

November 6, 2018

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U.S. Immigration and Customs Enforcement
Department of Homeland Security
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Via Federal e-Rulemaking Portal: <http://www.regulations.gov>

RE: DHS Docket No. ICEB-2018-0002

To Whom It May Concern:

The Asylum Seeker Advocacy Project (“ASAP”) at the Urban Justice Center appreciates the opportunity to comment on the Notice of Proposed Rulemaking entitled “Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children” published on September 8, 2018 (the “Notice”) by the U.S. Department of Homeland Security (“DHS”) and the U.S. Department of Health and Human Services (“HHS”) (“the Departments”).

ASAP connects asylum-seeking families to community support and emergency legal aid in communities all over the United States. ASAP has represented dozens of asylum-seeking families both in family detention and after their release. ASAP is in contact with over three thousand mothers who are seeking asylum in the United States, the majority of whom are from the Northern Triangle of Central America and were previously detained in family detention centers. Moreover, ASAP is in touch with over 100 formerly separated families, who have since been reunited, and who face legal, psychological, and emotional obstacles as a result of their separation. Based on this experience, ASAP opposes the proposed regulations in their entirety. ASAP further challenges the Departments’ analyses contained in the Notice. Family detention is traumatic and unnecessary, and it prevents families from receiving the legal representation necessary to fully present their claims for relief.

A. The Departments Relied on Inaccurate and Constitutionally Impermissible Justifications for the Proposed Regulations

In the Notice, the Departments argued increased family detention would disincentivize migration from Central America. That is incorrect: neither family separation nor family detention has previously disincentivized Central American migrants from seeking asylum at the U.S.-Mexico border.¹ Nevertheless, it is noteworthy that the Departments ignored the well-documented

¹ Tal Kopan, *Exclusive: Trump admin thought family separations would deter immigrants. They haven’t*, CNN, June 18, 2018, available at <https://www.cnn.com/2018/06/18/politics/family-separation-deterrence-dhs/index.html>; Tom K. Wong, *Do Family Separation and Detention Deter Immigration?*, Center for American Progress, available at: <https://cdn.americanprogress.org/content/uploads/2018/07/23131244/FamilySeparation-brief1.pdf>.

violence families face in their home countries, indicating the Departments aimed to promulgate this rule with the constitutionally impermissible intention of deterring future asylum seekers.²

First, the Departments utterly failed to acknowledge the push factors causing individuals from Central America to seek asylum or refugee status around the world. In the Notice, the Departments instead suggested that there is a link between shifts in U.S. detention policy and the rate of migration from Central America. Yet the Departments failed to mention the high rates of homicide and gender-based violence in Central America. In 2015, the United Nations High Commissioner for Refugees (“UNHCR”) noted that “[a] surging tide of violence sweeping across El Salvador, Guatemala, and Honduras forces thousands of women, men, and children to leave their homes every month. This region of Central America, known as the Northern Triangle . . . is one of the most dangerous places on earth.”³ In 2018, UNCHR noted “a significant increase in the number of people fleeing violence and persecution in the North of Central America.”⁴ Furthermore, worldwide applications for refugee status from the North of Central America have increased in 2018.⁵ The Notice demonstrated the Departments’ severe disregard for the Central American refugee crisis and the safety of Central American asylum seekers in the United States.

Second, the Departments used a constitutionally impermissible justification for expanding the deprivation of liberty of asylum-seeking families: deterrence. It is impermissible under the Due Process Clause of the Fifth Amendment to use detention policies to deter families and children fleeing violence from seeking asylum in the United States⁶, and that is exactly what the Departments aim to do with the proposed regulations.

In February 2015, a federal district court in Washington, D.C. issued a preliminary injunction barring DHS from detaining asylum seekers with the purpose of deterring future Central American immigration to the United States.⁷ The court flatly rejected the U.S. government’s argument that “one particular individual may be civilly detained for the sake of sending a message of deterrence to other Central American individuals who may be considering immigration.”⁸ The court concluded such an argument was “out of line with analogous Supreme Court decisions” that held general deterrence justification in the context of civil commitment was impermissible.⁹ The court found that, even if, for the sake of argument, deterrence was a legitimate rationale, “a general deterrence rationale seems less applicable where . . . neither those being detained nor those being deterred are certain wrongdoers, but rather individuals who may have legitimate claims to asylum

² *RILR v. Johnson*, 80 F. Supp. 3d 164 (D.D.C. 2015).

