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## The Flores Settlement: Ripping Families Apart Under the Law

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## NOTE

# THE *FLORES* SETTLEMENT: RIPPING FAMILIES APART UNDER THE LAW

NATALIE LAKOSIL\*

### INTRODUCTION

The following quote is from an unknown former detainee at the Artesia Family Detention Center:

When we arrived at the U.S. border, I felt relieved because I thought we were finally safe. But immigration officials took my daughter and me to a place out in the middle of nothing in Artesia, New Mexico, where we were housed in trailers surrounded by barbed wire fences and cut off from the rest of the world. I only wanted to keep my daughter safe, that's why I came to the United States. But I couldn't keep her safe, not when we were locked away for months on end in a place that is bad for children. I understand that immigration officials need to have a system for keeping track of asylum seekers like my daughter and me while we wait for our legal hearings, but I don't think putting us in jail is the right way to do it. Why are we punishing children who have done nothing wrong? The only thing we have done is seek a safer, happier place for our children. Wouldn't any mother do that for her children?<sup>1</sup>

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<sup>1</sup> Andrea L. Alford, *Bait-and-Switch: As One Family Detention Center Closes, Another Opens*, ACLU WASH. LEGIS. OFF. (Dec. 23, 2014, 1:00 PM), <https://www.aclu.org/blog/speakeasy/bait-and-switch-one-family-detention-center-closes-another-opens>.

The United States hosts the biggest immigration detention infrastructure in the world, detaining roughly 380,000 to 442,000 persons each year.<sup>2</sup> In the 2013 fiscal year, the federal government detained more than 400,000 people in approximately 200 immigration jails.<sup>3</sup> Prior to the 1980s, approximately 30 individuals were in immigration detention each day.<sup>4</sup> Currently, the detention population has increased to roughly 34,000 people each day.<sup>5</sup> On average, it costs taxpayers \$90.43 per day to detain an individual in a private immigration detention facility, compared to the average of \$72.69 for individuals in a municipal jail.<sup>6</sup>

In 2014, in response to the “surge” of 60,000 unaccompanied children and 26,000 families reaching the U.S. border, the federal government expanded its family detention centers.<sup>7</sup> Many of the families that are exposed to family detention are from the “Northern Triangle” countries of Guatemala, Honduras, and El Salvador.<sup>8</sup> The “Northern Triangle” is currently undergoing a well-documented human rights crisis.<sup>9</sup> Almost 90% of individuals in family detention centers that are from the region pass their “credible or reasonable fear interviews” while seeking asylum.<sup>10</sup>

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<sup>2</sup> *Immigration Detention Maps & Statistics*, CIVIC, <http://www.endisolation.org/resources/immigration-detention/> (last visited Aug. 1, 2017).

<sup>3</sup> *Immigration Detention 101*, DET. WATCH NETWORK, <https://www.detentionwatchnetwork.org/issues/detention-101> (last visited Aug. 1, 2017).

<sup>4</sup> *Immigration Detention Maps & Statistics*, CIVIC, <http://www.endisolation.org/resources/immigration-detention/> (last visited Aug. 1, 2017).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Pamela Constable, *U.S. Holding Families in Custody to Keep Others From Crossing the Border*, THE WASH. POST (Mar. 5, 2016), [https://www.washingtonpost.com/local/social-issues/us-holding-families-in-custody-to-keep-others-from-crossing-the-border/2016/03/05/14fc9fb6-da6d-11e5-891a-4ed04f4213e8\\_story.html?utm\\_term=.522d04eaabfa](https://www.washingtonpost.com/local/social-issues/us-holding-families-in-custody-to-keep-others-from-crossing-the-border/2016/03/05/14fc9fb6-da6d-11e5-891a-4ed04f4213e8_story.html?utm_term=.522d04eaabfa).

<sup>8</sup> REP. OF THE DHS ADVISORY COMM. ON FAM. RESIDENTIAL CTRS. (Sept. 30, 2016), <https://www.ice.gov/sites/default/files/documents/Report/2016/ACFRC-sc-16093.pdf>.

<sup>9</sup> *Id.* In 2016/2017 the “Northern Triangle,” which is made up of the countries of “El Salvador, Guatemala and Honduras was one of the world’s most violent places, with more people killed there than in most conflict zones globally. El Salvador’s homicide rate of 108 per 100,000 inhabitants was one of the highest in the world. For many, daily life was overshadowed by criminal gangs.” *Americas 2016/2017*, AMNESTY INT’L, <https://www.amnesty.org/en/countries/americas/report-americas/> (last visited Oct. 30, 2017).

<sup>10</sup> REP. OF THE DHS ADVISORY COMM. ON FAM. RESIDENTIAL CTRS. (Sept. 30, 2016), <https://www.ice.gov/sites/default/files/documents/Report/2016/ACFRC-sc-16093.pdf>. Credible or reasonable fear interviews occur when an individual is seeking asylum in the United States. Asylum is granted based on if an individual has either “suffered persecution or fear that they will suffer persecution due to: race, religion, nationality, membership in a particular social group, [or] political opinion.” *Asylum*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/refugees-asylum/asylum> (last visited Oct. 30, 2017).

The quote from the detained mother above has become an all too familiar story.<sup>11</sup> This Note focuses on families' experiences in immigration detention centers, specifically how they are affected by the government practice of releasing children without simultaneously releasing their parents. In *Flores v. Lynch*,<sup>12</sup> a plaintiff class consisting of minors detained in the legal custody of the Department of Homeland Security ("DHS")<sup>13</sup> sued then acting Attorney General of the United States, Loretta Lynch and other U.S. government organizations.<sup>14</sup> The suit sought to enforce a 1997 consent decree between the parties.<sup>15</sup> The consent decree, ("the Settlement") implements standards that the government must abide by while minors are detained in custody.<sup>16</sup> Additionally, the Settlement dictates who can take custody of such minors upon their release from U.S. Immigration and Customs Enforcement ("ICE") detention.<sup>17</sup> The *Flores* plaintiff class sought to enforce the Settlement in family detention centers where members of the class were being detained.<sup>18</sup> The government argued that the Settlement only applies to unaccompanied minors and is not applicable to minors who are detained with their parents in family detention centers.<sup>19</sup>

In *Flores*, the United States Court of Appeals for the Ninth Circuit<sup>20</sup> held that the Settlement pertains to all minors detained in government custody.<sup>21</sup> Additionally, the court held that the Settlement does not grant right of release to parents in detention with their children.<sup>22</sup> Lastly, it held that the government could not alter the Settlement to reflect that it

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<sup>11</sup> See also Claudia Morales, *Families Crossing the Border: 'We Are Not Criminals,'* CNN (Nov. 2, 2016, 1:13 PM), <http://www.cnn.com/2016/11/02/us/family-immigration-detention-centers/index.html>.

<sup>12</sup> Hereinafter, *Flores* refers to *Flores v. Lynch*, 828 F.3d 898 (9th Cir. 2016).

<sup>13</sup> The minors in the original lawsuit were detained by the Immigration and Naturalization Service ("INS"). Congress enacted the Homeland Security Act in 2002, which abolished INS and shifted most of its immigration functions to DHS, which houses Immigration and Customs Enforcement ("ICE"). The Homeland Security Act delegated responsibility for the care and custody of unaccompanied minors to the Office of Refugee Resettlement in the Department of Health and Human Services. *Id.* at 904.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 902-05.

<sup>16</sup> *Id.* at 902 (The term "Settlement" in this Note refers to the *Flores* consent decree. The *Flores* Settlement is a 1987 stipulated consent decree between the U.S. government and a minor plaintiff class. The Settlement was eventually approved by the court in 1997 and is still in effect today).

<sup>17</sup> *Flores v. Lynch*, 828 F.3d 898, 904 (9th Cir. 2016).

<sup>18</sup> *Id.* at 898.

<sup>19</sup> *Id.*

<sup>20</sup> Hereinafter, "Ninth Circuit."

<sup>21</sup> *Flores*, 828 F.3d at 904.

<sup>22</sup> *Flores v. Lynch*, 828 F.3d 898 (9th Cir. 2016).

did not apply to accompanied minors.<sup>23</sup> The most significant portion of the ruling is the overturning of the district court's holding regarding parents' right of release with their children, which is the focus of this Note's argument.<sup>24</sup>

Section I provides the procedural and factual background of *Flores v. Lynch*, the recent history of family detention centers, and discusses the Ninth Circuit's ruling of the case. Section II provides the argument that, although the Ninth Circuit's holding is correct, the government refusing to release parents with their children is unconstitutional because it violates the parents' fundamental right to custody over their biological child and family unity. Furthermore, this Note urges Congress to codify law to ensure the constitutional rights afforded to detained families are recognized and parents are released with their children.

## I. BACKGROUND

This section describes how the Settlement was formed and how it arrived before the Ninth Circuit. The section begins with a detailed description of the facts that resulted in the formation of the Settlement. It continues with a background on the history of family detention centers in the United States as it relates to this case. Next, is a discussion of the underlying litigation that resulted in the Ninth Circuit hearing the case. Lastly, this section provides a brief discussion of what the Ninth Circuit held in *Flores*.

### A. HOW THE SETTLEMENT WAS FORMED

In 1984, the Immigration and Naturalization Service's ("INS") Western Region adopted a new release policy for deportable minors in government custody.<sup>25</sup> The INS policy allowed for detained minors to only be released to parents or lawful guardians.<sup>26</sup> Additionally, the policy allowed that in "unusual and extraordinary cases," certain agents could release a minor to a responsible individual who agreed to provide care and be accountable for the wellbeing and welfare of the child.<sup>27</sup> In 1985,

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<sup>23</sup> *Id.*

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

<sup>25</sup> *Flores by Galvez-Maldonado v. Meese*, 934 F.2d 991, 994 (9th Cir. June 20, 1990), *opinion vacated and superseded on rehearing Flores by Galvez-Maldonado v. Meese*, 942 F.2d 1352 (9th Cir. Aug. 9, 1991), *rev'd*, *Reno v. Flores*, 507 U.S. 292, 295-96 (1993). The original complaint raised seven claims. Two of the claims challenged the INS Western Region's release policy on constitutional, statutory, and international law grounds, and the final five claims challenged the conditions of the minors' detention. *Id.*

<sup>26</sup> *Flores by Galvez-Maldonado*, 934 F.2d at 994.

