record.*

*Elena is a Salvadoran mother of two children taken from her after entering the U.S. in April 2019. Border patrol agents separated her because she happened to be questioned by Salvadoran police a decade earlier and was confused for a gang suspect because gang members were brought to the police station at the same time. NIJC provided the Justice Department with an official clearance document from the Salvadoran government. Elena was finally released and reunified with her children after being separated for more than two months.*

NIJC has also seen cases where DHS uses unsubstantiated allegations of terrorist activity and criminal convictions of dubious origins to justify separations. *NIJC represented an asylum seeking mother from a West African country, for example, who entered the U.S. in April 2019 with her two young children. The mother was separated from her children because the U.S. government accused her of being subject to the terrorist related inadmissibility grounds based on ambiguous, unconfirmed notes taken by the asylum officer who conducted her credible fear interview.*<sup>32</sup>

NIJC found that parents were sometimes given some verbal indication at their credible fear interviews of the basis for the separation, but no specific details or documentation. As attorneys for separated parents, NIJC asked numerous government officers, including ICE Deportation Officers, USCIS Asylum Officers, ICE Trial Attorneys, and attorneys from the Department of Justice, for documentation to substantiate allegations of gang affiliation or criminal history. In all but one case, the government refused to provide NIJC with documentation reflecting the reason or justification for the separation.

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<sup>30</sup> See Lomi Kriel and Dug Begley, *Trump administration still separating hundreds of migrant children at the border through often questionable claims of danger*, Houston Chronicle (June 24, 2019), available at <https://www.houstonchronicle.com/news/houston-texas/houston/article/Trump-administration-still-separating-hundreds-of-14029494.php>.

<sup>31</sup> See U.S. House Judiciary Committee Hearing, Oversight of Family Separation and U.S. Customs and Border Protection Short-Term Custody under the Trump Administration, *Statement of the National Immigrant Justice Center (NIJC)*.

<sup>32</sup> See *Ms. L., et al., Petitioners-Plaintiffs, v. U.S. Immigration and Customs Enforcement ("ICE"), et al., Respondents-Defendants*, U.S. Southern District of California, Declaration of Lisa Koop, Case No. 18-cv-00428-DMS-MDD, July 20, 2010.

We remain concerned that the programs used to separate families under the prior administration remain intact. In some cases, for example, the sources of the erroneous gang and criminal accusations came from transnational intelligence-sharing programs that we fear are still active.<sup>33</sup> While the Biden administration terminated the Trump-era Asylum Cooperation Agreements (ACA's) with El Salvador, Honduras, and Guatemala, there is no indication that the biometric data sharing agreements with those countries have ended.<sup>34</sup> Worse, the Biden administration has proposed increasing information sharing between law enforcement in El Salvador, Honduras, and Guatemala, and U.S. agencies with respect to gang activity.<sup>35</sup>

The Task Force on family reunification has not provided public guidance on whether it is including families excluded from the Ms. L class in its reunification efforts. Through the together.gov system, NIJC has sought to reunify mothers who were repatriated to their home country prior to the Ms. L court order to reunify families, including mothers with criminal allegations. We have yet to receive confirmation that these families will be considered by the Task Force.

## **Recommendations**

The Task Force must take steps towards preventing family separations from occurring based on accusations of gang affiliations, and criminal histories that have no bearing on a parent's fitness, and address all cases of separations, including those that fall outside of the Ms. L class. The Task Force should also recommend that the administration:

- Ensure that people separated who fall outside of the Ms. L class are not excluded from reunification efforts and that no further separations occur on the basis of foreign intelligence sharing or any gang-related enforcement programs;
- End the reliance on gang affiliations in ICE and CBP enforcement practices, and terminate foreign intelligence sharing agreements that lead to separations of families;
- Instruct DHS to provide justifications, including a copy of any evidence, arrest warrants, or other documentation of alleged criminal accusation, to individuals and their attorneys who are separated based on foreign data sharing programs alleging gang affiliation or criminal history,

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<sup>33</sup> One program, called the Joint Border Intelligence Initiative, allowed CBP and U.S. law enforcement access to participating countries' criminal databases and histories of suspected gang members and criminals entering into or already in the U.S. See Jesse Franzblau, "Consequences Of Unreliable Transnational Gang Allegations," NIJC (Sept. 30, 2021), available at <https://immigrantjustice.org/staff/blog/consequences-unreliable-transnational-gang-allegations>.