³ UNCHR, *Women on the Run* (Oct. 2015), available at <http://www.unhcr.org/en-us/publications/operations/5630f24c6/women-run.html>

⁴ UNHCR, *UNHCR alarmed by sharp rise in forced displacement in North of Central America* (May 22, 2018), available at <http://www.unhcr.org/en-us/news/briefing/2018/5/5b03d89c4/unhcr-alarmed-sharp-rise-forced-displacement-north-central-america.html>.

⁵ *Id.*

⁶ *RILR*, 80 F. Supp. 3d at 188.

⁷ *Id.* at 164.

⁸ *Id.* at 188-89.

⁹ *Id.* at 189.

in this country.”¹⁰ As Judge Boasberg noted, “[i]ncantation of the magic words ‘national security’ without further substantiation is simply not enough to justify significant deprivations of liberty.”¹¹

Under UNHCR Detention Guidelines, there is a general presumption against detaining asylum seekers, noting the use of detention in order to deter future asylum seekers from entering the country is “generally unlawful” and “inconsistent with international norms.”¹² Furthermore, the Refugee Convention permits only narrow exceptions to the presumption against immigration detention.¹³ “Thus, detention of asylum seekers, based solely on their unauthorized entry or to deter unauthorized entry by others, violates international law.”¹⁴

B. The Departments Should Rescind the Notice because they Failed to Adequately Analyze Costs

The Departments’ cost-benefit analysis in the Notice was incomplete because it (1) failed to provide estimated financial costs associated with the proposed regulations, and (2) failed to consider the harm caused by family detention. The Departments should conduct a full analysis of costs before promulgating regulations that could result in the unnecessary, long-term detention of children and families.

The Notice failed to include even a minimal analysis of estimated costs associated with prolonged family detention. In fact, the Notice included this statement: “DHS is unsure how many individuals will be detained at [Family Residential Centers (“FRCs”)] after this rule is effective or for how much longer individuals may be detained because there are so many other variables to consider. Therefore, DHS is unable to provide a quantified estimate of any increased FRC costs.”¹⁵ However, Immigration and Customs Enforcement (“ICE”) included the average daily cost of a

¹⁰ *Id.*

¹¹ *Id.* at 190.

¹² UNHCR, *Detention Guidelines: Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum Seekers and Alternatives to Detention*, Introduction ¶ 3 (2012) [hereinafter UNHCR Detention Guidelines], available at: <http://www.unhcr.org/505b10ee9.html>; *id.* at 4.1.4 ¶ 32.

¹³ Article 9 of the Refugee Convention provides, “Nothing in this Convention shall prevent a Contracting State, in time of war or other grave and exceptional circumstances, from taking provisionally measures which it considers to be essential to the national security in the case of a particular person, pending a determination by the Contracting State that that person is in fact a refugee and that the continuance of such measures is necessary in his case in the interests of national security.” Convention Relating to the Status of Refugees (Refugee Convention), art. 9, opened for signature July 28, 1951, 189 U.N.T.S. 150.

¹⁴ Allard K. Lowenstein International Human Rights Clinic at Yale Law School, *U.S. Detention and Removal of Asylum Seekers: An International Human Rights Law Analysis* (June 20, 2016), available at: https://law.yale.edu/system/files/area/center/schell/human_rights_first_-_immigration_detention_-_final_-_20160620_for_publication.pdf.

¹⁵ Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 83 FR 45486 (Sep. 7, 2018), at 45488.

“family bed” in its FY 2018 Budget: \$319.37.¹⁶ The Departments also have data on the number of families (measured by “family unit”) apprehended crossing the Southwest Border in FY 2018, as included in the Notice.¹⁷ The Departments could seek additional data on the adjudication of asylum claims from the Department of Justice or from an independent, nonpartisan source, like the Transactional Records Access Clearinghouse (“TRAC”) at Syracuse University. TRAC has an Immigration Court Backlog Tool, which estimates that immigration court cases currently have an average wait time of 710 days before adjudication.¹⁸ In sum, the data available to the Departments is sufficient to provide cost estimates. And without analysis of estimated costs based on available data, neither the Departments nor the public can properly assess the proposed regulations.