<sup>27</sup> *Id.*

four plaintiffs, including named plaintiff Jenny Flores, filed a class action in the United States District Court for the Central District of California against the U.S. government, alleging that the INS release policy was unconstitutional and challenging the conditions of juvenile detention.<sup>28</sup> The district court certified two separate classes composed of all persons under the age of 18 within the INS Western Region that had been, were, or would be detained by INS agents, and those who had been, were, or would be subjected to the conditions the plaintiff class was arguing against.<sup>29</sup>

The parties entered into a consent decree, the Settlement, on November 30, 1987.<sup>30</sup> The Settlement required that minors held in the custody of INS in the Western Region for more than 72 hours be housed in facilities meeting certain standards, including state standards for the housing and care of dependent children.<sup>31</sup> For example, the terms include standards requiring the government to provide adequate reading materials to detained juveniles and opportunities for exercise.<sup>32</sup>

The district court granted the plaintiff class partial summary judgment on their Equal Protection Clause (“EPC”) claim that the INS had violated the EPC by treating minors in deportation and exclusion proceedings differently.<sup>33</sup> In response to the court’s holding, the INS adopted a new rule allowing minors in deportation proceedings “to be

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<sup>28</sup> *Id.* This case ultimately stemmed from the unreasonable body searches of minors in INS custody and procedures or lack thereof, the government had in place. *Id.*

<sup>29</sup> *Flores v. Lynch*, 828 F.3d 898, 902 (9th Cir. 2016). The two classes were composed of:

- “1. All persons under the age of eighteen (18) years who have been, are, or will be arrested and detained pursuant to 8 U.S.C. § 1252 by the [INS] within the INS’ Western Region and who have been, are, or will be denied release from INS custody because a parent or legal guardian fails to personally appear to take custody of them.
2. All persons under the age of eighteen (18) years who have been, are, or will be arrested and detained pursuant to 8 U.S.C. § 1252 by the Immigration and Naturalization Service (“INS”) within the INS’ Western Region and who have been, are, or will be subjected to any of the following conditions:
  - a. inadequate opportunities for exercise or recreation;
  - b. inadequate educational instruction;
  - c. inadequate reading materials;
  - d. inadequate opportunities for visitation with counsel, family, and friends;
  - e. regular contact as a result of confinement with adult detainees unrelated to such minors either by blood, marriage, or otherwise;
  - f. strip or body cavity search after meeting with counsel or at any other time or occasion absent demonstrable adequate cause.” *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> Stipulated Settlement Agreement at *Flores v. Meese*, (C.D. Cal. 1997), <https://www.aclu.org/legal-document/flores-v-meese-stipulated-settlement-agreement-plus-extension-settlement>.

<sup>32</sup> *Flores*, 828 F.3d at 902.

<sup>33</sup> *Id.* The differences in these two proceedings is not relevant to this Note or the current litigation. “Prior to April 1997 deportation and exclusion were separate removal procedures. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 consolidated these proce-

released to their parents, adult relatives, or custodians designated by their parents; and if no adult relative was available, the rule allowed the INS discretion to release a detained relative” with the minor.<sup>34</sup>

In 1993, the U.S. Supreme Court<sup>35</sup> in *Reno v. Flores*, heard the constitutional arguments raised by the plaintiff class.<sup>36</sup> In the original litigation, minors who were detained without their parents, (“unaccompanied minors”), sought to be released to people other than their parents and argued it was unconstitutional to hold them in detention.<sup>37</sup> The Supreme Court held that the new policy was constitutional because the INS could not send the unaccompanied minors “off into the night on bond” or on their own recognizance.<sup>38</sup>

The Supreme Court reasoned that the INS had “decided to strike a balance” by creating a list of assumingly suitable guardians while preserving “the discretion of local INS directors to release detained minors to other custodians in unusual and compelling circumstances.”<sup>39</sup> At the top of the list are parents, “whom our society and this Court’s jurisprudence have always presumed to be the preferred and primary custodians of their minor children.”<sup>40</sup>

Additionally, the Supreme Court held that the right to be released to someone other than a parent is not a fundamental right, and that the government must know that someone will care for the minor pending determination of his or her deportation proceedings.<sup>41</sup> The Court reasoned it “is easily done when the juvenile’s parents have also been detained and the family can be released together; it becomes complicated when the juvenile is arrested alone, *i.e.*, unaccompanied by a parent, guardian, or other related adult.”<sup>42</sup> The Supreme Court held that the government must only provide care that is adequate, and is not required to release juveniles to adults that are not family members.<sup>43</sup>

In 1997, the U.S. District Court for the Central District of California approved the Settlement, which ultimately “sets out nationwide policy for the detention, release, and treatment of minors in the custody of INS”

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dures.” *Deportation*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <https://www.uscis.gov/tools/glossary/deportation> (last visited Oct. 30, 2017).

<sup>34</sup> *Flores*, 828 F.3d at 902; *see Reno v. Flores*, 507 U.S. 292, 296-97 (1993); *Detention and Release of Juveniles*, 53 Fed. Reg. 17449, 17451 (1988) (codified as amended, 8 C.F.R. § 236.3).

<sup>35</sup> Hereinafter, “Supreme Court.”

<sup>36</sup> *Flores*, 507 U.S. at 294-95.

<sup>37</sup> *Id.* at 301-02.

<sup>38</sup> *Id.* at 295.

<sup>39</sup> *Reno v. Flores*, 507 U.S. 292, 310 (1993).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 295.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 313-15; *Flores v. Lynch*, 828 F.3d 898, 904 (9th Cir. 2016).

and is still in effect today.<sup>44</sup> The Settlement was to terminate within five years of court approval or within three years after the court found the government to be in substantial compliance with the Settlement.<sup>45</sup> In 2001, the parties stipulated that the Settlement would terminate 45 days after the government's final publication of regulations applying the Settlement.<sup>46</sup> As of the publication of this Note, the government has not yet published these regulations. However, Congress partially codified the terms of the Settlement, creating some statutory standards for unaccompanied minors through the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 ("TVPRA").<sup>47</sup>

The Settlement guides the government standards for minors in custody regarding "food, clothing, grooming items, medical and dental care, individualized needs assessments, educational services, recreation and leisure time, counseling, access to religious services, contact with family members, and a reasonable right to privacy."<sup>48</sup> It defines the contracting class as "[a]ll minors who are detained in the legal custody of the INS."<sup>49</sup> The Settlement states that, when a juvenile is taken into custody by the INS, the INS shall expeditiously process the juvenile, provide the juvenile with a notice of rights, and if release is not possible, place the juvenile in a non-secured, licensed facility within five days.<sup>50</sup> However, the Settlement also provides that in "the event of an emergency or influx of minors into the United States, the INS need only make the transfer as expeditiously as possible."<sup>51</sup>

The Settlement creates a presumption in favor of releasing juveniles.<sup>52</sup> If INS determines that detention of the minor is not required "either to secure his or her timely appearance before the INS or the immigration court, or to ensure the minor's safety or that of others, the INS shall release a minor from its custody without unnecessary delay . . . ."<sup>53</sup> Furthermore, it requires prompt and continuous efforts toward family

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<sup>44</sup> *Flores*, 828 F.3d at 901, 904.

<sup>45</sup> Stipulated Settlement Agreement at *Flores v. Meese*, (C.D. Cal. 1997), <https://www.aclu.org/legal-document/flores-v-meese-stipulated-settlement-agreement-plus-extension-settlement>.

<sup>46</sup> *Flores*, 828 F.3d at 903.

<sup>47</sup> *Id.* at 904; see 8 U.S.C. § 1232(c)(2)(A) (an unaccompanied minor "shall be promptly placed in the least restrictive setting that is in the best interest of the child," subject to flight and danger concerns). TVPRA is not relevant to this Note because this Note focuses solely on accompanied minors.

<sup>48</sup> *Flores v. Lynch*, 828 F.3d 898, 903 (9th Cir. 2016) (quoting Paragraph 12 of the Settlement).

<sup>49</sup> *Id.* at 902 (quoting Paragraph 10 of the Settlement).

<sup>50</sup> *Id.* (quoting Paragraph 12(A) of the Settlement).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 901.

<sup>53</sup> *Flores v. Lynch*, 828 F.3d 898, 903 (9th Cir. 2016).

reunification and the release of the juvenile.<sup>54</sup> In certain situations, some minors may be held in juvenile detention facilities instead of a licensed program.<sup>55</sup>

#### B. U.S. IMMIGRATION FAMILY DETENTION CENTERS

Prior to 2001, families that were stopped by the government for entering the United States illegally were often released as opposed to being detained because of the lack of family bed space available.<sup>56</sup> Detained families were housed separately, and parents were split from their children.<sup>57</sup> However, immigration policy drastically changed after the events of September 11, 2001, leading to “more restrictive immigration controls, tougher enforcement, and broader expedited removal of illegal aliens, which made the automatic release of families problematic.”<sup>58</sup>

In 2001, a family detention center was opened in Berks County, Pennsylvania (“Berks”).<sup>59</sup> In 2006, DHS opened a second facility, the Don T. Hutto Family Residential Center (“Hutto”).<sup>60</sup> In 2007, three minors at Hutto sued the government in the Western District of Texas alleging that the detention conditions violated the terms of the Settlement and sought to be released with their parents, who were being detained with them.<sup>61</sup> During the litigation proceedings of *Bunikyte ex rel. Bunikiene v. Chertoff*, the plaintiffs and their parents sought asylum from various countries while being detained at Hutto.<sup>62</sup> The government argued that the Settlement only applied to unaccompanied minors.<sup>63</sup> Ultimately, the district court disagreed with the government and found that by its terms, the Settlement applies to all minors in the custody of government agencies such as ICE and DHS and that it had been violated.<sup>64</sup> The court rejected the claim that the Settlement entitled parents a right of release.<sup>65</sup> The case settled before trial; however, the Ninth Circuit used the decision

<sup>54</sup> *Id.* (quoting Paragraph 18 of the Settlement).

