



TESTIMONY OF:

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BROOKLYN DEFENDER SERVICES

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Oversight Hearing on the Impacts of the Trump Administration Family Separation

Policy on New York City

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I. Introduction

My name is Nyasa Hickey. I am a Supervising Attorney of the Immigration Practice at Brooklyn Defender Services (BDS). I thank the City Council for this opportunity to testify about the work that legal service providers across New York City, including Brooklyn Defender Services, are doing to assist families harmed by the Trump Administration's Family Separation Policy. I will also speak about the ramifications of the policy on New York City residents with pending immigration cases.

BDS is a full-service public defender office in Brooklyn, representing nearly 35,000 low-income New Yorkers each year who are arrested, charged with abuse or neglect of their children or face deportation. Since 2009, BDS has counseled, advised or represented more than 10,000 immigrant clients. We are a Board of Immigration Appeals-recognized legal service provider.

Our immigration practice consists of more than 40 staff that work in three distinct teams that handle different aspects of immigration law:

- **The BDS Padilla Team** advises BDS's criminal defense and family defense attorneys and their noncitizen clients on the immigration consequences of a guilty plea to help avoid or minimize negative immigration consequences.

About a quarter of BDS's 30,000 criminal defense clients are foreign-born, roughly half of whom are not naturalized citizens and therefore at risk of deportation or loss of opportunity to obtain lawful immigration status as a result of their criminal case. Our criminal-immigration specialists provide support and expertise on thousands of cases, including Padilla advisals, advocacy regarding enforcement of the NYC detainer law, as well as with ICE officials to secure the release of our clients while charges are pending against them.

- The **New York Immigrant Family Unity Project (NYIFUP)** is the New York City Council-funded first-in-the-nation program providing counsel to immigrant New Yorkers who are detained and facing deportation and separation from their families and communities. BDS is proud to be a NYIFUP provider, along with The Bronx Defenders and The Legal Aid Society. Since the project's inception three years ago, BDS NYIFUP attorneys have defended more than 1,000 people in deportation proceedings. Jointly the NYC NYIFUP providers have won release from ICE custody for over 900 clients and won the cases of over 500 clients, with hundreds of cases still pending. The Vera Institute of Justice's comprehensive November 2017 study found that 48% of NYIFUP cases end successfully – a 1,100% increase from the rate for unrepresented cases before NYIFUP.
- **BDS' Immigrant Youth and Communities Team** has represented thousands of Brooklyn immigrants in their applications for lawful immigration status and in non-detained removal proceedings, including motions to reopen. Highlights of our work include representing young clients in their pursuit of Special Immigrant Juvenile Status (SIJS) or Deferred Action for Childhood Arrivals (DACA) and working with Haitian and Central American New Yorkers to file or renew applications for Temporary Protected Status (TPS). We regularly provide Know Your Rights trainings for the community, including information on encounters with ICE and family preparedness planning. We also produced four short animated films as part of a national empowerment campaign called *We Have Rights* that informs community members how to prepare for and safely defend their rights during encounters with ICE.¹

II. Background

On May 5, 2018 U.S. Attorney General Jeff Sessions instituted an official zero tolerance policy for people who enter or attempt to enter the U.S. without prior authorization. The federal government's new policy was to prosecute people crossing the U.S.-Mexico border with illegal entry and separate the adults from any children traveling with them.²

¹ Learn more about the campaign at www.wehaverights.us.

² Aric Jenkins, *Jeff Sessions: Parents and Children Illegally Crossing the Border Will Be Separated*, TIME, May 7, 2018, available at <http://time.com/5268572/jeff-sessions-illegal-border-separated/>.

In fact, the policy was the continuation of a 2017 pilot program separating migrant families. NBC News reported last month that 1,786 children were separated from their parents between October 2016 and February 2018, with an additional 2,342 children separated from their parents after the zero tolerance policy went into effect.³ In June, in response to massive and unified public pressure to rescind the policy, the President issued an Executive Order rescinding his prior policy of separation, instead ordering the Secretary of Homeland Security to “maintain custody of alien families during the pendency of any criminal improper entry or immigration proceedings involving their members.”⁴ In short, the Administration would continue to pursue a zero tolerance approach, but would detain families and children in camps together, not separately.