Furthermore, DHS should implement the United States Government Accountability Office (“GAO”) guidelines for reliable cost estimates. GAO previously identified errors and inconsistencies in ICE budgets and estimated costs, and made recommendations for improvements.¹⁹ Until DHS improves its process for estimating costs accordingly, DHS should not promulgate regulations, like this one, that would result in the expansion of its existing programs.

Moreover, the Departments made no effort to compare the costs of prolonged family detention with viable alternatives to detention. Some of the benefits of family detention mentioned by the Departments, including family unity and appearance in immigration court, are also served by placing families in Alternatives to Detention (“ATD”) programs. ATD programs have proven to be effective and less costly than immigration detention²⁰, yet the Departments did not mention them in the Notice.

Finally, the Departments failed to weigh the harm of the proposed regulations on children and asylum seekers. The Flores Settlement Agreement (“FSA”) plays an important role in protecting immigrant children from harm. The American Academy of Pediatrics (“AAP”) has found “no evidence indicating that any time in detention is safe for children.”²¹ The AAP’s stated position is that children accompanied by a parent “should never be detained, nor should they be separated from a parent, unless a competent family court makes that determination.”²² In the

¹⁶ Department of Homeland Security, Immigration and Customs Enforcement Budget Overview (FY 2018).

¹⁷ Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 83 FR 45486, at 45494.

¹⁸ TRAC, Immigration Court Backlog Tool, available at http://trac.syr.edu/phptools/immigration/court_backlog/.

¹⁹ GAO, *Immigration Detention: Opportunities Exist to Improve Cost Estimates* (Apr. 2018), available at <https://www.gao.gov/assets/700/691330.pdf>

²⁰ Lutheran Immigration and Refugee Service, National Immigrant Justice Center, Women’s Refugee Commission & American Immigration Lawyers Association, *The Real Alternatives to Family Detention*, available at <https://www.womensrefugeecommission.org/images/zdocs/Real-Alternatives-to-Family-Detention.pdf>.

²¹ American Academy of Pediatrics, *Detention of Immigrant Children*, Pediatrics Volume 139, number 4 (Apr. 2017) at 6.

²² *Id.* at 7.

Notice, the Departments failed to contend with the harm to children caused by prolonged detention in immigration facilities, thereby minimizing the human costs of the proposed regulations.

C. The Departments Should Instead Consider Humane Alternatives to Detention to Prevent *In Absentia* Removal Orders and Ensure the Proper Adjudication of Asylum Claims

The Departments should abandon these proposed regulations and instead promote access to counsel and ATD programs, like family case management. In the Notice, the Departments expressed concern with rates of appearance in immigration court, stating “the reality is that a significant number of aliens who are not in detention either fail to appear at the required proceedings or never actually seek asylum relief, thus remaining illegally in the United States.” However, asylum seekers often miss court hearings because they lack basic information about the process and DHS does not provide adequate information to them upon release from detention or during ICE check-ins.²³ Accordingly, the Departments’ stated concern with *in absentia* removal orders does not take into account the failure of the Executive Office of Immigration Review (“EOIR”) and DHS to make asylum seekers aware of their upcoming immigration court hearings.

If the Departments are concerned with *in absentia* removal orders in particular, ASAP and the Catholic Legal Immigration Network, Inc. (CLINIC) made multiple recommendations for DHS in our 2016 report, “Denied a Day in Court: The Government’s Use of In Absentia Removal Orders Against Families Seeking Asylum.”²⁴ We urge the Departments to consider and implement those recommendations before resorting to the harmful detention of families and children. We explain our findings below and enclose the entire report as an attachment to this Comment.

