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The Honorable Dolly Gee
Judge, U.S. District Court, Central District of California
350 West First Street, Suite 4311
Los Angeles, CA 90012-4565

RE: Flores v. Sessions, CV 85-4544-DMG, Letter in the Nature of a Short Brief Amicus Curiae

In its earlier-filed "Ex Parte Application for Limited Relief from the Flores Settlement Agreement" [Dkt. #435], and its subsequent "Notice of Compliance" [Dkt. #447], the government argues that the only way it can avoid separating families, as required by an order in *Ms. L v. U.S. Customs Enforcement*, No. 18-428 (S.D. Cal. June 26, 2018), while at the same time complying with the President's new zero-tolerance policy, is to keep families with children together in detention "during the pendency of immigration proceedings" [Notice at 1]; a process which can take months and therefore appears to be contrary to "the Flores Agreement - as interpreted by this Court and the Ninth Circuit" [Notice at 1].

Their argument that the new policy of detaining families together with their children indefinitely "during the pendency of immigration proceedings" is in "compliance" with the Flores Agreement is based upon a false and deceptive interpretation of the word "necessary." After noting that the "Flores Agreement specifies that a minor should be 'released from its custody without unnecessary delay,'" it asserts that the "court's order in *Ms. L*, which requires that the minor be kept with the parent, makes delay necessary in these circumstances" [Notice at 5, boldface emphasis added].

But delay is not at all "necessary" because the government has many well-tested and easily-scalable programs which would permit it to carry out its new zero-tolerance policy, thereby avoiding which has been termed a "catch and release" program, while at the same time not detaining children with or without their parents. Below are four such programs, and additional ones are noted in the references provided below.

ANKLE BRACELETS - For many years, immigration officials have used ankle bracelets with built-in GPS monitoring to keep track of certain subjects who are required to appear in court. The small units, attached to the ankle and incapable of being removed without detection, keep ICE apprised of the location of each person being monitored, and apparently can even send an alert if he moves beyond a certain range, or otherwise engages in movements which appears suspicious. The cost of this form of electronic monitoring is reportedly less than \$5.00 a day per person, compared with hundreds of dollars a day to physically detain him, and much more if children are also to be detained with him.

CELL PHONE ONE - A second form of electronic surveillance uses a cell phone app called SmartLINK which works by requiring the subject to check in at specified times by cell phone, and permits the government to monitor people without physically detaining them or watching them at all times. To verify the identity of the person checking in via a cell phone, the app can use a photo check-in picture [photo ID system] as a biometric measure.

CELL PHONE TWO - Still another ICE cell phone check-in system uses voice recognition software, which reportedly is also highly accurate. Contractors provide telephonic monitoring for less than 20 cents a day, according to the Department of Homeland Security.

At least up until recently, the majority of undocumented immigrants detained at the border would be enrolled in Immigration and Customs Enforcement's "ALTERNATIVE TO DETENTION" program which utilizes these various types of electronic devices to monitor subjects who are required to report for a trial. This tech alternatives program works well, and reportedly has a 99.8% compliance rate, with virtually all of those being monitored showing up in court to receive justice. As of mid February, over 77,000 people were supervised under this program.

SOCIAL WORKERS - Still another method of insuring justice while avoiding physical incarceration of persons required to appear at a trial is known as the "FAMILY CASE MANAGEMENT" program [FCMP], a program originally developed under the Obama administration in 2016, only to be abandoned by the Trump administration in 2017.

Under this program, immigrants were paired with social workers who helped insure that they would show up for their court dates. This program was almost as successful as the technical monitoring programs, with only about 2% of the immigrants failing to show up in court on time. However, its cost was slightly higher: \$36 a day per person.

In summary then, it is not at all "necessary" (in the words of the Flores Agreement) to detain entire families indefinitely "during the pendency of immigration proceedings" in order to comply with the Ms. L order while at the same time enforcing a new zero-tolerance policy as the President has directed. Any such argument is false and deceptive.

Instead, at least for immigrants whose only offense is entering the country illegally - and excluding those who smuggle drugs or people, those with criminal records or who otherwise present an unusual risk, etc. - permitting them to enter ICE's already established "Alternative to Detention," "Family Case Management," or other non-detention supervision programs would appear to be the best - if not the only - way out of a corner into which the President appears to have painted himself.

For all these reasons, the undersigned respectfully suggests that the Court not agree to the government's request that it modify the Flores Agreement simply so that it can detain entire families together indefinitely, nor acquiesce passively in the governments alleged "compliance" with the existing Flores Agreement in accordance with its just-filed notice of compliance.

While the President may have the authority to change long standing policy and bring criminal charges simply for crossing the border illegally, that does not mean that he necessarily has the legal authority to detain all such people - including any minor children - who have committed no other crime indefinitely "during the pendency of immigration proceedings." Indeed, doing so may even raise serious questions under international law, including under treaties to which the U.S. is a party.