<sup>55</sup> *Id.* (quoting Paragraph 12 of the Settlement).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Flores v. Lynch*, 828 F.3d 898, 903 (9th Cir. 2016).

<sup>59</sup> *Id.* Berks is a converted nursing home. *Id.*

<sup>60</sup> *Id.* at 904. In 2009, ICE stopped detaining families in the Hutto facility. Between 2009 and 2014, the Berks facility was the only family detention facility in operation. Hutto is located in Taylor, Texas, and was previously a medium security prison. *Id.*; Lazaro Zamora, *What You Need to Know: Immigrant Family Detention*, BIPARTISAN POL’Y CTR. (Aug. 27, 2015), <http://bipartisanpolicy.org/blog/what-you-need-to-know-immigrant-family-detention/>.

<sup>61</sup> *Flores*, 828 F.3d at 904.

<sup>62</sup> *Bunikyte ex rel. Bunikiene v. Chertoff*, 2007 WL 1074070 at \*1 (W.D. Tex. 2007).

<sup>63</sup> *Flores*, 828 F.3d at 904.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

in its *Flores* analysis to reverse the district court's holding, which granted parents a right of release.<sup>66</sup>

In 2014, there was significant growth in the number of undocumented parents and children entering the United States-Mexico border from Central America.<sup>67</sup> At the time, Berks detention facility was the only open and operating family detention center.<sup>68</sup> In response to the vast increase of families arriving at the border, the government opened three more family detention centers in Karnes City and Dilley, Texas, and Artesia, New Mexico.<sup>69</sup> Karnes and Dilly currently operate under ICE's Family Residential Standards;<sup>70</sup> those standards do not conform to the requirements of the Settlement.<sup>71</sup>

Previously, in 2011, ICE's policy was to place families stopped near the border in regular removal proceedings rather than expedited removal proceedings.<sup>72</sup> However, in the summer of 2014, when the number of unaccompanied children and families increased, the policy changed.<sup>73</sup> After the increase, DHS Secretary Jeh Johnson publicly stated that the government would detain families in order to deter others from coming to the United States.<sup>74</sup> After this statement, DHS began placing families, consisting primarily of mothers and their children, in expedited removal proceedings, and detaining them, rather than issuing them Notices to Appear and then releasing them.<sup>75</sup>

In January 2015, in the U.S. District Court of Colombia, a group of Central American migrants filed a class action against the government regarding the government's release policy under the Due Process Clause.<sup>76</sup> In *R.I.L.-R v. Johnson*, the plaintiffs' alleged that DHS had adopted a no-release policy as to Central American families.<sup>77</sup> The district court held that the government had not implemented such a policy,

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<sup>66</sup> *Id.* (quoting *In re Hutto Family Det. Ctr.*, No. 1:07-cv-00164-SS, Dkt. 94 (W.D. Tex. Aug. 26, 2007)).

<sup>67</sup> *Flores*, 828 F.3d at 904; see Jonathan T. Hiskey et al., *Understanding the Central American Refugee Crisis*, AMERICAN IMMIGR. COUNCIL (Feb. 1, 2016), <https://www.americanimmigrationcouncil.org/research/understanding-central-american-refugee-crisis>.

<sup>68</sup> REP. OF THE DHS ADVISORY COMM. ON FAM. RESIDENTIAL CTRS. (Sept. 30, 2016), <https://www.ice.gov/sites/default/files/documents/Report/2016/ACFRC-sc-16093.pdf>.

<sup>69</sup> *Flores v. Lynch*, 828 F.3d 898, 904 (9th Cir. 2016).

<sup>70</sup> *Family Residential Standards*, U.S. IMMIGR. AND CUSTOMS ENFORCEMENT, <https://www.ice.gov/detention-standards/family-residential> (last visited Sept. 4, 2017).

<sup>71</sup> *Flores*, 828 F.3d at 904.

<sup>72</sup> REP. OF THE DHS ADVISORY COMM. ON FAM. RESIDENTIAL CTRS. (Sept. 30, 2016), <https://www.ice.gov/sites/default/files/documents/Report/2016/ACFRC-sc-16093.pdf>.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Flores v. Lynch*, 828 F.3d 898, 904 (9th Cir. 2016).

<sup>77</sup> *Id.*

but did find support for the plaintiffs' alternative assertion that the policy directed ICE agents to factor "deterrence of mass migration" into their custody decisions.<sup>78</sup> Furthermore, the district court found the DHS policy of deterrence to be a factor that had played a substantial part in the high number of Central American families being detained.<sup>79</sup>

In May 2015, the government informed the district court that it would no longer use deterrence as a factor in family custody determinations.<sup>80</sup> Following the government's statement to the court and through an agreement between the parties, the case ended.<sup>81</sup> The Ninth Circuit also considered this case in its analysis of *Flores v. Lynch*.<sup>82</sup>

### C. *FLORES V. LYNCH* IN THE CENTRAL DISTRICT OF CALIFORNIA

On February 2, 2015, the most recent litigation was brought in the Central District of California.<sup>83</sup> The *Flores* class filed a motion seeking to enforce the terms of the Settlement and arguing, similarly to *R.I.L.-R. v. Johnson*, that the government had breached the Settlement in a number of ways.<sup>84</sup> The plaintiff class alleged that the government was not releasing minors as it had in the past and failed to abide by the standards of care required under the terms of the Settlement.<sup>85</sup>

The plaintiff class brought the motion to enforce the 18-year-old Settlement against then acting U.S. Secretary of Homeland Security Jeh Johnson, DHS, and its subordinate entities, ICE and U.S. Customs and Border Protection ("CBP").<sup>86</sup> In response, the government argued that the terms of the Settlement do not extend to accompanied minors and filed a motion to amend the Settlement to reflect that claim.<sup>87</sup> The plaintiff class proposed that the government comply with the Settlement by releasing minors without unwarranted delay and firstly to a parent, including any parents who were apprehended and currently detained alongside that minor.<sup>88</sup> The district court acknowledged that the terms of the Settlement do not directly provide any rights for adults and their treat-

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<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Flores v. Lynch*, 828 F.3d 898, 905 (9th Cir. 2016).

<sup>82</sup> *Id.* at 904-05.

<sup>83</sup> *Id.* at 905; The Settlement provides for legal claims to be brought in the Central District of California; however, it allows for individual challenges to placement or detention conditions to be brought in any district court that venue is proper and where the court has jurisdictional power to hear the case. *Id.* at 903.

<sup>84</sup> *Id.* at 905.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 908.

ment in detention.<sup>89</sup> However, it reasoned “ICE’s blanket no-release policy with respect to mothers cannot be reconciled with the Agreement’s grant to class members of a right to preferential release to a parent.”<sup>90</sup>

On July 24, 2015, the district court granted the plaintiffs’ motion to enforce the Settlement in family detention centers.<sup>91</sup> The district court held that the government had breached the Settlement because the terms apply to *all* minors in detention,<sup>92</sup> and denied the government’s motion to amend the Settlement.<sup>93</sup> The district court held that the government must comply with the Settlement, and unless the parent is subject to mandatory detention, “the government must release an accompanying parent as long as doing so would not create or pose a significant flight risk or safety risk.”<sup>94</sup>

The district court reinforced its conclusion by finding that the regulation upheld by the Supreme Court in the original *Flores v. Reno* case did support the release of an accompanying family member.<sup>95</sup> The language of the Settlement that the district court focused on was: “[i]f a relative who is not in detention cannot be located to sponsor the minor, the minor may be released with an accompanying relative who is in detention.”<sup>96</sup> Furthermore, it found support through ICE’s prior practice of usually releasing parents who were not found to be a flight risk or safety risk.<sup>97</sup>

On October 23, 2015, the district court set forth the remedies the government was required to implement for its breach.<sup>98</sup> Although the district court entertained the motion to amend, it found the government had not moved to modify the Settlement properly and held that the Settlement could not be altered.<sup>99</sup> The district court discussed in detail why

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<sup>89</sup> *Id.*

<sup>90</sup> *Id.* (quoting *Flores v. Johnson*, 212 F. Supp. 3d 864, 874 (C.D. Cal. 2015)).

<sup>91</sup> *Flores v. Lynch*, 828 F.3d 898, 905 (9th Cir. 2016).

<sup>92</sup> *Flores*, 212 F. Supp. 3d at 872.

<sup>93</sup> *Flores*, 828 F.3d at 905.

<sup>94</sup> *Id.* at 908.

<sup>95</sup> *Id.*; see 8 C.F.R. § 212.5(b)(3)(ii) (2011).

<sup>96</sup> *Flores v. Lynch*, 828 F.3d 898, 905 (9th Cir. 2016) (citing 8 C.F.R. § 212.5(a)(3) (1997)); cf. *Reno v. Flores*, 507 U.S. 292, 315 (1993).

<sup>97</sup> *Flores*, 828 F.3d at 908.

<sup>98</sup> *Id.* at 901 (The district court ordered the government to implement the following remedies: “(1) ‘make prompt and continuous efforts toward family reunification,’ (2) release class members without unnecessary delay, (3) detain class members in appropriate facilities, (4) release an accompanying parent when releasing a child unless the parent is subject to mandatory detention or poses a safety risk or a significant flight risk, (5) monitor compliance with detention conditions, and (6) provide class counsel with monthly statistical information.”).