ASAP’s work to reopen the cases of asylum seekers who received a deportation order for failure to appear in immigration court (called an *in absentia* removal order), and our investigation of *in absentia* removal orders for families seeking asylum, provides a more complete picture of why so many asylum seekers fail to appear, despite having strong claims to asylum under U.S. law.²⁵ In November 2016, ASAP and CLINIC filed a Freedom of Information Act (“FOIA”) request with EOIR to obtain statistics regarding cases for all women with children detained/apprehended at border, including: (a) completed cases (i.e., cases adjudicated and closed by an immigration judge); (b) removal orders; (c) *in absentia* removal orders; and (d) rates of

²³ Asylum Seeker Advocacy Project at the Urban Justice Center and the Catholic Legal Immigration Network, Inc., *Denied a Day in Court: The Government’s Use of In Absentia Removal Orders Against Families Seeking Asylum*, available at: <https://asylumadvocacy.org/wp-content/uploads/2018/04/Denied-a-Day-in-Court.pdf> [hereinafter *In Absentia* Report].

²⁴ *Id.* at 31-33.

²⁵ *Id.*; see also INA § 240(b)(5), 8 U.S.C. § 1229a(b)(5) (West 2017) (“Any alien who, after written notice . . . has been provided to the alien or the alien's counsel of record, does not attend a proceeding under this section, shall be ordered removed in absentia if the Service establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable . . .”).

representation.²⁶ In February 2017, EOIR provided the requested data for the time period from July 18, 2014 to November 28, 2016, covering 29,808 completed cases.²⁷

During this period of slightly more than two years, immigration judges ordered 83 percent of families removed—a total of 24,862 families.²⁸ Of these 24,862 families, 21,041 of them—or 85 percent—were ordered removed *in absentia*. *In absentia* removal orders represented 71 percent of all completed cases— meaning those in which a family won asylum or another form of relief or was ordered removed. Thus, immigration judges ordered nearly three-fourths of all families removed who were in immigration proceedings during this time, despite the fact that most of these families never went to court to present their claims for asylum or other forms of immigration relief.

It is important to note that asylum-seeking families have little incentive to skip the master calendar hearing as this is merely a scheduling hearing during which immigration judges will generally not order removal unless they fail to appear. From July 2014 through September 2016, U.S. Citizenship and Immigration Services (“USCIS”) found a positive credible fear determination for 45,393 or 88 percent of the 51,977 credible fear interviews it conducted at all of its family detention facilities.²⁹ Through these positive credible fear determinations, families had already successfully begun the process to obtain long-term relief in the form of asylum.

In 2015, ASAP and CLINIC encountered many families who had missed their hearings for several reasons, mostly outside of the families’ control. Subsequently, ASAP and CLINIC undertook the representation of these families, the vast majority of whom had been previously unable to retain representation. From 2015 to 2017, ASAP and CLINIC represented 22 families, comprised of 46 clients with *in absentia* orders. Of these, ASAP and CLINIC successfully challenged the *in absentia* orders for 44 clients or 96 percent of cases. Through the representation of these individuals, ASAP and CLINIC identified several common reasons families fail to attend immigration court and receive *in absentia* orders, including insufficient notice, government errors and omissions on the part of DHS officials.

In terms of missing notices, families faced situations where notices never arrived or were not received in time. Incorrect addresses contributed to this problem. Upon release from detention, one must provide DHS an address where one intends to reside. When one moves, one is also expected to update one’s address with up to five different entities—the immigration court, USCIS, ICE OCC, ICE ERO, and ISAP—using three different mediums—Form EOIR-33, Form AR-11, and oral or written notice. The government’s failure to communicate this requirement clearly and in a timely manner contributed to a significant number of notices that did not reach the intended recipient.

²⁶ *In Absentia* Report at 12-13.

²⁷ *Id.* at 13.

²⁸ *Id.* at 14.

²⁹ USCIS, *USCIS Asylum Division: Family Facilities Credible Fear* (May 16, 2016), available at https://www.uscis.gov/sites/default/files/USCIS/Outreach/Upcoming%20National%20Engagements/PED_CredibleFearReasonableFearFamilyFacilitiesFY14_16.pdf.

Other clients received written notices too late or received written notices with incorrect hearing dates. Furthermore, when ICE officers had the opportunity to correct mistaken assumptions or ensure sufficient notice had been received, they failed to do so.

ASAP includes the below stories from the 2016 report as a demonstration of the circumstances beyond asylum seekers' control – but within the government's control – that often lead to *in absentia* removal orders. The Departments should consider the flaws in the system as it exists, as well as ASAP and CLINIC's recommendations in the enclosed report, before using *in absentia* removal orders to justify the long-term detention of asylum seekers.