Thus, almost overlooked in discussions of this new indefinite incarceration policy is that it might violate not only international law, but also specific international treaties which can be enforced in U.S. courts. Of particular interest are Article 14 of the Universal Declaration of Human Rights, and especially the Refugee Convention and Protocol to which the U.S. is a party.

Other treaties such as the International Covenant on Civil and Political Rights (ICCPR), which the U.S. has also ratified, prohibit arbitrary detention and the deprivation of liberty. The ICCPR holds that detention should only be used with an individualized determination of a need to detain, which should

then be periodically reviewed by an independent court. A blanket detention policy for all illegal crossings apparently violates this principle.

See, e.g., GLOBEPOST - Trump's Zero Tolerance Could Undermine International Rule of Law ***
In violating the right to asylum, prohibitions on detention, and other fundamental principles of international human rights law, US immigration policies risk undermining a rules-based system of international order. [<https://www.theglobepost.com/2018/06/25/us-trump-migration/>]

There are several well-tested programs which ICE itself has shown to be very effective and efficient alternatives to detaining entire families together on military bases or anywhere else, and the government should, at the very least, be required to explain why, in light of its own reports, including the two cited below, none of these programs can be employed in the instant situation so that indefinite confinement of families is "necessary."

SEVERAL REFERENCES:

■ CBS NEWS - In Border Controversy, U.s. Ignores Tech Alternative to Detention Centers [<https://cbsn.ws/2tJMsvv>], excerpts :

"The U.S. government may have a more humane and cost-effective tech alternative to detaining families at the border. But it isn't being offered to the thousands of immigrant families that have been forcibly split over the past two months.

The majority of undocumented immigrants detained by border patrol agents are enrolled in Immigration and Customs Enforcement's "Alternative to Detention" program, which uses technology to keep track of people instead of physically detaining them.

Since the pilot program kicked off in 2004, these techniques allowed for tracking through ankle bracelets, phone check-ins with voice recognition software and a mobile app. It meant that families could stay together rather than in a detention center.

The technologies offer an alternative to the "zero tolerance" policy that has separated more than 2,300 children from adults at the U.S. border in just five weeks. The policy has touched off a massive public backlash against ICE, the Department of Homeland Security and President Donald Trump.

The tech alternatives program allows ICE to monitor immigrants without locking them up. It has a low rate of failure. An ICE spokesman said the program had a 99.8 percent compliance rate, with the majority of immigration hearings happening without a hitch.

As of Feb. 16, ICE had 77,417 people enrolled in electronics supervision, the spokesman said, while roughly 44,000 people were physically detained as of June 9. The electronics supervision continues to grow, with 26,000 more participants in 2018 than the year before.

The monitoring program on mobile devices works through an app called SmartLINK. The app is made by Behavioral Interventions, a subsidiary of private prison company GEO Group.

[In addition to the SmartLINK program], ICE can also use ankle bracelets with GPS monitoring, as well as call check-ins using voice recognition software, to catch fraudsters. The ICE spokesman said telephonic reporting was the most common method for electronic surveillance.

The Department of Homeland Security's Inspector General reported in February 2015 that contractors charge 17 cents a day for telephonic monitoring and \$4.41 for GPS monitoring. The U.S. Government Accountability Office reported in 2014 that the average cost per day for electronic surveillance was \$85 a person.

In comparison, ICE's detention centers cost \$133.99 a day per bed, according to its 2018 budget. The budget requested for a \$1.2 billion increase for detention beds, while only asking for \$57.4 million for its Alternatives to Detention program." [emphasis added]

■ VOX - Trump Doesn't Need to Put Families in Detention Centers to Enforce His Immigration Policy. There Are Better Options *** Community supervision and electronic monitoring are two alternatives that the government has used instead. [<https://bit.ly/2K27LW3>], excerpts:

"The way the administration has framed the issue, the situation on the border leaves them with only two options to enforce its "zero tolerance" policy: either separate parents from their children (because kids can't stay in federal prison while their parents are criminally prosecuted); or keep the family together in detention — possibly indefinitely — while the parents' case makes its way through the court system. But these are hardly the only options to enforce the president's immigration policy.

Under past administrations, DHS has usually chosen to lock up immigrants arrested at the border — but the agency has also created several effective alternatives to detention. The White House could prioritize these programs instead of trying to find more places to lock up families.

One alternative is to release immigrants under community supervision, in which a non-profit group or government contractor provides families with social workers, who help them find housing and transportation, and who make sure they attend court hearings and comply with the law.

Another alternative is to release immigrants with electronic monitoring, which generally involves placing GPS ankle monitors on the parents and assigning them case workers.