<sup>99</sup> *Flores v. Lynch*, 212 F. Supp. 3d 907, 910 (C.D. Cal. 2015), *aff’d in part, rev’d in part and remanded by Flores v. Lynch*, 828 F.3d 898 (9th Cir. 2016).

it rejected the government's motion for reconsideration.<sup>100</sup> The government appealed to the Ninth Circuit.<sup>101</sup> On appeal, the government argued that the Settlement only applies to unaccompanied minors and is not violated when minors accompanied by parents or other adult family members are placed in family detention centers.<sup>102</sup> Furthermore, the government challenged the district court's holding regarding the right of release of parents and the district court's denial of its motion to modify the Settlement.<sup>103</sup>

#### D. THE NINTH CIRCUIT'S ANALYSIS OF *FLORES V. LYNCH*

On appeal, the Ninth Circuit held that the Settlement unambiguously applies to accompanied<sup>104</sup> and unaccompanied minors; the Settlement does not provide parents who accompany detained minors an affirmative right of release; and modification of the Settlement was not necessary.<sup>105</sup> Previously, no court has held that the Settlement applied to accompanied minors in detention. This section discusses the three holdings individually.

##### 1. *Settlement Applies to All Minors*

First, the Ninth Circuit held that the Settlement unambiguously applies to accompanied and unaccompanied minors by its express terms.<sup>106</sup> The Settlement defines a minor as "any person under the age of eighteen (18) years who is detained in the legal custody of the INS."<sup>107</sup> Furthermore, the Settlement's scope is described as setting a "nationwide policy for the detention, release, and treatment of minors in the custody of the INS," and it defines the plaintiff class as "[a]ll minors who are detained

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<sup>100</sup> *Id.* at 909-14. The court rejected the motion based on Local Rule 7-18. The court found that none of the enumerated limitations applied, and that the defendants improperly brought the motion for reconsideration. *Id.*

<sup>101</sup> *Flores v. Lynch*, 828 F.3d 898, 905 (9th Cir. 2016).

<sup>102</sup> *Id.* at 905-10.

<sup>103</sup> *Id.*

<sup>104</sup> Immigration laws do not define the term 'accompanied' children or minors, but children arriving in the United States with a parent or guardian are considered accompanied. *See* AM. IMMIGR. COUNCIL, *A Guide to Children Arriving at the Border: Laws, Policies and Responses* (June 26, 2015), <https://www.americanimmigrationcouncil.org/research/guide-children-arriving-border-laws-policies-and-responses>.

<sup>105</sup> *Flores*, 828 F.3d at 901.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 905.

in the legal custody of the INS.”<sup>108</sup> This language led the Ninth Circuit to hold that the Settlement expressly and clearly applies to *all* minors.<sup>109</sup>

Additionally, the court reasoned, as did the district court before it, that the Settlement affords special guidelines for unaccompanied minors in certain situations, and “it would make little sense to write rules making special reference to unaccompanied minors if the parties intended the Agreement as a whole to be applicable only to unaccompanied minors.”<sup>110</sup> The court reasoned that the Settlement also explicitly identifies certain minors that the class definition does not apply to, such as emancipated minors.<sup>111</sup> This language led the court to conclude that if the parties wanted to exclude accompanied minors from the Settlement, they could have clearly done so when they listed the other exclusions.<sup>112</sup>

## 2. *Affirmative Release Rights of Parents*

Second, the Ninth Circuit held that the Settlement does not grant a right of release to parents and the district court erred in its interpretation.<sup>113</sup> The Ninth Circuit reasoned that unless the information is ambiguous, the Settlement must be interpreted only through the information found within its four corners because it is a consent decree.<sup>114</sup> It held that the terms of the Settlement do not explicitly provide any rights to adults, so it does not grant a right of release.<sup>115</sup> The Ninth Circuit reasoned that, even though the Settlement grants minors the right to preferential release to a parent, the government does not have to make a parent available by also releasing them.<sup>116</sup> The Ninth Circuit held that it only means that if a parent is already available, then that person is the first choice.<sup>117</sup>

Additionally, the Ninth Circuit reasoned that the language of the Settlement is straightforward, and not ambiguous; therefore, it need not con-

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<sup>108</sup> *Id.*; see Paragraphs 4, 9, and 10 of the Settlement.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 905-06; see Paragraphs 12(A) and 25 of the Settlement.

<sup>111</sup> *Flores v. Lynch*, 828 F.3d 898, 906 (9th Cir. 2016).

<sup>112</sup> *Id.* at 905-06; see Paragraph 4 of the Settlement. This Note does not address the government’s arguments because the court properly found the express language makes the Settlement applicable to *all* minors.

<sup>113</sup> *Id.* at 908.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*; Consent decrees which, “like a contract, must be discerned within its four corners, extrinsic evidence being relevant only to resolve ambiguity in the decree.” *United States v. Asarco Inc.*, 430 F.3d 972, 980 (9th Cir. 2005).

<sup>116</sup> *Flores v. Lynch*, 828 F.3d 898, 908 (9th Cir. 2016).

<sup>117</sup> *Id.* The court further supported its holding with the Western District of Texas court’s reasoning in *Bunikyte*; see *Bunikyte ex rel. Bunikiene v. Chertoff*, Nos. A-07-CA-164-SS, A-07-CA-165-SS, A-07-CA-166-SS, 2007 WL 1074070 at \*16-17 (W.D. Tex. 2007) (case settled before the court issued a ruling); see also 8 C.F.R. § 236.3.

sider any extrinsic evidence to determine the true intent of the parties.<sup>118</sup> However, it stated that the extrinsic evidence did not indicate that the parties intended to grant parents a right of release.<sup>119</sup> The court held, “the context of the *Flores* Settlement argues against this result: the Settlement was the product of litigation in which unaccompanied minors argued that release to adults other than their parents was preferable to remaining in custody until their parents could come get them.”<sup>120</sup>

The Ninth Circuit concluded that the instruction the district court relied upon in its decision at most demonstrated that the parties might have considered releasing an adult family member when creating the Settlement, but did not actually agree to do so in the text.<sup>121</sup> Furthermore, the Ninth Circuit held that there is no evidence to support that the government ever once released more parents and children because of the Settlement as opposed to other reasons.<sup>122</sup> On appeal, the plaintiff class proposed that the Ninth Circuit “construe the district court’s order narrowly,” asserting that the government should “grant accompanying parents individualized custody determinations,” just as it would single adults, in accordance with the appropriate laws and regulations.<sup>123</sup>

However, the Ninth Circuit stated that the district court went too far with its ruling by incorrectly placing the burden of releasing a parent on the government.<sup>124</sup> The burden is usually placed on the noncriminal detainee to establish “he or she does not present a danger to persons or property, is not a threat to the national security, and does not pose a risk of flight.”<sup>125</sup> This burden was shifted by the district court requiring the government to release an accompanying parent unless the parent is subject to mandatory detention or after it conducted an individualized custody determination.<sup>126</sup> Furthermore, the Ninth Circuit found that the district court’s order required the government to justify detention by a higher standard, which was a showing that a parent is a “significant flight risk,” while the normal standard is only “a risk of flight.”<sup>127</sup>

Lastly, the Court of Appeals reasoned that the parents were never plaintiffs in the *Flores* case nor members of the two certified classes.<sup>128</sup> Thus, it held that the Settlement does not afford parents any affirmative

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<sup>118</sup> *Flores*, 828 F.3d at 908.

<sup>119</sup> *Id.* at 908-09.

<sup>120</sup> *Id.* at 909.

<sup>121</sup> *Id.* (relying on 8 C.F.R. § 212.5(b)(3)(ii)).

<sup>122</sup> *Id.*

<sup>123</sup> *Flores*, 828 F.3d at 909.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

release rights, and the lower court erred by granting parents such rights.<sup>129</sup> The Ninth Circuit did not express its opinion as to whether parents have a right of release; instead, it held that the terms do not expressly grant that right.<sup>130</sup>

### 3. *Modification of the Settlement*

Third, the Ninth Circuit held that the district court did not abuse its discretion in denying the government's motion to amend the Settlement.<sup>131</sup> The Ninth Circuit reasoned that the moving party "bears the burden of establishing that a significant change in circumstances warrants revision of the decree" in order for it to be modified.<sup>132</sup> If the moving party can meet the required standard, then "the court should consider whether the proposed modification is suitably tailored to the changed circumstance."<sup>133</sup> In reviewing the record, the Ninth Circuit found that the Settlement should not be altered because there was no indication that the parties did not anticipate an influx of minors crossing the border when the parties entered into the Settlement.<sup>134</sup> Furthermore, it reasoned that modification should not be permitted in cases where a party relies upon occurrences that were anticipated at the time it entered into a consent decree.<sup>135</sup>

The Ninth Circuit found that the Settlement clearly expected an influx to occur, and if one did occur, the government agencies were allowed more time to release minors or could place them in certain licensed facilities.<sup>136</sup> Furthermore, even if the plaintiff class and the government had not predicted such an increase in the number of minors, the Ninth Circuit did not understand how a "suitably tailored response to the change in circumstances" would be to prevent an entire group of migrants from the terms of the Settlement.<sup>137</sup>

Additionally, the Ninth Circuit concluded that no substantial modification to the law had occurred to justify alteration of the Settlement to not extend to accompanied minors.<sup>138</sup> The court reasoned that if a change in law is the basis for modification, then "the moving party must establish that the provision it seeks to modify has become 'impermissi-

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<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 909 n.4.

<sup>131</sup> *Id.* at 910.