<sup>34</sup> See, e.g., U.S. Department of Homeland Security, *Fact Sheet: DHS Agreements with Guatemala, Honduras, and El Salvador*, available at [https://www.dhs.gov/sites/default/files/publications/19\\_1028\\_opa\\_factsheet-northern-central-america-agreements\\_v2.pdf](https://www.dhs.gov/sites/default/files/publications/19_1028_opa_factsheet-northern-central-america-agreements_v2.pdf).

<sup>35</sup> See White House, National Security Council, *Collaborative Migration Management Strategy*, (July 2021), available at <https://www.whitehouse.gov/wp-content/uploads/2021/07/Collaborative-Migration-Management-Strategy.pdf>.

- Develop a pathway for directly impacted parents to submit formal challenges with the Justice Department on any decision by DHS to separate them from their children based on accusations of criminal history, and;
- Conduct a thorough examination into the current practices relating to gang-based enforcement programs for potential rights violations.

**(3) MPP or Remain in Mexico has been a vehicle for family separations since its inception. Its recent reinstatement and expansion under the Biden administration all but ensures continued harm today.**

Families and children have been a prime target of anti-asylum programs such as MPP, which has returned tens of thousands to dangerous towns in Mexico during the pendency of immigration court cases in the United States. Per the United Nations High Commissioner for Refugees (UNHCR), 81% of families forcibly returned to Mexico in 2019 feared for their safety, while their children formed nearly half of the incidents involving physical violence or kidnappings.<sup>36</sup>

With such dangerous circumstances, many families faced a Sophie’s Choice: stay in danger in Mexico despite imminent threat to parents and their children, or send children alone to the United States in the hope that they can find temporary safety. This impossible situation was a direct consequence of DHS’ systematic push-back of asylum seekers to Mexico. In essence, DHS deputized families to self-separate or endure intolerable danger.<sup>37</sup> Unsurprisingly, hundreds of children were sent alone to the United States and labeled unaccompanied, despite the presence of their parent or caregiver across the border with cases initiated in the United States.<sup>38</sup>

NIJC has represented these children and their parents, who have recounted harrowing stories of violence that culminated in their separation. Many of these children faced Kafkaesque proceedings in the U.S., requiring rescission of *in absentia* orders due to prior kidnappings in Mexico or decoupling their case from their parent or caregiver stranded in Mexico.

*NIJC represents Lina, a 10-year-old girl from Central America who entered the United States as an unaccompanied child and has been in the custody of the Office of Refugee Resettlement since*

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<sup>36</sup> See DHS, Explanation of the Decision to Terminate the Migrant Protection Protocols (Oct. 29, 2021), at p.13 n.51-52 (citing UNHCR, Rapid Protection Assessment: MPP Returnees at the Northern Border of Mexico 15, Dec. 2019).

<sup>37</sup> Internal memos released through FOIA provide evidence that MPP was designed as part of the Trump administration’s deterrence policies, implemented to “effectuate removals” and “reduce the number of aliens released into the interior of the United States.” One memo states that the intent of MPP was to “maximize returns of aliens amenable to MPP at already established locations.” See DHS Enforcement Programs Division, *Guiding Principles of the Migrant Protection Protocols* (Mar. 15, 2019), available at [https://www.dhs.gov/sites/default/files/publications/migrant\\_protection\\_protocols\\_01.pdf](https://www.dhs.gov/sites/default/files/publications/migrant_protection_protocols_01.pdf).

<sup>38</sup> See American Immigration Council, *The “Migrant Protection Protocols”* (Oct. 6, 2021), available at <https://www.americanimmigrationcouncil.org/research/migrant-protection-protocols> (“At least 700 children who were part of families subject to MPP were sent across the border alone by their parents.”).

*April 2021. Lina was originally enrolled in MPP with her mom and sibling, but was separated from them at the border and designated by U.S. officials as an unaccompanied minor. While in MPP, all three family members were ordered removed in 2020. Her mother and sibling remain in Mexico, unable to reunite with Lina. Were Lina reunited with her family, they could jointly seek reopening of their cases. Apart for more than half a year, all three of them could face deportation. Lina exhibits cognitive difficulties that are exacerbated by the separation from her mother and sibling, who live in constant fear of violence.*