A week later, a federal judge in California ordered U.S. immigration authorities to reunite separated families on the border within 30 days and families with children younger than age five within 14 days.⁵ The administration failed to make the first deadline and seems unlikely to make the second. The administration stated last week that they have a list of nearly 3,000 children who might have been separated but they are still trying to figure out exactly which ones had parents taken away.⁶ In the wake of the court order to reunite separated families, the Trump administration stated that they plan to release the majority of families on ankle bracelet monitoring rather than detain the migrant children and parents together.⁷

We are already feeling the effects of the Administration’s policy change here in New York City. Just yesterday, BDS helped reunify a family at the request of a partner legal services provider in Texas. This simple matter of bringing a mother together with her children, who had been housed in a NYC facility, took a full two days because of utter incompetence and lack of concern by immigration authorities for these families.⁸ BDS is committed to helping other families, including by sending qualified immigration attorneys

³ Lisa Riordan Seville & Hannah Rappleye, *Trump admin ran ‘pilot program’ for separating migrant families in 2017*, NBC News, June 29, 2018, available at <https://www.nbcnews.com/storyline/immigration-border-crisis/trump-admin-ran-pilot-program-separating-migrant-families-2017-n887616>.

⁴ *Executive Order: Affording Congress an Opportunity to Address Family Separation*, June 20, 2018, available at <https://www.whitehouse.gov/presidential-actions/affording-congress-opportunity-address-family-separation/>.

⁵ See American Civil Liberties Union, *Ms. L v. ICE*, available at <https://www.aclu.org/news/court-rules-trump-administration-must-adhere-family-reunification-deadlines>.

⁶ Dara Lind, *The Trump administration just admitted it doesn’t know how many kids are still separated from their parents*, VOX, July 5, 2018, available at <https://www.vox.com/2018/7/5/17536984/children-separated-parents-border-how-many>.

⁷ Eliza Fawcett & Victoria Kim, *Trump appears to walk back ‘zero tolerance’ immigration policy as family reunification deadline looms*, L.A. TIMES, July 10, 2018, available at <http://www.latimes.com/local/lanow/la-me-deadline-separated-20180710-story.html>.

⁸ See Melanie Grayce West & Arian Campo-Flores, *A Day After Court Deadline, a Round of Family Reunifications at 26 Federal Plaza*, WALL ST. JOURNAL, July 11, 2018, available at https://www.wsj.com/articles/a-day-after-court-deadline-a-round-of-family-reunifications-at-26-federal-plaza-1531347140?tesla=y&mod=article_inline; Annie Correal, *‘Mi Amor!’: Tearful Scenes as Immigrant Reunions Begin in New York*, N.Y. TIMES, July 11, 2018, available at <https://www.nytimes.com/2018/07/11/nyregion/immigrant-children-reunited.html?rref=collection%2Fsectioncollection%2Fnyregion&action=click&contentCollection=nyregion®ion=rank&module=package&version=highlights&contentPlacement=2&pgtype=sectionfront>;

to supervise the interviews of detainees in Albany over the next couple of weeks and working with our pro bono partners to ensure everyone receives legal counsel.⁹

Our one experience so far speaks to the enormous challenges befalling the families that were separated and the authorities who have custody of these children. Now penniless and traumatized, this family is thrust into our country even more unprepared than they were when they crossed the border to adjust to life in the United States. One very positive aspect of the reunification we worked on was the fact that there was a safe house, provided by a local volunteer, with food and showers so these families could get themselves ready to travel to their next destination in California to live with relatives.

Other service providers will likely speak to the challenges of representing hundreds of children¹⁰ and adults¹¹ who have been transferred to detention facilities in and around the New York City area. I would like to take to this opportunity to focus my testimony today on two other issues: potential sponsors for the unaccompanied children and the elimination of in-person court appearances at Varick Street Courthouse.