Insufficient Notice

- **LAURA'S STORY:** Laura and her father were members of the Christian Democrat Party in Honduras and sought to improve their local community by running for political office. In 2012, Laura's father was murdered during his campaign for mayor because of his political beliefs. Shortly thereafter, Laura began to receive death threats. Wanting to protect herself and her 3-year-old daughter, Laura made the difficult decision to withdraw from civic service and move to a new town in Honduras. The men who had been threatening Laura followed her and her daughter to their new home and continued their threats. Believing that the men would follow her anywhere in Honduras, Laura fled to the United States and sought asylum in August 2015. When ICE released Laura and her daughter from detention, Laura provided her uncle's address as the residence where she planned to live. While awaiting her hearing notice, Laura moved, changed her address with ICE, and continued to attend regular check-ins with ICE. No notice regarding her immigration court hearing ever arrived at her uncle's home. But in late 2015, Laura received a letter at her uncle's address informing her that a judge had ordered her removed *in absentia* in November 2015. In May 2016, ASAP and CLINIC successfully challenged Laura and her daughter's *in absentia* order, and in April 2017, Laura and her daughter won asylum.
- **SOFIA'S STORY:** Sofia, a Honduran citizen, was raped by one of her neighbors in early 2015 and later threatened by another man affiliated with one of the transnational gangs working in Honduras. As part of an escalating campaign of violence and in response to Sofia's Catholic faith, gang members attempted to murder Sofia's mother and son, threatened Sofia's family with violence, and intimidated the family by killing Sofia's dog. Fearing for her life, Sofia made the difficult decision to leave Honduras and seek asylum in the United States in April 2015. Upon release from detention, Sofia provided ICE the address where the government could send her notices—her cousin's apartment—where she would be staying. Sofia and her family diligently checked the mail for any notices regarding her hearing, but no notice ever arrived. Sofia did, however, eventually receive a letter instructing her to check in with ICE, a meeting where ICE revealed she missed her hearing in August 2015 where the immigration judge had ordered her removed *in absentia*. In February 2016, ASAP and CLINIC successfully challenged Sofia and her son's *in absentia* orders. Their asylum case is currently pending.

Government Errors

- PAULA’S STORY:** Three gang members murdered Paula’s husband in early 2015 in Guatemala. Shortly thereafter, the gang members began to target the rest of the family, including Paula and her 10-year-old son, by making multiple death threats. Believing the threats would soon turn into action, Paula left Guatemala with her two children and sought asylum in the United States in February 2015. Upon release from detention, Paula provided the address where the government could send her notices. She checked her mail on a regular basis and one day in late July, she opened her mailbox to discover two pieces of mail. The first was a notice for her immigration hearing with a hearing date of July 23, 2015, which had already passed. The second piece of mail was an *in absentia* removal order for her and her son. In January 2016, ASAP and CLINIC successfully challenged Paula and her two sons’ *in absentia* orders. Their asylum case is currently pending.
- ADRIANA’S STORY:** Adriana, a Honduran citizen, became pregnant by a married man who abandoned her shortly thereafter. Furious that she had chosen to carry the pregnancy to term, the child’s father began to threaten and harass Adriana, while the wife attempted to poison Adriana’s son and continually threatened the boy’s life. As the father was Adriana’s stepfather’s brother, he and his wife were able to easily locate and threaten Adriana. Adriana fled Honduras with her 7-year-old son and arrived in the United States in April 2015. ICE released Adriana and her son, and Adriana provided the government with her address in Phoenix. On June 10, 2015, Adriana received her first notice indicating that her hearing was in July 2016. Later, Adriana decided to move to Houston for more stable housing and informed ICE of her intentions at a July 2015 check-in. In Phoenix, Adriana updated her address with ICE, but ICE failed to inform Adriana that she also had to update her address with the immigration court and file a motion to change her hearing venue to the Houston Immigration Court. To escape the bullying her son faced in school, Adriana then decided to move from Houston to Dallas. During a check-in with ICE in Houston to update her address, ICE finally informed Adriana she needed to also update her address with the immigration court. After moving to Dallas, she contacted all of the attorneys on the list of legal aid providers ICE gave her, but was not able to find an attorney to help her update her address with the immigration court. She eventually scheduled a consultation with an attorney in January 2016, thinking she had enough time because the notice she had received stated her hearing was to be held in July 2016. Adriana was shocked to discover that the date of her original notice was incorrect. While the hearing notice stated her hearing was in July 2016, her hearing had actually taken place in August 2015. Since Adriana did not attend the August 2015 hearing, the immigration court ordered Adriana removed *in absentia*. In May 2016, ASAP and CLINIC successfully challenged Adriana and her son’s *in absentia* orders. Their asylum case is currently pending.

