



# ASYLUM SEEKER ADVOCACY PROJECT

January 24, 2022

Dear Secretary Mayorkas and Executive Director Brané:

Nearly three years after the end of the official Zero-Tolerance policy that ripped thousands of children from their parents' arms, hundreds of families are still separated, and all families impacted by the policy continue to suffer trauma caused by separation.<sup>1</sup> On December 10, 2021, the Department of Homeland Security (DHS) published a Request for Public Input, seeking comments from the public on recommendations to "minimize the separation of migrant parents and legal guardians and children entering the United States."<sup>2</sup>

For the U.S. government to address the wrongs inflicted by family separation, it must reunite families that are still separated and provide all families with mental health services. The government must also provide permanent legal status to the families that were subjected to family separation in order to make sure that they are not separated again as a result of deportation.

But the only way that the Biden administration can ensure separation of parents and legal guardians from their children is not a policy of future administrations is by ensuring there is accountability for the wrongdoing committed during the Trump administration. By settling outstanding family separation damages claims, the Biden administration has the opportunity to take decisive and immediate action to ensure that all future administrations get the message that "it is unconscionable to separate children from their parents as a means to deter migration" and that any policy that aims to separate families should never again be implemented.<sup>3</sup>

When asked what they would like to see the U.S. government do in order to ensure that family separations never occur again, several Asylum Seeker Advocacy Project (ASAP) members and

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<sup>1</sup> Ed Pilkington, *Families separated at the border under Trump suffering severe trauma - study*, The Guardian (Nov. 24, 2021),

<https://www.theguardian.com/us-news/2021/nov/24/trump-family-separations-trauma-study>.

<sup>2</sup> See 86 FR 70512, *Identifying Recommendations To Support the Work of the Interagency Task Force on the Reunification of Families*, (Dec. 10, 2021),

<https://www.federalregister.gov/documents/2021/12/10/2021-26691/identifying-recommendations-to-support-the-work-of-the-interagency-task-force-on-the-reunification>.

<sup>3</sup> Geneva Sands, *Biden administration asks public for help stopping family separation in the future*, CNN (Dec. 9, 2021), <https://www.cnn.com/2021/12/09/politics/dhs-public-input-family-separation/index.html>  
<https://www.cnn.com/2021/12/16/politics/separated-families-negotiations/index.html>.

formerly separated families responded that most of all, they wished to see the U.S. government take accountability for their actions.

***Leticia Peren**, an indigenous woman from Guatemala who was separated from her son for almost three years: “The government has the power to change the lives of asylum seekers like myself and recognize the pain and trauma families like ours have been through by providing us with support. The government should do what it promised and ensure that my son and I never have to worry of once again being separated. Separated families deserve the peace of mind of being able to live in the U.S. safely and together without the fear of being torn apart again.”*

***Daniel Paz**, a father from Honduras that was separated from his then 7-year-old daughter: “Both the families that are still separated and also the ones that have been reunited all still live with the trauma of what happened. What happened to me still haunts me. I continue to live with it, despite the years that have passed. We need compensation for what happened and we need financial aid. We also need a legal status in this country for those who have not yet been able to regularize their status. The government has to pay a price for what they did. That was inhumane, an unfair decision and they have to pay for it.”*

***Lucinda Gonzales**, a Honduran mother separated from two of her children: “I would ask the government to make a law saying that families in this country can get green cards so that we feel safe that we will never be separated again. Also, I would ask the government that there should be compensation—though they could never pay for what we suffered—but at least it would be seen that the government recognizes what it did and wants to do justice.”*

### Taking Accountability for Family Separation Will Ensure Future Administrations Do Not Institute Family Separation Policies.

The U.S. government must take responsibility for what occurred during the Trump administration, both during the official Zero-Tolerance policy, and all related policies before and after, that caused the separation of migrant families. That means admitting to wrongdoing in court by making it clear that the U.S. government does not have the right to systematically separate children for parents and legal guardians.

Accountability also requires the government to pay for the wrongs committed against asylum seekers by settling lawsuits related to family separation and compensating these families for the harms they suffered. The U.S. government settling lawsuits and compensating separated families is ultimately the best way to ensure that future administrations think twice before implementing similar policies designed to rip children away from their parents. In the absence of genuine relief and accountability, future administrations with different goals than this one will not be deterred from separating families.<sup>4</sup>

### By Defending Family Separation, the Biden Administration is Breaking its Promise to Stand Up for Separated Families.

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<sup>4</sup> See Inter-American Commission on Human Rights, *Compendium of the Inter-American Commission on Human Rights on truth, memory, justice and reparation in transitional contexts*, April 12, 2021, OEA/Ser.L/V/II. Doc.121/21, at ¶ 144.

Earlier this year, families separated at the Mexico-U.S. border met with DHS Secretary Alejandro Mayorkas.<sup>5</sup> Several parents told Secretary Mayorkas about the ongoing effects that family separation had on them and their children. At this meeting, the Secretary relayed to the families the administration had “efforts underway to ensure that family separations never occur again.”<sup>6</sup> President Biden has also made clear that righting the injustice of family separation is one of the key priorities of his administration.<sup>7</sup> In fact, President Biden has indicated his support for compensating separated families, previously stating that any parent and children separated by U.S. immigration officials “deserve some kind of compensation, no matter what the circumstances.”<sup>8</sup>

In the same week that DHS requested the public’s input that prompted this comment, however, the administration’s Department of Justice (DOJ) unilaterally pulled out of settlement negotiations addressing compensation for separated families.<sup>9</sup> Settlements would have provided separated families compensation for their injuries and avoided protracted litigation, which will now force separated families to relive the pain of their experiences in fighting their case.<sup>10</sup> By walking away from settlement negotiations, the Biden administration is choosing to defend the legality of the Trump administration’s family separation policy in court and forcing families to relive their trauma by having to recount it in depositions and in open court during stressful trials.<sup>11</sup>

On January 5, 2022, the Biden administration officially defended the Zero Tolerance policy of family separation as legal and constitutional in new court filings.<sup>12</sup> The filings made the Biden administration’s position clear: separated families should not receive compensation and redress

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<sup>5</sup> Rafael Bernal, *Mayorkas Meets with Parents of Separated Families*, The Hill (Aug. 20, 2021), <https://thehill.com/latino/568810-mayorkas-meets-with-parents-of-separated-families>.