The Biden administration recognized the extensive record of atrocities associated with MPP. Nevertheless, it has recently reinstated the deadly program, all but ensuring the continuation of systemic harms and family separations. NIJC has already spoken with asylum seekers in “acute psychological distress” due to this reinstated policy, with many recounting direct harms or threats received in Mexico.<sup>39</sup> Furthermore, the Biden administration has expanded the list of countries subject to this new iteration of MPP.<sup>40</sup>

## **Recommendations**

In light of the continued nexus between MPP and family separations, we call on DHS to:

- End the placement of any new individual in MPP;
- Resume and intensify the return of individuals formally subjected to MPP to the U.S. through the use of humanitarian parole or other vehicles, including individuals with terminated cases or removal orders;<sup>41</sup> and
- Conduct a comprehensive review of individuals returned to Mexico to date and work in partnership with other agencies, such as the Office of Refugee Resettlement and the Department of State, to identify and reunify families separated by MPP in the United States through humanitarian parole or other means.

### **(4) Much like MPP, Title 42 expulsions force families to separate in order to bring their children to safety in the United States.**

Though initiated by the Trump administration, President Biden’s DHS has overseen and conducted the largest number of expulsions to date under Title 42 of the U.S. Code. These expulsions have returned over a million people, including children, to harm. Unsurprisingly, they

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<sup>39</sup> NIJC, *Field Update: Biden Administration’s Migrant Protection Protocols Are Rife With Due Process And Human Rights Violations* (Dec. 15, 2021), available at <https://immigrantjustice.org/press-releases/field-update-biden-administrations-migrant-protection-protocols-are-rife-due-process>.

<sup>40</sup> See Camilo Montoya-Galvez, *U.S. finalizes plan to return migrants to Mexico under Trump-era policy as soon as next week*, CBS News (Dec. 2, 2021), available at <https://www.cbsnews.com/news/immigration-remain-in-mexico-policy-us-return-migrants>.

<sup>41</sup> This process, previously initiated in partnership with the United Nations’ top refugee agency, successfully facilitated the return of over 13,000 people enrolled in MPP 1.0. Resuming and intensifying this process will be an efficient way to reunify families.

have also created the same conditions that force parents and caregivers to separate from their children. Thousands of children, including children as young as ten years old, have arrived unaccompanied in the United States due to these summary expulsions.<sup>42</sup>

Nothing justifies the imminent harm to children caused by Title 42 expulsions. And indeed there is no reasonable or lawful justification for the continued expulsions; public health experts have overwhelmingly rejected the racist and xenophobic rationale that undergirds the expulsion policy.<sup>43</sup> Nonetheless, DHS continues to expel thousands per month, in a policy that directly endangers children and their families. This has resulted in over 8,700 reports of kidnappings, rapes, torture and other attacks against asylum seekers expelled or forced to return to Mexico during the first year of the Biden administration.<sup>44</sup> Ending the separation of families requires ending Title 42 expulsions, as well as MPP.

### **Recommendations:**

Given the thousands of children already separated as a result of Title 42 expulsions, we call on DHS to:

- Immediately end the use of expulsions at ports of entry;
- Restore asylum processing for adults, children, and families at the border; and
- Conduct a comprehensive review of expulsions conducted to date and work in partnership with other agencies, such as the Office of Refugee Resettlement and the Department of State, to identify and reunify families in the United States.

### **(5) Interior immigration enforcement actions separate families, often permanently.**

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<sup>42</sup> See Kevin Sieff and Ismael López Ocampo, “Migrant boy found wandering alone in Texas had been deported and kidnapped,” Wash. Post (April 9, 2021), available at <https://www.washingtonpost.com/world/2021/04/09/migrant-boy-found-wandering-alone-texas-had-been-deported-kidnapped/>; Nicole Sganga and Camilo Montoya-Galvez, “Over 2,100 children crossed border alone after being expelled with families to Mexico,” CBS News (May 7, 2021), available at <https://www.cbsnews.com/news/migrant-children-left-families-asylum-border>.

<sup>43</sup> See Montoya-Galvez, *Top CDC official told Congress migrant expulsion policy was not needed to contain COVID*, CBS News (Nov. 12, 2021), available at <https://www.cbsnews.com/news/cdc-official-told-congress-migrant-expulsion-policy-not-needed-to-contain-covid/> (“A former senior official with the Centers for Disease Control and Prevention told a congressional committee that a border policy instituted last year to expel migrants and block them from requesting asylum was not needed to contain the spread of the coronavirus, according to a transcript released Friday.”); Physicians for Human Rights, *1,300+ Medical Professionals from 49 U.S. States and Territories Call on CDC to End “Junk Science” Border Expulsion Policy* (Oct. 28, 2021), available at <https://phr.org/our-work/resources/u-s-medical-professionals-demand-cdc-end-title-42/> (“1,383 medical professionals today demanded that the Centers for Disease Control and Prevention (CDC) end the Title 42 border expulsions order that has systematically endangered thousands of people who seek asylum in the United States.”).