III. Sponsor Advisals

The federal Office of Refugee Resettlement (ORR) has custody of children who are not accompanied by a parent or legal guardian or, more recently, who have been forcibly separated from their parent or guardian. Federal law requires that ORR feed, shelter and provide medical care for migrant children until the office is able to release them to safe settings with sponsors (usually family members).¹²

According to ORR, in order for a family member or other person to be approved as a sponsor, they must pass a background check, possibly undergo a home visit and, among other responsibilities, consent to ensure the child's presence at future immigration hearings.¹³ Previously, ORR had protections in place for sponsors to ensure that their background check information was not shared with ICE. The Trump Administration, however, is rolling back many of these policies.

A May 2018 Memorandum of Agreement (MOA) between ICE, ORR and Customs and Border Protection (CBP) clarified that going forward, "ICE will run background checks

⁹ Massarah Mikati, *Uphill battle for volunteer attorneys for ICE detainees at Albany County jail*, ALBANY TIMES-UNION, July 9, 2018, available at <https://www.timesunion.com/local/article/Some-ICE-detainees-at-Albany-jail-separated-from-13060830.php>.

¹⁰ Jesse McKinley, Liz Robbins & Annie Correal, *16 and Alone, Inside a Center for Separated Children in New York*, N.Y. TIMES, June 21, 2018, available at <https://www.nytimes.com/2018/06/21/nyregion/cuomo-separated-families-children.html>.

¹¹ Mikati, *Uphill battle for volunteer attorneys for ICE detainees at Albany County jail*

¹² Office of Refugee Resettlement, *Unaccompanied Alien Children Released to Sponsors by State*, June 30, 2017, available at <https://www.acf.hhs.gov/orr/resource/unaccompanied-alien-children-released-to-sponsors-by-state>.

¹³ *Id.*

(criminal and immigration) and then provide that information to ORR for their determination of the suitability of the sponsor.”¹⁴ As the U.S. Conference of Catholic Bishops notes, “The MOA stipulates that ORR will also provide ICE with the name, date of birth, address, fingerprints, and any available documents or biographic information about not only the sponsor but also all adult members of the potential sponsor’s household.”¹⁵ This policy change on information sharing went into effect concurrently with other decisions by the federal government making clear that they intend to use any and all available information to increase deportations.¹⁶

Consequently, if a potential sponsor or someone in their household is themselves undocumented or potentially at risk for deportation, undergoing the background check may pose specific risks.¹⁷ Further complicating this matter is the fact that many low-income people in New York City live with many individuals in a single apartment because of the lack of affordable housing. When any person in the home refuses to undergo the background check, for good reason, the sponsor must choose between leaving the home, at great personal expense, or leaving their minor family member in federal detention.

To address some of these concerns and limit harm to potential sponsors, the City has taken the bold step of contracting with providers like Brooklyn Defender Services to advise sponsors of the specific immigration risks of undergoing the background check and to help them identify alternative sponsors in their community, if necessary to protect the sponsor and their family from deportation by ICE.

With additional funding from the City through the Immigrant Opportunities Initiative (IOI), we will also be able to offer sponsors or their family members comprehensive immigration representation to help them to minimize the risk of deportation. This new initiative will allow the City to reach out directly to communities and individuals who

¹⁴ U.S. Conference for Catholic Bishops, Justice For Immigrants, ORR and DHS Information-Sharing Agreement: The Unintended Consequences, 2018, available at <https://justiceforimmigrants.org/what-we-are-working-on/unaccompanied-children/orr-and-dhs-information-sharing-agreement-the-unintended-consequences/>.

¹⁵ *Id.*

¹⁶ See, e.g., U.S. Citizenship and Immigration Services, Policy Memorandum: Updated Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens, June 28, 2018, available at <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-28-PM-602-0050.1-Guidance-for-Referral-of-Cases-and-Issuance-of-NTA.pdf>.