Misleading or incomplete information from ICE during check-ins

- ELIZABETH’S STORY:** Elizabeth, a Salvadoran citizen, ran a successful business that drew the unwanted attention of MS-13, El Salvador’s notorious transnational gang. Gang members extorted Elizabeth, threatened her with violence, and threatened to kidnap and rape her 10-year-old daughter. Elizabeth and her daughter left El Salvador and arrived at

the U.S.-Mexico border seeking asylum in October 2016. ICE released Elizabeth and her daughter and instructed Elizabeth to regularly check in with them. Elizabeth, wanting to pursue her case, regularly reported to ICE and updated her address every time she moved. What ICE failed to tell her, however, was that ICE would not share her new address with the immigration court and that Elizabeth had to contact the immigration court separately to update her address. Consequently, the immigration court sent her notice of hearing to an old address and, in September 2015, ordered Elizabeth removed *in absentia*. In early 2016, ASAP and CLINIC successfully challenged Elizabeth and her daughter's *in absentia* orders. Their asylum case is currently pending.

- **LUCIA'S STORY:** Lucia, a Honduran citizen, suffered a family tragedy—her brother-in-law was murdered. Lucia discovered the identity of the murderer. Subsequently, the same man began making death threats against her. Fearing for her and her son's safety, she came to the United States to seek asylum in October 2014. ICE released Lucia and her son, and Lucia attended regular check-ins with ICE. Lucia eventually moved to a new address and updated ICE, but ICE failed to inform her that she also had to update her address with the immigration court. Lucia never received a notice and the immigration court eventually ordered Lucia removed *in absentia*. Nevertheless, Lucia continued to attend her check-ins with ICE and ICE continued to tell her that there were no issues with her case. Instead, ICE directed Lucia to keep returning for check-ins and Lucia diligently complied. Throughout these check-ins, Lucia regularly called the immigration court hotline and selected "Option 1," which is supposed to provide information regarding upcoming hearings. The hotline informed her that she did not have an upcoming hearing (because the hearing had already occurred). Neither ICE nor EOIR informed her of "Option 3" on the hotline, which shares information regarding outstanding removal orders. Eventually, Lucia learned of "Option 3," followed up with the hotline, and discovered the immigration court ordered her removed *in absentia*. In 2016, ASAP and CLINIC successfully challenged Lucia and her son's *in absentia* orders. Their asylum case is pending.
- **ELENA'S STORY:** Elena, a citizen of Honduras, experienced repeated violence and sexual assault by her partner. After being raped and beaten on a regular basis, Elena decided to leave. Her partner threatened her and her son after he discovered Elena wanted to leave him. Unable to convince the authorities to assist her, Elena and her 4-year-old son fled to the United States in August 2015 and sought asylum. ICE released Elena from detention, but did not provide her with instructions of any kind or a point of contact for questions. Though she diligently checked the mail every day, Elena never received her notice from the immigration court. Elena did not call the EOIR hotline for months because she did not know it existed. During her check-ins, ICE did not provide any information regarding the hotline or how to seek additional information regarding her case. Once Elena was alerted to the EOIR hotline's existence, she became aware of her removal order. The immigration court had ordered Elena removed *in absentia* in October 2015. In 2016, ASAP and CLINIC successfully challenged Elena and her son's *in absentia* order. Their asylum case is pending.

ASAP and CLINIC's success in reopening cases with *in absentia* removal orders suggests that failures to appear in court by Central American families are at least partly rooted in systemic problems and bureaucratic failures, not in a desire on the part of Central American families to abscond without pursuing their asylum claims. ASAP and CLINIC's work establishes a more credible, fact-based narrative: families are receiving *in absentia* deportation orders despite their best efforts to seek asylum, participate in the immigration court system, and plead their cases. To satisfy our nation's moral and legal obligation to those fleeing persecution, it is incumbent on the government to ensure asylum seekers have an opportunity to present their claims before an immigration judge. The Departments should therefore support family case management as an alternative to detention. Family case management will provide the necessary information and support to traumatized families as they navigate the asylum process.