<sup>44</sup> See Human Rights First, *A Shameful Record: Biden Administration’s Use of Trump Policies Endangers People Seeking Asylum* (Jan. 13, 2022), available at <https://www.humanrightsfirst.org/resource/shameful-record-biden-administration-s-use-trump-policies-endangers-people-seeking-asylum>.

Family separation caused by immigration enforcement actions are not unique to the southern border. Every day, families are separated by an enforcement action undertaken by Immigration and Customs Enforcement (ICE) against a parent or caregiver in the United States. The numbers are staggering. During the first half of 2020 (the most recent publicly available data), ICE removed 9,172 people with at least one U.S.-born child;<sup>45</sup> in 2019 the number was 27,980.<sup>46</sup>

Interior enforcement actions undertaken by ICE routinely separate children from their parents for months, years, or forever. As of December 2021, the average length of time a person detained by ICE remained in custody was 52.3 days.<sup>47</sup> In some cases, the disruption to family unity caused by detention is temporary if the parent is successfully released from detention and wins protection from removal. In other cases, where a parent is deported, the separation is far too frequently permanent. Some individuals are permanently barred from return by law; in other cases legal mechanisms may exist to seek to return to the U.S. subsequent to a removal, but the procedural, bureaucratic, and practical hurdles are often insurmountable especially without costly legal representation.

When a detention or deportation tears a parent from their child or children, the impact is devastating and the consequences lifelong. Families who lose a breadwinner to detention or deportation often fall into poverty. A recent analysis by the Marshall Project and the Center for Migration Studies found that household incomes drop by nearly half after a deportation; this same analysis found that about 908,891 households with at least one American child would fall into federally defined poverty if their undocumented breadwinners were removed.<sup>48</sup> Previous studies have repeatedly proven deportations to cause economic hardship for family members left behind, including housing instability and food insecurity.<sup>49</sup> These hardships in turn have their own consequences, as remaining family members must work longer hours or take multiple jobs to make up for lost income, destabilizing family units where a sibling may need to step up into a parental role or children may be more frequently left without a caregiver present.

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<sup>45</sup> See DHS U.S. Immigration and Customs Enforcement (ICE), *Deportation of Parents of U.S.-born Children, First Half, Calendar Year 2020* (April 2021), available at [https://www.dhs.gov/sites/default/files/publications/ice\\_-\\_deportation\\_of\\_parents\\_of\\_u.s.-born\\_children\\_first\\_half\\_cy\\_2020.pdf](https://www.dhs.gov/sites/default/files/publications/ice_-_deportation_of_parents_of_u.s.-born_children_first_half_cy_2020.pdf).

<sup>46</sup> See ICE, *Deportation of Parents of U.S.-born Children, First Half, Calendar Year 2019* (April 2020), [https://www.dhs.gov/sites/default/files/publications/ice\\_-\\_deportation\\_of\\_parents\\_of\\_u.s.-born\\_children\\_first\\_half\\_cy\\_2019.pdf](https://www.dhs.gov/sites/default/files/publications/ice_-_deportation_of_parents_of_u.s.-born_children_first_half_cy_2019.pdf); Department of Homeland Security U.S. Immigration and Customs Enforcement, *Deportation of Parents of U.S.-born Children, Second Half, Calendar Year 2019* (July 2020), available at [https://www.dhs.gov/sites/default/files/publications/ice\\_-\\_deportation\\_of\\_parents\\_of\\_u.s.-born\\_children\\_second\\_half\\_cy\\_2019.pdf](https://www.dhs.gov/sites/default/files/publications/ice_-_deportation_of_parents_of_u.s.-born_children_second_half_cy_2019.pdf).

<sup>47</sup> ICE detention data is available at <https://www.ice.gov/detain/detention-management> (last accessed Dec. 20, 2021).

<sup>48</sup> See Julia Preston, *The True Costs of Deportation*, The Marshall Project (June 18, 2020), available at <https://www.themarshallproject.org/2020/06/22/the-true-costs-of-deportation>.