<sup>6</sup> Press Release, U.S. Dep’t of Homeland Sec., Office of Public Affairs, *Readout of Secretary Mayorkas’s Meeting with Reunited Families Separated Under the Previous Administration’s “Zero-Tolerance” Policy* (Aug. 20, 2021), <https://www.dhs.gov/news/2021/08/20/readout-secretary-mayorkas-s-meeting-reunited-families-separated-under-previous>.

<sup>7</sup> See *Executive Order on the Establishment of Interagency Task Force on the Reunification of Families*, Exec. Order No. 14,011, 86 Fed. Reg. 8273 (Feb. 2, 2021), <https://www.federalregister.gov/documents/2021/02/05/2021-02562/establishment-of-interagency-task-force-on-the-reunification-of-families>; see also, Joe Biden, *Separated Ad Joe Biden Para Presidente 2020*, YouTube (Oct. 28, 2020), <https://www.youtube.com/watch?v=PevJComlSV0/>; Joe Biden, Facebook (June 20, 2018), <https://www.facebook.com/joebiden/posts/10155305481581104>.

<sup>8</sup> Zeke Miller and Colleen Long, *Biden: Families of separated children deserve compensation*, ABC News (Nov. 6, 2021), <https://abcnews.go.com/Politics/wireStory/biden-families-separated-children-deserve-compensation-81010134>.

<sup>9</sup> Priscilla Alvarez, *Justice Department breaks off settlement talks with families separated at US-Mexico border*, CNN (Dec. 16, 2021), <https://www.cnn.com/2021/12/16/politics/separated-families-negotiations/index.html>.

<sup>10</sup> Negar Katirai, *Retraumatization in Court*, 62 Ariz. L. Rev. 81 (2020).

<sup>11</sup> Camilo Montoya-Galvez, *U.S. ends talks over compensation for families separated under Trump*, CBS News (Dec. 16, 2021), <https://www.cbsnews.com/news/immigration-family-separations-compensation-us-ends-talks/>.

<sup>12</sup> See *Wilpur P.G. et al v. United States of America*, No. 4:21-cv-04457-KAW (N.D. Cal. Jun. 10, 2021).

for having their children taken by U.S. immigration officials.<sup>13</sup> This position contradicts public statements made by the President and directly undermines the underlying mission of the Family Reunification Taskforce and this request for comment.<sup>14</sup>

### It is Not Too Late for the DOJ to Change Course and Settle Lawsuits Brought by Separated Families.

The U.S. government will have to pay to compensate separated families down the line, but the Biden administration has the power to lessen the burden on separated families. We are confident that many families torn apart at the border will win significant monetary relief, and that these families will set a precedent that will make it extremely costly for the government to separate families again. However, by failing to settle these claims the Biden administration will force separated families to take a long and arduous path — and needlessly delay relief during years of litigation.<sup>15</sup>

It is also in the best interest of taxpayers and the U.S. government to settle damages claims brought by separated families. It will likely cost the U.S. significantly more money to litigate these cases in court, both because litigation is itself expensive and time-consuming for all parties, and because separated families will win large awards in court. Indeed, it is possible that many families will receive significantly *larger* sums of money than what had been discussed in settlement negotiations.<sup>16</sup>

The Biden administration has a choice: it can stand with the Trump administration in defending the legality of family separation and fight the victims of Zero Tolerance, or it can follow through on its campaign promises to make separated families whole. The choice is obvious, and the administration must stand on the right side of history and compensate families for their suffering.

### Conclusion

If the U.S. government is genuinely committed to implementing solutions that will ensure the U.S. government never again adopts a policy of family separation. In order to ensure the horrors of family separation do not happen again, the government must acknowledge its responsibility for the deliberate and systematic violation of human rights that was perpetrated on asylum-seeking families seeking protection at the Mexico-U.S. border. Settling monetary damages claims brought by separated families would not only fulfill the promises that Secretary Mayorkas and President Biden have already made, but would also promote the Biden administration's stated commitment to protecting family unity and ensuring children entering the U.S. are not separated from their families.<sup>17</sup>

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<sup>13</sup> Press Release, Lawyers' Committee for Civil Rights of the San Francisco Bay Area (Jan. 6, 2022), [https://lccrsf.org/pressroom\\_posts/biden-administration-makes-cruel-decision-to-fight-california-families-separated-at-the-border-in-court/](https://lccrsf.org/pressroom_posts/biden-administration-makes-cruel-decision-to-fight-california-families-separated-at-the-border-in-court/).

<sup>14</sup> Executive Order 14011 Sec. 4(c)(iii).

<sup>15</sup> See CRS R45732, *The Federal Tort Claims Act (FTCA): A Legal Overview*, by Kevin M. Lewis (2019).

<sup>16</sup> Editorial Board, *Opinion: Letting juries decide how much families separated at the border are owed could be an expensive mistake*, Wash. Post (Nov. 11, 2021), <https://www.washingtonpost.com/opinions/2021/11/11/trying-put-price-tag-trauma-suffered-by-families-separated-border-good-luck/>.

<sup>17</sup> Executive Order 14011 Sec. 4(c)(iii).