¹⁷ One specific concern, for example, is that federal authorities have issued memoranda prioritizing immigration enforcement and prosecution of “alien smugglers,” a term that they have interpreted to target parents or sponsors who may have relied on smugglers to help bring their children to the U.S. See John Burnett, *ICE Has Arrested More Than 400 In Operation Targeting Parents Who Pay Smugglers*, NPR: ALL THINGS CONSIDERED, Aug. 18, 2017, available at <https://www.npr.org/2017/08/18/544523231/arrests-of-undocumented-parents-sparks-debate-between-federal-officials-and-immi>; Camila Domonoske & Joel Rose, *What’s New In Those DHS Memos on Immigration Enforcement?*, NPR, Feb. 22, 2017, available at <https://www.npr.org/sections/thetwo-way/2017/02/22/516649344/whats-new-in-those-dhs-memos-on-immigration-enforcement>.

otherwise may not know how to access free city-funded legal services and expand the scope of New York City's already robust provision of immigration services.

We are also in the process of fundraising to help alleviate costs imposed on sponsors by the federal government. The *New York Times* recently reported on the high costs of transportation that ORR is imposing on sponsors in order to have the children transferred to their care. For example, one sponsor in the article was told that he would have to pay \$1,800 to fly his cousin's 14-year-old daughter and an escort from Houston to his home in Los Angeles.¹⁸ Such prohibitive costs imposed on families who are desperately trying to survive the harmful policies and practices already inflicted on immigrant communities by the federal government are simply unjust and wrong. We call on the City Council and the Mayor to determine how best to alleviate some of the financial burdens on sponsors or families who are eventually reunited after this devastating and traumatic experience.

Our hope is that every child currently detained in the New York City area will be settled with his or her family or with a family friend before the end of the summer and in time for the new school year. We look forward to working with our community partners, city agencies and the City Council to make this goal a reality.

IV. Clients Denied In-Person Hearings at Varick Street

BDS' NYIFUP team represents detained immigrants facing deportation, thanks to the support of the City Council and the City. Purportedly in reaction to #OccupyICE demonstrations at the Varick Street Courthouse protesting the federal government's family separation policy, ICE instituted a new policy refusing to bring any detained individuals to immigration court for their hearings.¹⁹ Even though the protest began and ended within one business day, the exclusive use of Video Teleconferencing (VTC) hearings continues without any plan to go back to in-person hearings for detainees.²⁰

The new policy is already harming BDS's NYIFUP clients, especially new clients awaiting their first court date. Prior to this policy, NYIFUP attorneys met with detained clients scheduled for intake at the Varick Street Courthouse three times per week. For the past four years BDS, The Legal Aid Society and The Bronx Defenders have been staffing intake shifts and representing all of the detained immigrants who cannot afford or do not already have an attorney. It is important to note that due to the extreme increase in pre-adjudication detention, people who are detained wait for up to three

¹⁸ Miriam Jordan, *Sponsors of migrant children face steep transport fees and red tape*, N.Y. TIMES, July 1, 2018, available at <https://www.nytimes.com/2018/07/01/us/migrant-children-families.html>.

¹⁹ Emma Whitford, *ICE Limits Access to Lawyers for NYC Immigrants in Detention, Citing Protests*, THE APPEAL, June 27, 2018, available at <https://theappeal.org/ice-limits-access-to-lawyers-for-nyc-immigrants-in-detention-citing-protests/>.

²⁰ Gerald Porter, Jr., *Manhattan's Immigration Court Begins Video Only Hearings*, WALL ST. JOURNAL, June 29, 2018, available at <https://www.wsj.com/articles/manhattans-immigration-court-begins-video-only-hearings-1530274855?mod=searchresults&page=1&pos=1>.

months for their first court date and their chance to meet with a NYIFUP attorney. Intake is a chance for our NYIFUP attorneys to familiarize themselves with complex cases and begin exploring potential relief options, such as filing a green card application or a motion for cancellation of removal. NYIFUP has a small area with interview rooms on the building's 11th floor, where attorneys are able to individually interview and screen each new client in person.²¹ Now that ICE is no longer bringing our clients to the court building, this opportunity is lost. Our ability to ascertain the facts that we need to build a strong case for relief from deportation is greatly inhibited already and continues to affect more and more of our clients. Now, we must do the first court appearance without any client interview and adjourn the case for another date, usually a few weeks in the future. Our clients are detained now for four to five months before they get a meaningful opportunity for even a bond hearing. Through this period, people remain in detention facilities that lack proper health care, separated from family members, often children, with very limited visitation.