<sup>132</sup> *Id.* at 909.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 910.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

ble.’”<sup>139</sup> The court stated that the restructuring of government agencies overseeing minors in custody did not require a modification to the Settlement.<sup>140</sup> Furthermore, even if “some provisions of the TVPRA regarding the detention and release of unaccompanied minors” might be inconsistent with the Settlement, at most, that would provide for alteration of just those provisions.<sup>141</sup> Additionally, the creation of rights under TVPRA for unaccompanied children did not make the Settlement “impermissible” if applied to accompanied children.<sup>142</sup>

## II. ARGUMENT: CUSTODY AND FAMILY UNITY

Although this Note agrees with the Ninth Circuit’s reasoning for its holding in *Flores*,<sup>143</sup> it argues that the plaintiff class should not appeal the court’s decision. Instead, it provides the parents with a constitutional violation claim to achieve the goal of simultaneous release. This Note argues that while the terms of the Settlement do not require the government to release a parent with their child, it is unconstitutional for the government to not release parents with their children because it violates the parents’ fundamental right to custody over one’s biological child and family unity. Separating families in detention is a constitutional violation of the parents’ Substantive Due Process rights because the government is depriving the parents of a fundamental right granted to them under the Fifth and Fourteenth Amendments of the United States Constitution.<sup>144</sup>

Subsection A explains Substantive Due Process and the strict scrutiny test. Subsection B explains the fundamental right of custody and family unity and explains why custody is a constitutional right afforded to all individuals, even those who are in the United States “illegally.” Subpart 1 argues why the “best interest of the child” standard should be applied in family immigration cases and why it is in the child’s best interest to be released with a parent. Subpart 2 provides examples of constitutional restrictions that have been upheld and differentiates those cases. Subpart 3 combines the examples and arguments from Subparts 1 and 2, and establishes that the action of separating families is an infringement on established fundamental rights. Subsection C argues the government is infringing on the parents’ fundamental rights to custody and family unity. Subsection D explains why strict scrutiny applies and ar-

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<sup>139</sup> *Id.* at 909-10.

<sup>140</sup> *Id.* at 910.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> The Ninth Circuit’s reasoning for its holding is outside the scope of this Note.

<sup>144</sup> *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); *see Plyler v. Doe*, 457 U.S. 202, 210 (1982).

gues against the hypothetical government interest of “national security.” Finally, Subsection E argues that less restrictive means exist such as released monitoring systems; therefore, the government action of separating families is unconstitutional because it fails the strict scrutiny test.

This Note also acknowledges that, if the government continues to keep children in detention longer than necessary based on the release eligibility of their parents or to not break the family unit apart, then the government will be breaching the terms of the Settlement, and the plaintiff class can bring a claim against the government for the breach. Furthermore, this Note urges Congress to codify law, like it did for unaccompanied minors with TVPRA, to ensure the constitutional rights afforded to this vulnerable population is recognized and followed.

#### A. SUBSTANTIVE DUE PROCESS AND STRICT SCRUTINY

The Due Process Clause of the Fifth Amendment of the United States Constitution prohibits the government from depriving individuals of their “life, liberty, or property, without due process of law.”<sup>145</sup> Every Due Process analysis starts with the question: has the government deprived an individual of one of these rights?<sup>146</sup> The Substantive Due Process doctrine requires all governmental intrusions into fundamental rights and liberties be fair and reasonable and in furtherance of a legitimate governmental interest.<sup>147</sup> In order to be found constitutional, the infringement must be narrowly tailored to serve a compelling government interest.<sup>148</sup>

The Substantive Due Process doctrine is applied under the Fourteenth and Fifth Amendments of the U.S. Constitution.<sup>149</sup> Since family law is usually reserved to the States, this Note uses many cases that involve states infringing on fundamental rights, which the courts analyze under the Fourteenth Amendment.<sup>150</sup> Here, a Fifth Amendment analysis

<sup>145</sup> U.S. Const. amend. V.

<sup>146</sup> National Paralegal College, *Substantive Due Process – Fundamental Rights*, LAWShelf Educ. Med., [https://nationalparalegal.edu/conLawCrimProc\\_Public/DueProcess/SubstantiveFundamentalRights.asp](https://nationalparalegal.edu/conLawCrimProc_Public/DueProcess/SubstantiveFundamentalRights.asp) (last visited Aug. 1, 2017).

<sup>147</sup> *Reno v. Flores*, 507 U.S. 292, 301-02 (1993); see ERWIN CHERMERINSKY, CONSTITUTIONAL LAW 938 (4th ed. 2013).

<sup>148</sup> *Flores*, 507 U.S. at 301-02.

<sup>149</sup> Legal Info. Inst., *Substantive Due Process*, CORNELL L. SCH., [https://www.law.cornell.edu/wex/substantive\\_due\\_process](https://www.law.cornell.edu/wex/substantive_due_process) (last visited Aug. 1, 2017). The Fifth Amendment protects people from the federal government intruding on their liberty interests, and through the doctrine of incorporation, the Fourteenth Amendment protects people from the states intruding on those same interests. See *Mathews v. Diaz*, 426 U.S. 67, 77-78 (1976); ERWIN CHERMERINSKY, CONSTITUTIONAL LAW 938 (4th ed. 2013).

<sup>150</sup> *Meyer v. Nebraska*, 262 U.S. 390, 398-403 (1923); ERWIN CHERMERINSKY, CONSTITUTIONAL LAW 938 (4th ed. 2013).

applies because it is the federal government intruding on a fundamental right.<sup>151</sup>

The Supreme Court has held that Due Process and liberty protections are not afforded only to U.S. citizens.<sup>152</sup> The fourth President of the United States, James Madison, wrote “as they [aliens], owe, on the one hand, a temporary obedience, they are entitled, in return, to their [constitutional] protection and advantage.”<sup>153</sup> More recently, the Supreme Court in *Zadvydas v. Davis*, made it clear that “once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.”<sup>154</sup> Additionally, the Due Process Clause protects an individual subject to a final order of deportation.<sup>155</sup>

In countless cases, the Supreme Court has held that the laws and traditions of the United States grant constitutional protection to individual decisions relating to family relationships, child rearing, marriage, procreation, and education.<sup>156</sup> The right to liberty under the Due Process Clause gives people the full right to engage in personal conduct without intervention of the government.<sup>157</sup>

Ordinarily when the federal government infringes on a fundamental liberty interest, a strict scrutiny standard applies.<sup>158</sup> The Supreme Court has explained that the Substantive Due Process rights provided by the Fifth and Fourteenth Amendments afford “heightened protection against government interference with certain fundamental rights and liberty interests.”<sup>159</sup> When strict scrutiny applies, it is the government’s responsibility to demonstrate the compelling nature of its interest and the

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<sup>151</sup> *Reno v. Flores*, 507 U.S. 292 (1993).

<sup>152</sup> *Id.*

<sup>153</sup> Raoul Lowery Contreras, *Yes, Illegal Aliens Have Constitutional Rights*, THE HILL (Sept. 29, 2015, 12:30 PM), <http://thehill.com/blogs/pundits-blog/immigration/255281-yes-illegal-aliens-have-constitutional-rights>.

<sup>154</sup> *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); *see also Plyler v. Doe*, 457 U.S. 202, 210 (1982).

<sup>155</sup> *Zadvydas*, 533 U.S. at 693-94.

<sup>156</sup> *E.g.*, *Lawrence v. Texas*, 539 U.S. 558, 572-73 (2003); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

<sup>157</sup> *Lawrence*, 539 U.S. at 578.

<sup>158</sup> *Reno v. Flores*, 507 U.S. 292, 301-02 (1993); ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW* 938 (4th ed. 2013).

<sup>159</sup> *Washington v. Glucksberg*, 521 U.S. 702, 719-20 (1997); *see also Troxel v. Granville*, 530 U.S. 57, 73 (2000).

necessity of the chosen means.<sup>160</sup> As custody and family unity are established fundamental rights, the court should apply a strict scrutiny test.<sup>161</sup>

#### B. FUNDAMENTAL RIGHTS AT STAKE – CUSTODY AND FAMILY UNITY

The interests of parents in the care, custody, and control of their children are arguably some of the oldest fundamental liberty interests recognized by the Supreme Court.<sup>162</sup> The Supreme Court has stated on numerous occasions that the relationship between a parent and child is constitutionally protected.<sup>163</sup> “It is cardinal with us [Supreme Court] that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.”<sup>164</sup> It is established that one of the liberties protected by the Due Process Clause is the freedom of personal choice in matters of family life.<sup>165</sup>

Family law proceedings and the decision to terminate parental rights are regulated by the individual states.<sup>166</sup> The Supreme Court has explained the law’s view of the family “rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life’s difficult decisions.”<sup>167</sup> The Supreme Court has recognized that the natural bonds of affection will often cause parents to act in the best interests of their children.<sup>168</sup> The Supreme Court stated that it holds “little doubt that the Due Process Clause would be offended” if the government attempted to break up a natural family unit over the objections of the family “without some showing of unfitness and for the sole reason that to do so was thought to be in the children’s best interest.”<sup>169</sup>

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<sup>160</sup> U.S. v. Salerno, 481 U.S. 739, 746-51 (1987).

<sup>161</sup> *Troxel*, 530 U.S. at 59, 65-66.

<sup>162</sup> *Id.*

<sup>163</sup> *E.g.*, *Troxel*, 530 U.S. at 65-66; *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

<sup>164</sup> *Quilloin*, 434 U.S. at 255.

<sup>165</sup> *Id.*

<sup>166</sup> Child Welfare Information Gateway, *Grounds for Involuntary Termination of Parental Rights*, U.S. DEP’T OF HEALTH AND HUMAN SERVS. 16 (Dec. 2016), <https://www.childwelfare.gov/pubPDFs/groundtermin.pdf>.

<sup>167</sup> *Troxel v. Granville*, 530 U.S. 57, 68 (2000).