<sup>49</sup> See Regina Day Langhout, et al., Society for Community Research and Action, Div. 27 of the American Psychological Association, *American Journal of Community Psychology*, *Statement on the Effects of Deportation and Forced Separation on Immigrants, their Families, and Communities*, Volume 62 Issue 1-2 (July 31, 2018), available at <https://onlinelibrary.wiley.com/doi/10.1002/ajcp.12256>.

But the financial hardship is only part of the story. Children suffering the loss of a parent to deportation demonstrate significant emotional and behavioral distress, including eating and sleeping changes, anxiety, sadness, anger, and withdrawal.<sup>50</sup> A 2020 study of Latino or Latina adolescents aged 11 to 16 found that the detention or deportation of a family member in the preceding 12 months led to “significantly higher” odds of suicidal ideation, alcohol use, and other externalizing symptoms.<sup>51</sup> It is unknown in exactly how many cases detentions and deportations remove a child’s *only* parent or caregiver from the home, leaving the child to be cared for by a less close relative or placed in the foster care system. The most recent study to estimate this impact, in 2011, determined there were at least 5,100 children in foster care at that time because of a parent’s detention or deportation.<sup>52</sup>

Despite these proven harmful outcomes, the fact that a detention or deportation will separate a child from their parent has no meaningful significance in the legal determination as to whether the detention or deportation proceeds. There are policies currently in place that recommend immigration enforcement officers include family unity and parental interests in discretionary determinations, but these policies do not in any circumstance compel the prioritization of family unity over the enforcement action. The recently issued “Guidelines for the Enforcement of Civil Immigration Law,” which provides guidance for the exercise of immigration civil enforcement actions across the Department of Homeland Security (DHS) includes “the impact of removal on family in the United States, such as loss of provider or caregiver” as one of a list of nine “mitigating factors” that may “militate in favor of declining enforcement actions.”<sup>53</sup> NIJC and members of the We are Home campaign had called, instead, for the Biden administration to implement a forbearance policy for broad categories of individuals in need of protection, including people who care for minor children or elderly parents.<sup>54</sup>

Additionally, a 2017 ICE Policy Directive entitled “Detention and Removal of Alien Parents or Legal Guardians” generally requires immigration officers to “remain cognizant of the impact enforcement actions” may have on the children of those facing the action. In the event of such an enforcement action, the Directive: requires ICE personnel to “make alternative care

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<sup>50</sup> *Id.*

<sup>51</sup> See Kathleen M. Roche, Rebecca M.B. White, Sharon F. Lambert, JAMA Pediatrics, *Association of Family Member Detention or Deportation With Latino or Latina Adolescents’ Later Risks of Suicidal Ideation, Alcohol Use, and Externalizing Problems* (Mar. 16, 2020), available at <https://jamanetwork.com/journals/jamapediatrics/fullarticle/2762642>.

<sup>52</sup> See Applied Research Center (now Race Forward: the Center for Racial Justice Innovation), *Shattered Families: The Perilous Intersection of Immigration Enforcement and the Child Welfare System* (2011), available at <https://www.raceforward.org/research/reports/shattered-families>.

<sup>53</sup> See Memorandum to Tae D. Johnson from Alejandro N. Mayorkas, *Guidelines for the Enforcement of Civil Immigration Law* (Sept. 30, 2021), available at <https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf>.

<sup>54</sup> See We are Home, *We are Home Urges DHS to Adopt New Framework for Immigration Processing* (Mar. 2021), <https://www.wearehome.us/news/we-are-home-urges-dhs-to-adopt-new-framework-for-immigration-processing>.

arrangements” for their minor child(ren), restricts ICE’s ability to transfer the parent outside of the ICE region where they were apprehended, and “where practicable” requires ICE to arrange for the parent or legal guardian to be able to participate in family court or child welfare proceedings during the course of their detention.<sup>55</sup> This memo superseded a 2013 directive that recommended ICE at least consider exercising its discretion to refrain from undertaking an enforcement action against the primary caretaker of a minor.<sup>56</sup>

Neither memo provides meaningful protection for the parental interests of immigrants facing enforcement actions, largely because in many cases a parent’s parental rights simply cannot be assured unless they can physically be present to care for and assume custody of their child – an impossibility in the case of prolonged detention and/or deportation.<sup>57</sup>

DHS’s failure to meaningfully consider family unity in its interior enforcement policies may seem abstract when viewed through numbers or studies, but for the families separated by detention or left stranded across oceans by deportation the pain is very real.