VTC also makes it more difficult for our non-English speaking clients to understand and participate in their court proceedings. As affirmed by the American Bar Association, the exclusive use of video appearances makes it difficult for people facing deportation to understand interpreters and often discourages people from asking questions.²² The use of VTC rather than in-person appearance prevents an interpreter from translating the proceedings in real time (simultaneously), but must wait to interpret. This ensures that the person facing the accusations does not really know what is happening in the courtroom—they are left to receive a summary of the proceedings after they are over. In our experience, the interpreters in this type of situation are not able to provide a meaningful understanding of what happened. More importantly, our client is not able to catch an inaccuracy or otherwise address ongoing discussions with his or her attorney or with the court.

Our clients are effectively excluded from their removal hearing when they are not in the courtroom. They cannot lean over and ask their attorney a question, they cannot pass their attorney a note while a witness is testifying, and their emotions and essential human dignity are obscured to the court. As the American Bar Association noted, "VTC also makes it harder for parties, attorneys, and the immigration judge to communicate and connect emotionally, which compounds difficulties faced by vulnerable individuals such as juveniles and individuals diagnosed with severe mental illnesses."²³

The shift to teleconferencing also harms families who are desperate to see each other after months of separation. Family members frequently attend court dates because it may be their only chance to see their loved ones and maintain critical family bonds

²¹ Whitford, *ICE Limits Access*.

²² American Bar Association, *ABA Concerned About Videoconferencing in Immigration Courts; Urges Allowing Requests for In-Person Hearings*, March 2012, available at https://www.americanbar.org/publications/governmental_affairs_periodicals/washingtonletter/2012/march/immigrationcourts.html.

²³ *Id.*

despite their separation. When families, friends and neighbors attend hearings this also shows the judge and the prosecuting attorney that the person facing deportation has deep community ties, strengthening the argument for release on bond or relief from deportation.

In short, ICE has taken advantage of public protest to advance its cruel agenda—creating an inhuman deportation machine. We hope to work with the City Council to actively oppose this policy change and to join with us to ensure that in-person appearances are restored immediately.

V. **Resolution 2018-2418**

Resolution 2018-2418 calls on the federal government to pass the federal Keep Families Together Act (S. 3036) to immediately stop the Department of Homeland Security from taking children from their parents at the U.S. border, except with express directive from a child welfare expert. While we strongly support the sentiment behind this legislation – keeping immigrant families together – we have concerns about the child welfare language in the bill.

In addition to defending people in criminal and immigration court, Brooklyn Defender Services represents about 3,000 parents accused of neglect and abuse in family court – a system that many are calling the New Jane Crow for its sharp racial disparities. *In supporting this bill, we ask that the Council articulate in the resolution that the bill language must clearly state that any removal of a child from his or her parent at or near the border must be subject to state laws governing removal.*

As currently written, the statute could be interpreted to allow state family court judges to authorize separation of migrant families under unconstitutional standards for removal. S.3036 states that federal officers cannot remove a child from his or her parent or legal guardian, at or near the port of entry or within 100 miles of the border of the United States, unless “a state court...determines that it is in the best interests of the child to be removed from his or her parent or legal guardian, in accordance with the Adoption and Safe Families Act of 1997.” This particular language is problematic because the “best interests” standard is not a legal basis for removing a child from their parent under state or constitutional law. It also does not make sense that the bill references the Adoption and Safe Families Act of 1997, as this legislation does not define the standard for removal; it governs what happens to a child once they are removed from their families and placed in foster care. Our fear with the bill as currently written is that state court judges, if they interpret the law in this manner, may summarily remove children from their parents simply because the parents are detained, as detention would not be in the child’s best interests, and parents would be left with no recourse to meaningfully challenge this decision or to ensure regular visitation. In short, the bill could be used by the current federal administration, in coordination with willing state family court judges, to legalize the continued separation of migrant families at the border.