<sup>168</sup> *Id.*

<sup>169</sup> *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); *see also Stanley v. Illinois*, 405 U.S. 645, 651-52, 657 (1972).

### 1. Parental Unfitness and the “Best Interest of the Child” Standard

In determining whether the separation of family members in detention centers is constitutional, the standard the Court should apply is the “best interest of the child” standard.<sup>170</sup>

The best interest of the child standard “requires prioritizing family integrity and the maintenance of emotional ties and relationships among family members.”<sup>171</sup> Although the Supreme Court in the original *Reno v. Flores* litigation pointed out that the “best interest of the child” is not a constitutionally recognized standard, all 50 states, the District of Columbia, and all the U.S. territories, have statutes that require a “child’s best interests” be considered whenever certain decisions are made concerning a child’s custody, placement, or other critical life issue.<sup>172</sup> While applying the standard, the Supreme Court held that, even when a biological parent has not been found “unfit,” the parent’s Due Process rights are not deprived when the court terminates a parent-child relationship, if termination is in the “best interests of the child” and it does not break apart a recognized family unit.<sup>173</sup>

The “best interest of the child” standard and parental “fitness” often overlap because, as the Supreme Court explained, a presumption exists that “fit” parents act in the best interests of their child.<sup>174</sup> As long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for a state to inject itself into the private realm of the family.<sup>175</sup> The Due Process Clause does not authorize “a State to infringe on the fundamental right of parents to make childrearing decisions” simply because a state official believes a better decision could be made.<sup>176</sup>

Before a state may involuntarily sever the rights of parents and biological children, parental unfitness must be proven because a parent and child share an interest in preventing a wrongful termination of their relationship.<sup>177</sup> The Due Process Clause requires that the state support its allegations by at least clear and convincing evidence as to whether a

<sup>170</sup> REP. OF THE DHS ADVISORY COMM. ON FAM. RESIDENTIAL CTRS. (Sept. 30, 2016), <https://www.ice.gov/sites/default/files/documents/Report/2016/ACFRC-sc-16093.pdf>.

<sup>171</sup> *Id.*

<sup>172</sup> *Reno v. Flores*, 507 U.S. 292, 303-04 (1993); U.S. Dep’t of Health and Hum. Servs., *Determining the Best Interest of the Child*, CHILD. BUREAU, [https://www.childwelfare.gov/pubPDFs/best\\_interest.pdf#page=2&view=Best%20interests%20definition](https://www.childwelfare.gov/pubPDFs/best_interest.pdf#page=2&view=Best%20interests%20definition) (last updated March 2016).

<sup>173</sup> See *Quilloin*, 434 U.S. at 255.

<sup>174</sup> *Troxel v. Granville*, 530 U.S. 57, 67 (2000).

<sup>175</sup> *Id.* (finding a state statute unconstitutional because it allowed the court to dictate who could have visitation rights even though the parents were “fit”).

<sup>176</sup> *Troxel*, 530 U.S. at 72-73.

<sup>177</sup> *Id.* at 73; *Santosky v. Kramer*, 455 U.S. 745, 760 (1982).

parent is “unfit” and to determine if severance of the relationship is in the “best interest of the child.”<sup>178</sup> However, if the child does not have an existing relationship with the parent, the court does not necessarily need to find the parent “unfit” to terminate the relationship.<sup>179</sup>

The fundamental liberty interest of natural parents in the “care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State.”<sup>180</sup> The Court reasoned, “[e]ven when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life.”<sup>181</sup>

Involuntary termination of parental rights occurs when a child cannot safely return home due to “risk of harm by the parent or the inability of the parent to provide for the child’s basic needs,” which in most states will constitute as parental unfitness.<sup>182</sup> Furthermore, the most common grounds states use when determining parental unfitness are: “severe or chronic abuse or neglect, sexual abuse,” abuse of other children in the household, abandonment, mental illness or deficiency of the parents that is long term, drug or alcohol induced incapacity of the parents that is long term, failure to support or maintain contact, and involuntary termination of rights between the parent and another child.<sup>183</sup> A violent felony conviction of the parent against the child or another family member is another common ground for termination.<sup>184</sup> A conviction for any felony that results in long-term incarceration and requires the child to enter foster care could, in some cases, constitute a ground for termination of parental rights.<sup>185</sup>

Although the reasons for termination of parental rights vary from state to state, one thing is consistent across the nation: adjudication is necessary before custody rights are severed.<sup>186</sup> The adjudication must demonstrate that the parent is “unfit” and termination is in “the best interest of the child.”<sup>187</sup> Both of these requirements must be supported by

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<sup>178</sup> *Troxel*, 530 U.S. at 67; *Santosky*, 455 U.S. at 774, 759, 769.

<sup>179</sup> *Santosky*, 455 U.S. at 759.

<sup>180</sup> *Id.* at 752-53.

<sup>181</sup> *Id.* at 753.

<sup>182</sup> U.S. Dep’t of Health and Hum. Servs., *Grounds for Involuntary Termination of Parental Rights*, CHILD. BUREAU (December 2016), <https://www.childwelfare.gov/pubPDFs/groundtermin.pdf>.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Troxel v. Granville*, 530 U.S. 57, 67 (2000); *Santosky v. Kramer*, 455 U.S. 745, 760 (1982).

<sup>187</sup> U.S. Dep’t of Health and Hum. Servs., *Grounds for Involuntary Termination of Parental Rights*, CHILD. BUREAU (December 2016), <https://www.childwelfare.gov/pubPDFs/groundtermin.pdf>.

clear and convincing evidence before parents lose their constitutional right to custody of their child.<sup>188</sup> Adjudication has not occurred when families are in detention awaiting their deportation and/or asylum hearings. Furthermore, the parents have not been found “unfit” by clear and convincing evidence. Thus, the government should not interject itself in the family unit and sever natural relationships by releasing family members separately because it is not in the best interest of the children.

Federal courts should apply the standard used throughout the United States, the “best interest of the child” standard, when deciding the liberty interests of families in federal detention. Even the DHS Advisory Committee on Family Residential Centers (DHS Committee) reported that the standard should be applied in all custody decisions regarding family members apprehended by the government and families should not needlessly be detained because it affects their best interests.<sup>189</sup>

## 2. *When Government Restrictions on Fundamental Rights are Constitutional*

In some instances, the Supreme Court and other federal courts have recognized that the government can limit constitutional freedoms granted to individuals and their families. For example, the Supreme Court held that prisons can restrict speech between family members, including parent inmates and their children without violating the inmate’s constitutional rights because when a person is confined in a prison, many of the liberties and freedoms granted to other citizens must be forfeited.<sup>190</sup>

The Supreme Court acknowledged that the Constitution protects certain kinds of personal relationships “[a]nd outside the prison context, there is some discussion in our cases of a right to maintain certain familial relationships . . . .”<sup>191</sup> However, it concluded that the “very object of imprisonment is confinement. Many of the liberties and privileges enjoyed by other citizens must be surrendered by the prisoner. An inmate does not retain rights inconsistent with proper incarceration.”<sup>192</sup> The Supreme Court reasoned that freedom of association is among the least compatible with incarceration and some infringement of that freedom must be expected in a prison context.<sup>193</sup>

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<sup>188</sup> *Santosky*, 455 U.S. at 759.

<sup>189</sup> REP. OF THE DHS ADVISORY COMM. ON FAM. RESIDENTIAL CTRS. (Sept. 30, 2016), <https://www.ice.gov/sites/default/files/documents/Report/2016/ACFRC-sc-16093.pdf>.

<sup>190</sup> *See Overton v. Bazzetta*, 539 U.S. 126, 131 (2003).

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

Another example of restricting constitutional rights is when a parent is deportable and his or her child is a U.S. citizen. In *de Robles v. INS*, a Mexican national was ordered deported on the ground that her visa had expired.<sup>194</sup> Maria Lopez de Robles argued it was unconstitutional under the Fifth Amendment to break her family unit apart by deporting her to Mexico because her children were United States citizens.<sup>195</sup> The Tenth Circuit rejected that argument, holding that it was not unconstitutional when one parent is deportable and the children are not deprived of their right to continuation of the family unit.<sup>196</sup> The court did not analyze the constitutional concerns; rather, it stated that the cases the plaintiff cited were inapposite and her argument was without merit.<sup>197</sup>

Many district courts have agreed with the Tenth Circuit, finding a valid deportation does not violate a minor child's constitutional rights because ultimately the child does not choose where to be born and parents know they will not be allowed to stay in the country past a certain amount of time under their visa.<sup>198</sup> The courts have reasoned that it is not breaking up the family unit or denying children their constitutional right to stay in the U.S. because the children can choose to return to the U.S. when they turn 18-years-old.<sup>199</sup> The First Circuit held that "deportations of parents are routine and do not of themselves dictate family separation."<sup>200</sup> Furthermore, the court reasoned, if it were such a right, it would be difficult to see "why children would not also have a constitutional right to object to a parent being sent to prison or, during periods when the draft laws are in effect, to the conscription of a parent for prolonged and dangerous military service."<sup>201</sup>

The fundamental liberty interest of the parents in detention centers is not analogous to prisoners having their constitutional rights limited while in prison. First, many of the families in detention centers are awaiting their asylum and deportation proceedings, and have not had an adjudication.<sup>202</sup> An adjudication must occur before the government can interject

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<sup>194</sup> *de Robles v. Immigr. and Naturalization Serv.*, 485 F.2d 100, 101 (10th Cir. 1973).

<sup>195</sup> *Id.* at 102.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *E.g.*, *Payne-Barahona v. Gonzales*, 474 F.3d 1, 3 (1st Cir. 2007); *Newton v. Immigr. and Naturalization Serv.*, 736 F.2d 336, 342 (6th Cir. 1984); *Perdido v. Immigr. and Naturalization Serv.*, 420 F.2d 1179, 1181 (5th Cir. 1969).