*ICE deported Esperanza Pacheco in 2017, separating her from her four daughters who were born and raised in Ohio. She had lived in the United States for more than twenty years, with one misdemeanor conviction from 15 years prior to her deportation. Esperanza’s story was recently profiled by Julia Preston for the Marshall Project, with her husband and children recounting the aftermath of her deportation. Subject to taunts at school, Esperanza’s daughters felt isolated and began acting out. Her 17 and 15 year old daughters both attempted suicide. Without Esperanza’s income and crippled by the girls’ medical bills, the family fell deeper into poverty.<sup>58</sup> Esperanza’s husband Eusebio told the Marshall Project, “I thought I was OK to handle my daughters. But now I find out they need mom over here. She’s the one that makes us a family together.”*

*Cristina, an NIJC client, is a survivor of multiple forms of trafficking and a beloved spouse and step-mother. After fleeing forced marriage and sexual abuse in her home country, Cristina was forced to work for an organized criminal organization in the United States, resulting in a criminal conviction that was the result of coercion due to her trafficking victimization. Cristina served her full criminal sentence, but instead of being released to her family was transferred to*

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<sup>55</sup> See ICE, Policy Number 11064.2: Detention and Removal of Alien Parents or Legal Guardians (Aug. 29, 2017), available at <https://www.ice.gov/doclib/detention-reform/pdf/directiveDetainedParents.pdf>.

<sup>56</sup> See ICE, Policy Number 11064.1: Facilitating Parental Interests in the Course of Civil Immigration Enforcement Activities (Aug. 23, 2013), available at <https://www.immigrantdefenseproject.org/wp-content/uploads/2013-ICE-Parental-Interests-Directive.pdf>.

<sup>57</sup> See Applied Research Center (now Race Forward: the Center for Racial Justice Innovation), Shattered Families: The Perilous Intersection of Immigration Enforcement and the Child Welfare System, 2011, <https://www.raceforward.org/research/reports/shattered-families> (“ARC’s research clearly indicates that once children of noncitizens are removed from the custody of their parents, their families are subjected to particular and deep systemic barriers to reunification”).

<sup>58</sup> Julia Preston, The Marshall Project, The True Costs of Deportation, June 18, 2020, <https://www.themarshallproject.org/2020/06/22/the-true-costs-of-deportation>.

*ICE custody in a county jail where she remained detained for approximately ten months. ICE's decision to detain Cristina during her removal proceedings separated her from her husband, who was hospitalized repeatedly during her detention for significant mental health concerns, and her step-children, who desperately needed her support.*

## **Recommendations**

The administration, through the Family Reunification Task Force and/or other multi-agency efforts, must take steps to end the systemic family separations that result from civil immigration enforcement actions.

Urgent recommended actions include:

- Implementation of a forbearance policy to protect parents and caregivers of minor children from immigration enforcement actions including detention and deportation,<sup>59</sup> and
- Development and implementation of a centralized process to establish a meaningful chance to come home for those who have been forced to leave behind their families and loved ones because of unjust U.S. immigration laws and policies.<sup>60</sup>

## **Conclusion**

Averting future separation of families requires dismantling the many vehicles that DHS uses to tear families apart. We have highlighted the policies described above because we believe it is incumbent on the Task Force not only to redress the harms committed under the Zero-Tolerance Policy, but to review, end and repair the damage to families and communities incurred daily through other vehicles such as migrant prosecutions, MPP, Title 42, and routine interior enforcement and detention policies that result in family separations.

Thank you for your consideration and please do not hesitate to contact Jesse Franzblau for further information at [jfranzblau@heartlandalliance.org](mailto:jfranzblau@heartlandalliance.org).

/s/

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<sup>59</sup> For a more detailed discussion of this recommendation, see We are Home, *We are Home Urges DHS to Adopt New Framework for Immigration Processing* (March 2021), available at <https://www.wearehome.us/news/we-are-home-urges-dhs-to-adopt-new-framework-for-immigration-processing>.

<sup>60</sup> For a detailed white paper outlining this proposal, see Nayna Gupta, *A Chance to Come Home: A Roadmap to Bring Home the Unjustly Deported*, NIJC (April 2021), available at <https://immigrantjustice.org/sites/default/files/uploaded-files/no-content-type/2021-04/Chance-to-Come-Home-White-Paper-NIJC-April2021.pdf>.

/s/

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/s/

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On behalf of the National Immigrant Center