Up until recently, Immigration and Customs Enforcement (ICE) was running two such programs at the national level: the INTENSIVE SUPERVISION ALTERNATIVE PROGRAM (ISAP), which involves electronic monitoring, and the less restrictive FAMILY CASE MANAGEMENT PROGRAM (FCMP), which relied on community monitoring. The methods used in these programs are available to DHS, and are much cheaper than traditional detention — but the Trump administration is choosing to keep families behind bars instead.

To Trump, these programs represent the "catch-and-release" immigration policy he despises. However, unlike the practice of merely releasing an immigrant on bond or with a notice to appear in court, which happens in some minor immigration cases, these alternatives actually have strict supervision rules — people in these programs are hardly being "released."

The Family Case Management Program was launched by the Department of Homeland Security in 2015, in response to the waves of mothers and children seeking asylum from gang violence. Instead of keeping children in detention centers with their parents, families in certain cities were released and monitored by social workers, who helped them find lawyers, housing, and transportation, and made sure they attended their court hearings.

It seemed to work pretty well, according to ICE, though officers never had more than 1,600 people enrolled in the program during the two years it existed (compared to more than 350,000 immigrants who were held in ICE detention centers just in 2016).

The contractor that ran the program said that 99 percent of participants "successfully attended their court appearances and ICE check-ins." That included the 15 families who were ultimately deported.

In its budget request to Congress in May 2017, the Department of Homeland Security said alternative programs (in general) were effective, and led to "strong alien cooperation" and compliance with immigration proceedings. It asked for an extra \$57 million to expand electronic monitoring and community supervision programs to 26,000 more detainees.

Congress ended up giving \$4.1 billion to ICE for immigration detention and removal operations, which the agency can spend on detention centers or alternative programs. The agency decided to eliminate the Family Case Management Program, and placed 69,000 immigrants into the ISAP electronic monitoring program.

In its budget request for fiscal year 2019, the agency said it's necessary to continue expanding alternative programs with the limited available bed space in ICE detention centers." [emphasis added]

■ NATIONAL IMMIGRANT JUSTICE CENTER - The Real Alternatives to Detention [<https://bit.ly/2st8HqS>], excerpts:

"ATDs should be used as true alternatives to incarceration, not as a way to expand the population of individuals under government supervision and control. Here's why:

ATDs cost far less than detention, even if one is enrolled in ATD longer than in detention. The Department of Homeland Security (DHS) estimated in its Congressional Budget Justification for fiscal year (FY) 2018 that it costs the taxpayers \$133.99 per day to hold an adult immigrant in detention and \$319.37 for an individual in family detention. In FY 2018, DHS estimated that the average cost per ATD participant would be \$4.50 per day. Using its own calculations of the cost of detention and ATD, a 2014 Government Accountability Office (GAO) report found that the daily rate of ATD was less than 7% of that of detention. Although participants may be enrolled on ATD for a longer period of time due to court delays when they are not detained, GAO found that an individual would have had to be on ATD for 1,229 days before time on ATD and time in detention cost the same amount.

ATDs are extremely effective at ensuring compliance. ICE's current ATD program and several community supported pilot programs have shown high rates of compliance with immigration check-ins, hearings and - if ordered - removal. Over 95% of those on "full-service" ATDs (which include case management) are found to appear for their final hearings. Data from Contract Year 2013 from BI, Inc., the private contractor who operates some of the government's ATD programming, showed a 99.6% appearance rate at immigration court hearings for those enrolled in its "Full Service" program and a 79.4% compliance rates with removal orders for the same population. ICE's Family Case Management Program (FCMP), in which families received caseworker support without having to wear an ankle monitor, indicated compliance rates of 99% with court appearances, ICE appointments, and reported high compliance

Alternatives are widely used in the pre-trial criminal justice context. Alternatives to incarceration in the context of the criminal justice system have been broadly endorsed by organizations across the political spectrum, including the American Jail Association, American Probation and Parole Association, American Bar Association, Association of Prosecuting Attorneys, Heritage Foundation, International Association of Chiefs of Police, National Conference of Chief Justices, National Sheriffs' Association, Pretrial Justice Institute, and the Texas Public Policy Foundation.

Similar pilots have also shown excellent results at great cost-saving to the U.S. taxpayer, as follows: [showing additional programs with costs and and appearance rates]" [footnotes omitted and emphasis added]

■ OFFICE OF INSPECTOR GENERAL - U.S. Immigration and Customs Enforcement's Alternatives to Detention (Revised) [<https://bit.ly/21w0lwL>], excerpts:

"According to U.S. Immigration and Customs Enforcement (ICE), the Intensive Supervision Appearance Program is effective because, using its performance metrics, few program participants abscond." [emphasis added]

■ GAO - ALTERNATIVES TO DETENTION; Improved Data Collection and Analyses Needed to Better Assess Program Effectiveness [<https://bit.ly/2metqfB>]

Yours truly,

/s/

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