However, if the bill language were clarified to ensure that separation may not occur in any case unless removal would be authorized under state law, these concerns would be ameliorated. The custody of children is an issue squarely within the discretion of the state, subject to constitutional limitations. This is why state law should govern these separation proceedings. Pursuant to the same laws governing removal, parents would be afforded robust due process protections, including the right to an experienced family defense attorney and the right to regular visitation. These due process protections are critical to ensure that parents have a fighting chance to assert their constitutional and statutory rights to remain with their children and children equally get to be with their parents absent abuse or neglect.

The harm to children removed from their parents, in any context, is severe and irreparable. Many experts have weighed in on the harm to children separated from their parents at the border over the past few months, including the American Academy of Pediatrics and the American Psychological Association. Harmful effects range from future depression, anxiety and post-traumatic stress disorder (PTSD) to violent tendencies, substance abuse and difficulty forming relationships down the line.²⁴ As we know from the foster care system, removing children from their parents, even in cases involving abuse or neglect, generally leads to worse outcomes for children across the board. As the VERA Institute of Justice noted, “research shows that entry into foster care raises the risk of long-term adverse effects on children compared to socioeconomically similar children who are not removed, including poor school performance, homelessness, arrest, chemical dependency, and mental and physical illness.”²⁵ Child-protection-involved children tend to leave foster care with more problems than when they entered care. Children exiting foster care have significantly more behavioral problems when compared with their own pre-placement measures of adaptation. Former foster children experience additional negative life outcomes, including higher teen birth rates and lower career earnings.²⁶ Former foster children are also disproportionately likely to experience homelessness compared to the general population.²⁷

Brooklyn Defender Services strongly supports federal legislation that meaningfully ensures that families fleeing violence and hardship in other countries are allowed to remain together, in the community, while they litigate their right to live, work, and

²⁴ See, e.g., Jamie Ducharme, ‘What This Amounts to Is Child Abuse.’ *Psychologists Warn Against Separating Kids from Their Parents*, TIME, June 19, 2018, available at <http://time.com/5316030/kids-separation-parents-psychological-harm/>.

²⁵ Reva I. Allen, Alex Westerfelt, Irving Piliavin, & Thomas Porky McDonald, ASSESSING THE LONG TERM EFFECTS OF FOSTER CARE: A RESEARCH SYNTHESIS (Child Welfare League of America, 1997), cited in Allon Yaroni, Ryan Shanahan, Randi Rosenblum, & Timothy Ross, *Innovations in NC Health and Human Services Policy: Child Welfare Policy*, VERA INSTITUTE OF JUSTICE POLICY BRIEFS, Jan. 2014, available at <http://www.nyc.gov/html/ceo/downloads/pdf/policybriefs/child-welfare-brief.pdf>.

²⁶ Joseph J. Doyle, *Child Protection and Child Outcomes: Measuring the Effects of Foster Care*, 97 AM. ECON. REV. 1583, 1584 (2007) [hereinafter “Doyle 2007”].

²⁷ See Patrick J. Fowler et al., *Pathways to and From Homelessness and Associated Psychosocial Outcomes Among Adolescents Leaving the Foster Care System*, 99 AM. J. OF PUB. HEALTH 1453 (2009).

support their families in the US. New York ensures families due process protections in cases of possible removal. Any federal law that aims to keep migrant families together must be subject to existing state court procedures that protect families. The Council should call on Congress to make these amendments to limit any unintended consequences.

VI. Conclusion

The Council plays a critical role in safeguarding the vibrancy and safety of New York City's immigrant community. This Council has been a national leader in the creation of a first-in-the-nation assigned counsel, the NYIFUP program. Your investment in NYIFUP, IOI and other initiatives has provided service providers like BDS with the support and agility to respond to crises like this. We look forward to continuing to work with the Council to protect the rights and well-being of our communities and help all New Yorkers thrive.

Thank you for inviting me to testify and for considering my remarks today. Please reach out to Andrea Nieves, Senior Policy Attorney at anieves@bds.org or 718-254-0700 ext. 387 if you have any additional questions.