While advocates, immigration legal counsel, legislators, and government officials may not always agree on who should be granted asylum, ensuring the right to a fair hearing and basic due process should be a priority for all those who believe in the rule of law.³⁰ By facilitating the inappropriate issuance of *in absentia* removal orders, the government is denying a particularly vulnerable population the opportunity to present their claims. Furthermore, statistics regarding court appearances, without context or analysis, should not be used to rationalize inflicting further trauma on asylum seekers, including children, through long-term detention upon arriving in the United States.

D. Family Case Management Programs, Rather Than Detention, Increase Likelihood of Legal Representation

Further reason to abandon the proposed regulations is that asylum seekers are more likely to find legal representation when they are free from detention. Since detention centers are often in remote places, it is difficult for asylum seekers to find either pro bono attorneys or private attorneys who are willing or able to drive to detention centers in order to take on a case. This reality is reflected in a national study, which found that while approximately sixty percent of asylum seekers were unrepresented by an attorney in cases decided on the merits in immigration, eighty-six percent of immigrants in detention facilities went unrepresented.³¹

Legal representation helps the immigration court system function more efficiently and is essential for asylum seekers to be able to meaningfully present their claims.³² Counsel is necessary to properly prepare the initial asylum application and fully prepare the asylum seeker for the

³⁰ *Reno v. Flores*, 507 U.S. 292, 306 (1993) (“It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings.”).

³¹ Ingrid V. Eagly & Steven Shafer, A National Study of Access to Counsel in Immigration Court, 164 U. PENN. L. REV. 1, 6 (2016) (“By looking at individual removal cases decided on the merits, we find that only 37% of immigrants had counsel during our study period.”); *see also* Sabrineh Ardalan, Access to Justice for Asylum Seekers: Developing an Effective Model of Holistic Asylum Representation, 48 U. MICH. J. L. REFORM 1001, 1002 (2015).

³² *See, e.g.*, Ingrid Eagly, Esq. & Steven Shafer, Esq., American Immigration Council, *Access to Counsel in Immigration Court* (Sep. 28, 2016), at 1 (“The lack of appointed counsel may have a profound impact on immigrants’ ability to receive a fair hearing.”).

adversarial individual hearing.³³ In our experience, a typical asylum evidence packet can be anywhere from 200-600 pages. The trial requires the testimony of the asylum seeker, as well as the testimony of layperson witnesses or expert witnesses. Moreover, asylum law is complex and constantly changing. Asylum seekers are often unaware of the definition of a refugee, much less the multitude of decisions that analyze that definition. For these reasons, the Departments should aim to increase access to counsel; however, the proposed regulations would make it more difficult for asylum seekers to find legal representation from long-term detention.

ASAP therefore urges the Departments to abandon the proposed regulations in favor of ATD programs that include access to legal counsel and/or basic guidance on how to navigate the immigration system.

For all of the above reasons, ASAP urges the Departments to rescind the Notice in its entirety.

Sincerely,

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³³ See, e.g., National Immigrant Justice Center, *Basic Procedural Manual for Asylum Representation Affirmatively and In Removal Proceedings* (Apr. 2018), at 40-54 (documenting the work required to prepare a defensive asylum application); see also Beth Fertig, WNYC News, *New York Immigrants Have the Nation's Highest Rate of Legal Representation* (Apr. 3, 2018), available at <https://www.wnyc.org/story/new-york-immigrants-have-nations-highest-rate-legal-representation/> (“It is very difficult to be successful in court without representation,” [Susan Long] said. “It’s a very complicated law that we have, and very difficult to represent yourself.”); TRAC Immigration, *Asylum Representation Rates Have Fallen Amid Rising Denial Rates* (Nov. 28, 2017), available at <http://trac.syr.edu/immigration/reports/491/> (noting that the “odds of gaining asylum [are] five times higher when represented” and that “[r]egardless of nationality, representation status still made a big difference between whether asylum was granted or denied.”).