<sup>199</sup> *Perdido*, 420 F.2d at 1181.

<sup>200</sup> *Payne-Barahona*, 474 F.3d at 3.

<sup>201</sup> *Id.*

<sup>202</sup> REP. OF THE DHS ADVISORY COMM. ON FAM. RESIDENTIAL CTRS. (Sept. 30, 2016), <https://www.ice.gov/sites/default/files/documents/Report/2016/ACFRC-sc-16093.pdf>.

itself into family units and restrict their constitutional rights.<sup>203</sup> Second, immigration detention is not meant to be punitive like prison.<sup>204</sup> Thus, families in detention should not have their constitutional rights restricted as though they are prisoners.

Detention has been proven to be detrimental to children.<sup>205</sup> Current laws, particularly the Settlement, provide that juveniles in detention should be released as quickly as possible<sup>206</sup> because the harmful emotional, psychological, and physical effects of detention on children is well established.<sup>207</sup> Additionally, the DHS Committee concluded that detention should always be for the briefest amount of time possible, which aligns with the Settlement terms that juveniles should be detained for the briefest amount of time necessary.<sup>208</sup>

The previously mentioned cases the district courts rely on have a similar fact pattern: a parent is being *validly* deported. The decision in *de Robles* and the other federal cases are not analogous to families who are being detained and are awaiting their deportation or asylum hearings because, in those cases, a decision to deport the person already occurred. The Tenth Circuit also reasoned that the children could choose to relocate to be with their parent so the action was constitutional. In this case, that would be similar to asking a child to continue to stay in confinement instead of being released without a parent. The two situations are not analogous because, in this situation, the children and parents are awaiting their hearings; thus, no valid deportation decision has been made.<sup>209</sup>

The district courts' arguments do not apply to the families in *Flores*. Such examples and arguments should not be considered when deciding if parents in family detention centers can assert their constitutional right to custody and family unity.

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<sup>203</sup> *Troxel v. Granville*, 530 U.S. 57, 67 (2000); *Santosky v. Kramer*, 455 U.S. 745, 760 (1982).

<sup>204</sup> REP. OF THE DHS ADVISORY COMM. ON FAM. RESIDENTIAL CTRS. (Sept. 30, 2016), <https://www.ice.gov/sites/default/files/documents/Report/2016/ACFRC-sc-16093.pdf>.

<sup>205</sup> *Id.*

<sup>206</sup> *Flores v. Lynch*, 828 F.3d 898, 903 (9th Cir. 2016).

<sup>207</sup> REP. OF THE DHS ADVISORY COMM. ON FAM. RESIDENTIAL CTRS. (Sept. 30, 2016), <https://www.ice.gov/sites/default/files/documents/Report/2016/ACFRC-sc-16093.pdf>.

<sup>208</sup> *Id.*

<sup>209</sup> This Note's argument does not encompass parents that are found to be a flight risk or a danger to the community.

### 3. *Separating Families is a Liberty Violation*

The relationship between a parent and child is constitutionally protected and a fundamental liberty interest.<sup>210</sup> A parent's immigration detention should not cause his or her constitutional protections to be stripped away. A parent, whether in the United States legally or not, is afforded protection under the U.S. Constitution and that protection should include the right to raise his or her child and keep the family unit intact.<sup>211</sup>

First, in determining if the separation of family members in detention centers is constitutional, the standard the courts should apply is the "best interest of the child" standard.<sup>212</sup> The "best interest of the child" standard is recognized nationally, and although the Supreme Court held it is not the constitutional standard, all 50 states, the District of Columbia, and the U.S. territories, have statutes that require a "child's best interests" be considered whenever certain decisions are made concerning a child's custody and it is the standard that is applied in state court proceedings.<sup>213</sup> It is in the "best interest of the child" that a child being detained with his or her parent, also be released with his or her parent.<sup>214</sup> The Supreme Court already held in the original *Reno v. Flores* litigation that release of a child to another family member or "responsible adult" is not a fundamental liberty interest, but being released to a parent is a recognized right.<sup>215</sup>

Additionally, a presumption exists that "fit" parents act in the best interests of their child.<sup>216</sup> Currently, these are parents and children in detention that are waiting for a decision regarding their deportation or asylum claims.<sup>217</sup> It is unlikely a court would find that the parents are a threat to their children, or "unfit" under the common state standards because the parents are currently being detained with their children. Furthermore, parental unfitness must be proven by clear and convincing

<sup>210</sup> *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978).

<sup>211</sup> *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); *Reno v. Flores*, 507 U.S. 292, 301-02 (1993).

<sup>212</sup> REP. OF THE DHS ADVISORY COMM. ON FAM. RESIDENTIAL CTRS. (Sept. 30, 2016), <https://www.ice.gov/sites/default/files/documents/Report/2016/ACFRC-sc-16093.pdf>.

<sup>213</sup> U.S. Dep't of Health and Hum. Servs., *Determining the Best Interest of the Child*, CHILD. BUREAU, [https://www.childwelfare.gov/pubPDFs/best\\_interest.pdf#page=2&view=Best%20interests%20definition](https://www.childwelfare.gov/pubPDFs/best_interest.pdf#page=2&view=Best%20interests%20definition) (last updated March 2016).

<sup>214</sup> REP. OF THE DHS ADVISORY COMM. ON FAM. RESIDENTIAL CTRS. (Sept. 30, 2016), <https://www.ice.gov/sites/default/files/documents/Report/2016/ACFRC-sc-16093.pdf>.

<sup>215</sup> *Flores*, 507 U.S. at 294.

<sup>216</sup> *Troxel v. Granville*, 530 U.S. 57, 67 (2000).

<sup>217</sup> REP. OF THE DHS ADVISORY COMM. ON FAM. RESIDENTIAL CTRS. (Sept. 30, 2016), <https://www.ice.gov/sites/default/files/documents/Report/2016/ACFRC-sc-16093.pdf>.

evidence.<sup>218</sup> Since no hearing nor adjudication has occurred, and the parents are detained alongside their children, the government breaking apart the family unit by not releasing the members simultaneously is an infringement on the families' liberty interests.

Second, although in some instances the Supreme Court has recognized that the government can limit constitutional freedoms, those instances are inapposite to the families being detained in this case. Families in detention centers have not had any adjudication occur, thus, the families' constitutional protections cannot simply be revoked because they are awaiting their pending immigration hearings. Additionally, detention is constitutional when an individual is awaiting deportation.<sup>219</sup> However, it is not constitutional to infringe on the parents' right to custody simply because the government chooses to keep the parent detained pending an immigration decision. In all of the above-mentioned scenarios, the courts did not recognize the parents' loss of their fundamental rights as unconstitutional because a legally recognized decision, such as being in prison for violating a criminal law, had taken place.<sup>220</sup>

The government has the right to detain the parents and children, however, the constitutional violation occurs when the government breaks up the family unit to keep the parent detained. The government cannot break up a family simply because it has the parent and child detained together. The Ninth Circuit's holding requires the government to release *all* juveniles, including those in family detention centers, as quickly as possible under the terms of the Settlement.<sup>221</sup> If the government is not releasing children as quickly as possible, it is in breach of the Settlement.<sup>222</sup>

Current research and data indicate that most families in family detention centers are seeking and are likely to be found eligible for asylum.<sup>223</sup> Such families are being detained while awaiting that determination, which means the family could ultimately stay in the United States if their fear is found credible and would not be deported.<sup>224</sup> Nothing has been decided, and no other form of adjudication has occurred, other than the family being placed in detention for being in the country illegally, which is not a federal crime.<sup>225</sup> Since a judgment has

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<sup>218</sup> *Troxel*, 530 U.S. at 67; *Santosky v. Kramer*, 455 U.S. 745, 774, 759, 769 (1982).

<sup>219</sup> *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).

<sup>220</sup> *Overton v. Bazzetta*, 539 U.S. 126, 131 (2003).

<sup>221</sup> *Flores v. Lynch*, 828 F.3d 898, 903 (9th Cir. 2016).

<sup>222</sup> *Id.*

<sup>223</sup> REP. OF THE DHS ADVISORY COMM. ON FAM. RESIDENTIAL CTRS. (Sept. 30, 2016), <https://www.ice.gov/sites/default/files/documents/Report/2016/ACFRC-sc-16093.pdf>.

<sup>224</sup> *Id.*

<sup>225</sup> *R.I.L.-R v. Johnson*, 80 F. Supp. 3d 164, 171 (D.D.C. 2015).

not been entered, the government severing the parents' fundamental liberty interest in caring for and raising their child is unconstitutional if less restrictive means are available.

Therefore, the government releasing children and detaining parents deprives parents of their fundamental right to raise and retain custody of their children. As custody and family unity are established fundamental rights, the courts should apply the strict scrutiny test.<sup>226</sup>

### C. INFRINGEMENT BY THE GOVERNMENT

In considering whether a violation of a right has occurred, the Supreme Court considers "the directness and substantiality of the interference."<sup>227</sup> The DHS Committee concluded that the current government detention system manages migrants and their children as if they are pre-trial defendants or convicted inmates.<sup>228</sup> Such behavior "diminishes their self-esteem; impedes their access to the asylum system; negates their status as parent, protector, and provider; undermines family relationships; and contributes to the erosion of their physical, psychological, and social well-being, all of which are contrary to ICE's express commitment to creating a safe place."<sup>229</sup> The DHS Committee included in its 2016 report that "recent evidence suggests that some families are separated and adults detained and placed in expedited removal or reinstatement proceedings while children are sent to the Office of Refugee Resettlement."<sup>230</sup>

Additionally, a statement made in March 2017, by Homeland Security Secretary John Kelly, further supports direct evidence of government infringement.<sup>231</sup> In an attempt to deter illegal immigration from Mexico, Kelly told CNN news that DHS is considering separating children from parents caught crossing the border.<sup>232</sup> Mr. Kelly's proposal would result in the parent being detained, while any accompanying children would either be placed in government care or sent to live with any relatives present in the United States.<sup>233</sup>

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<sup>226</sup> *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

<sup>227</sup> ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW* 938 (4th ed. 2013).

<sup>228</sup> REP. OF THE DHS ADVISORY COMM. ON FAM. RESIDENTIAL CTRS. (Sept. 30, 2016), <https://www.ice.gov/sites/default/files/documents/Report/2016/ACFRC-sc-16093.pdf>.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> Samantha Schmidt, *DHS is Considering Separating Mothers and Children Who Cross the Border Illegally*, WASH. POST (Mar. 7, 2017), [https://www.washingtonpost.com/news/morning-mix/wp/2017/03/07/dhs-is-considering-separating-mothers-and-children-who-cross-the-border-illegally/?utm\\_term=.84c35d460c58](https://www.washingtonpost.com/news/morning-mix/wp/2017/03/07/dhs-is-considering-separating-mothers-and-children-who-cross-the-border-illegally/?utm_term=.84c35d460c58).

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

Keeping parents detained while releasing children infringes on the parents' custody rights because parents would no longer have custody of their children while being detained. The parents could not care for and nurture the children while in detention. The DHS Committee's reported findings and the statements made by Homeland Security Secretary John Kelly supports direct and substantial interference and infringement by the government on the parents' fundamental right to custody of their child. The government not only infringes on the fundamental right of custody when it releases children without their parents, but it would also infringe on that right if it were to separate the families immediately after taking them into custody. The government not releasing families together directly interferes with the fundamental right of custody and family unity.

#### D. GOVERNMENT INFRINGEMENT INTENDED TO ACHIEVE A COMPELLING INTEREST

Since the government is infringing on the parents' fundamental right to custody and family unity, the strict scrutiny test should be applied. Heightened scrutiny applies to government actions when a fundamental right is at stake.<sup>234</sup> Under the strict scrutiny test, if a right is deemed fundamental, the government must justify the infringement by presenting a compelling governmental interest.<sup>235</sup> The Supreme Court has not established or articulated criteria for determining whether a claimed purpose is deemed "compelling."<sup>236</sup> However, the Supreme Court has established that the burden is on the government to persuade the court that a vital interest is served by the action at issue.<sup>237</sup> The Supreme Court has recognized compelling government interests such as winning a war, assuring children receive adequate care, and preventing flight.<sup>238</sup>

The Supreme Court has identified a potential pair of interests that, under certain circumstances, can justify the detention of noncitizens awaiting immigration proceedings.<sup>239</sup> These include "preventing flight and protecting the community from aliens found to be specially dangerous."<sup>240</sup> However, in *Zadvydas*, the Supreme Court held "that because

<sup>234</sup> *Reno v. Flores*, 507 U.S. 292, 301-02 (1993); *see also Plyler v. Doe*, 457 U.S. 202, 216-17 (1982).

<sup>235</sup> ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 938 (4th ed. 2013); *Flores*, 507 U.S. at 301-02.

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*; *see Korematsu v. United States*, 323 U.S. 214 (1944); *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Zadvydas v. Davis*, 533 U.S. 678 (2001).

<sup>239</sup> *R.I.L-R v. Johnson*, 80 F. Supp. 3d 169, 188 (2000).

<sup>240</sup> *Id.*

those potentially legitimate justifications were weak or nonexistent when applied to *indefinite* detention, such detention raised serious constitutional concerns.”<sup>241</sup> Additionally, the District Court for the District of Columbia recently held that the “[i]ncantation of the magic words ‘national security’ without further substantiation is simply not enough to justify significant deprivations of liberty.”<sup>242</sup>

In this case, the government could argue or attempt to persuade the court that its compelling government interest in not releasing parents with their children is a matter of “national security.”<sup>243</sup> Although national security can be a legitimate governmental interest, the government would be required to justify its actions and not rely solely on the words “national security.”<sup>244</sup> The family unit should be released simultaneously unless the government establishes that the parent poses a higher risk to national security than the child. Additionally, the government breaking up a family does not clearly align with protecting the nation’s borders.

It is unlikely the government could demonstrate why keeping parents in detention longer than a child is necessary for “national security,” but even if it were found to be a legitimate compelling interest, a less restrictive means is available that could still provide national security.

#### E. LESS RESTRICTIVE MEANS AVAILABLE

The final step in a Substantial Due Process analysis is to determine if the action is narrowly tailored to achieve the compelling government interest and to determine if any less restrictive alternatives exist.<sup>245</sup> For the government’s action to be constitutional and survive strict scrutiny, it must prove a less restrictive alternative does not exist to achieve its compelling interest.<sup>246</sup>

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<sup>241</sup> *Id.*

<sup>242</sup> *Id.* at 190.

<sup>243</sup> It is not clear what the government would argue as its compelling interest. This Note hypothetically argues the government’s interest would be “national security,” which has been offered in many immigration actions. *See R.I.L.-R*, 80 F. Supp. 3d at 189; *Washington v. Trump*, 847 F. 3d 1151, 1161-1164 (9th Cir. 2017). However, the government could raise other compelling interests that this Note does not address, such as the concern of ensuring appearances at legal proceedings. Regardless of the compelling interest given, less restrictive means exist; thus, it is unlikely the government separating parents and children would be found constitutional for any given reason.

<sup>244</sup> *R.I.L.-R v. Johnson*, 80 F. Supp. 3d 169, 190 (2000). This Note does not argue for the right of release for parents who are considered a flight risk because that is a recognized reason for the government to continue detention. Additionally, if a parent is determined to be dangerous, the parent should not have custody of their child in or out of the family detention center.

<sup>245</sup> ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW* 938 (4th ed. 2013); *Reno v. Flores*, 507 U.S. 292, 301-02 (1993).

<sup>246</sup> REP. OF THE DHS ADVISORY COMM. ON FAM. RESIDENTIAL CTRS. (Sept. 30, 2016), <https://www.ice.gov/sites/default/files/documents/Report/2016/ACFRC-sc-16093.pdf>.

DHS has used various less restrictive alternatives in the past. DHS may release individuals from detention on their own recognizance, parole, bond, or with conditions of supervision.<sup>247</sup> Currently, a probationary condition that is commonly imposed requires the noncitizen to enroll in the Intensive Supervision Appearance Program (“ISAP”).<sup>248</sup> ICE is also piloting a case management-based alternatives-to-detention program for families.<sup>249</sup> Any of these alternatives to detention, *i.e.* released on their own recognizance and or parole,<sup>250</sup> would allow parents to remain with their children and make custody decisions.

Instead of breaking up the family unit, the government can release the parents when the children are released and utilize alternatives in order to protect the nation. These alternatives to breaking families apart should and need to be used to prevent the government’s intrusion on the parents’ fundamental rights. The government not releasing parents and children together does not pass the strict scrutiny test; therefore, the government action is unconstitutional.

### III. CONCLUSION

Since a deportation decision has not yet occurred, clear and convincing evidence as to the parent’s “fitness” has not been presented, and it is in the best interest of the child to remain with his or her parents, the government not releasing parents and children together deprives parents of their fundamental right to raise and have custody of their children. Additionally, the government infringement of separating parents and children is unlikely intended to achieve the compelling interest of “national security,” and less restrictive means exists, such as being released on their own recognizance. Furthermore, the government action is not narrowly tailored to achieve that purpose, therefore the government infringement does not pass strict scrutiny. Thus, the government action of breaking the family unit apart is unconstitutional.

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<sup>247</sup> *Id.*

<sup>248</sup> *Id.* ISAP is a DHS program which requires migrants to wear ankle monitors, have employment verification, curfew checks, and usually requires telephone or in-person check-ins. Jason Fernandes, *Alternatives to Detention and the For-Profit Immigration System*, CTR. FOR AM. PROGRESS (June 9, 2017), <https://www.americanprogress.org/issues/immigration/news/2017/06/09/433975/alternatives-detention-profit-immigration-system/>. The author of this Note does not advocate for the use of ISAP.

<sup>249</sup> REP. OF THE DHS ADVISORY COMM. ON FAM. RESIDENTIAL CTRS. (Sept. 30, 2016), <https://www.ice.gov/sites/default/files/documents/Report/2016/ACFRC-sc-16093.pdf>.

<sup>250</sup> Lazaro Zamora, *What You Need to Know: Immigrant Family Detention*, BIPARTISAN POL’Y CTR. (Aug. 27, 2015), <http://bipartisanpolicy.org/blog/what-you-need-to-know-immigrant-family-detention/>.

While the holding of *Flores* establishes the Settlement does not require the government to release a parent with his or her child, it is unconstitutional for the government to not release parents with their children because it violates the parents' fundamental right to custody over one's biological child and family unity. The holding of *Flores* is significant because it stems from ongoing litigation dating back to the 1980s and its holding continues to affect many people coming to the United States. The cost and number of individuals detained every year is substantial, and when other less costly and more humane alternatives exist, those alternatives should be utilized. Parents can raise the constitutional violation claim if the government continues to release children and keep parents detained. If the government continues to keep children in detention longer than necessary based on the release eligibility of their parents, in order to not break the family unit apart, then the government will be breaching the terms of the Settlement, and the plaintiff class can bring a claim against the government for the breach.

The government has continued to fail to meet the terms in the original Settlement; therefore, it is time for Congress to make clear laws for government agencies to follow regarding families in detention. This Note urges Congress to codify law, like it did for unaccompanied minors with TVPRA, to ensure the constitutional rights afforded to this vulnerable population is recognized and followed. Congress should look to various non-government organizations and its own subcommittee recommendations, to construct and pass legislation regarding children and parents in government immigration proceedings and release parents and children simultaneously to avoid violating individuals' rights protected by the Constitution.

