



TESTIMONY OF

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Chairwoman DeGette, Ranking Member Guthrie, and Members of the Subcommittee, thank you for the opportunity to address U.S. Customs and Border Protection's (CBP) role in the short-term custody of migrant children.

CBP is a law enforcement agency. We are charged with keeping terrorists and their weapons out of the United States, while simultaneously facilitating lawful international travel and trade. Our mission combines customs, immigration, border security, and agricultural protection, and we proudly serve as the first line of defense for the nation.

However, an unprecedented and unsustainable situation on the southwest border (SWB) has added a never-intended dimension to our mission: providing humanitarian support for large numbers of aliens, some of whom may be vulnerable.

From October 1, 2018 through July 31, 2019, the U. S. Border Patrol apprehended 760,370 aliens between ports of entry along our southwest border. That is nearly 92 percent higher than the total number of apprehensions for all of Fiscal Year (FY) 2018. The majority of the apprehended aliens are Central American family units and unaccompanied alien children (UAC). In FY 2019 to date, family units and UAC represented 66 percent of all aliens apprehended by the Border Patrol at the southwest border. This influx has led to capacity constraints at some CBP facilities.

To put this in context, it is important to understand Border Patrol's role in the nation's immigration system. Border Patrol agents are often the first people migrants encounter after they have entered the United States. We are the first to meet migrants' basic needs, such as providing food and water to those who may have spent weeks in the desert, but we are only the first point of contact. We process migrants before turning them over to other agencies as expeditiously as possible, and consequently migrants' time in Border Patrol custody is typically brief. Our facilities reflect this role; they are designed for processing, and not intended for long-term custody or care. This custodial brevity is especially pronounced for UAC, who—by law—are transferred to the custody of the Department of Health and Human Services (HHS) within 72 hours, absent exceptional circumstances.

However, due to the unprecedented levels of family units and UAC, Border Patrol has had a sharp increase in custodial responsibilities. Every day, Border Patrol agents are feeding and caring for migrants and rescuing individuals from perilous conditions; every day, Border Patrol upholds its humanitarian mission in addition to the border security mission its members were hired to perform.

The demographic shift to these more vulnerable migrant populations, combined with the overwhelming numbers, profoundly affects our ability to patrol the border and diminishes our ability to prevent deadly narcotics and dangerous people from entering our country. It also detracts from our ability to facilitate lawful trade and travel. CBP currently has approximately 200 officers from ports of entry assigned to the southwest border to help Border Patrol with processing the surge of aliens, and 225 Border Patrol agents from northern border and coastal areas have been temporarily assigned to the southwest border.

However, over the past two months, two important variables have allowed CBP to mitigate the challenging overflow conditions at our border facilities. One is the success of recent initiatives by the Administration and its international partners to address this border security and migration crisis. The second is the emergency supplemental appropriation we received from Congress.

### **International Partnerships and Other Initiatives**

Overall, apprehensions of UAC and family units decreased by roughly 50 percent from May to July 2019. In July, CBP observed a 26 percent decline from the previous month in total enforcement actions for individuals from Guatemala, Honduras, and El Salvador. The most significant decline is in the numbers of aliens from Guatemala, with a 42 percent decrease from June.

The reductions may be due in part to recent agreement in June on the part of the Government of Mexico to stem the flow of illegal migration, and the international collaboration with the Central American governments to dismantle and disrupt alien smuggling and human trafficking organizations. We continue to see the Government of Mexico making a significant effort on its southern border with Guatemala, as well as on the transportation routes of migrant smugglers.

By aligning our policies and providing access to protection to those who need it, as close to home as possible, in concert with international organizations, this regional approach limits the ability of migrant smuggling and human trafficking organizations to profit off the exploitation of migrants.

### **Emergency Humanitarian Supplemental Appropriations**

The *Emergency Supplemental Appropriations for Humanitarian Assistance and Security at the Southern Border Act, 2019* was signed into law on July 1, 2019. This Act provided CBP with a total of \$1,100,431,000 for humanitarian support, border operations, and mission support.

The significant majority of the CBP portion of the supplemental appropriation is dedicated to humanitarian support; this funding has been allocated to CBP for the establishment of soft-sided facilities in Donna and El Paso, Texas, and Yuma, Arizona; a modular facility in Yuma; a permanent facility in Nogales, Arizona; and single-adult holding facilities in multiple locations. CBP also received approximately \$112 million for food, water, sanitary items, blankets, and other consumables for migrants, and for medical assets and support, and \$35 million for transportation of migrants in Border Patrol custody to help alleviate overcrowding and expedite processing.

Congress also provided approximately \$110.5 million for border operations, specifically for overtime and temporary duty assignments for Border Patrol agents, CBP officers, and other CBP and Department of Homeland Security (DHS) staff. Of that \$110.5 million allotment, \$19.9 million is also designated for costs associated with the volunteer surge force—personnel from various government agencies who volunteered to deploy to the southwest border to assist with the surge of migrants arriving from Central America.

The supplemental appropriation also provided \$50 million for data systems and analysis, which CBP will use to address information technology shortfalls at operating locations and to better integrate immigration processing and reporting.

The supplemental appropriation has provided much-needed resources for the care and processing of the record-breaking numbers of aliens illegally crossing our southwest border. Much of the funds provided to CBP through the supplemental appropriation helped to replenish the CBP accounts used to provide the necessary facilities and resources needed to respond to the current humanitarian and border crisis. Prior to the passage of the supplemental appropriation, CBP had already used Operations and Support funding to build soft-sided facilities for family units in Donna and El Paso, Texas, and awarded a contract for a soft-sided facility in Yuma, Arizona. The consumables funding will continue replenishing food, water, sanitary items, blankets, and other consumables for migrants. Without the supplemental appropriation, the funding for these humanitarian custodial efforts provided in the *Consolidated Appropriations Act, 2019* would have been exhausted before the end of the fiscal year.

The majority of the emergency supplemental appropriation was allotted to our partners at HHS. Because of that appropriation, wait times at border stations and the number of UAC in CBP custody have been reduced. At the peak of the crisis, HHS shelters were operationally full and could therefore only accept additional UAC transfers from CBP as HHS discharged UAC to sponsors. However, UAC continued to arrive at Border Patrol stations, and we had nowhere to send them. As a result, there were nearly 2,600 UAC in Border Patrol facilities in early June, and more than 1,200 of them were in custody for 72 hours or more. Now, there are roughly 110 UAC in CBP custody at the border, with an average time in custody of fewer than 48 hours.

However, while DHS requested \$108 million for single-adult beds at U.S. Immigration and Customs Enforcement (ICE) detention facilities, this request was not funded. Without additional funding for ICE single-adult beds, the ability of CBP to process and transport single adults out of CBP custody and into the long term care and custody of ICE—which has the authority and appropriate facilities for longer-term custody—is further limited. In addition, as a practical matter, single adults are the only demographic that currently can be detained through expedited hearings pursuant to a final order of removal.

### **A Broken Immigration System**

Ultimately, we cannot adequately address this crisis by shifting resources or building more facilities. While many factors drive illegal migration, the rise in illegal border crossings is, in part, a consequence of the gaps created by layers of laws, judicial rulings, and policies related to the treatment of minors. While well-intentioned, this mosaic of legal requirements has helped create the conditions underlying the humanitarian and border security crisis at our southwest border today. Our current immigration laws provide clear incentives to cross our southwest border illegally, especially with a child. These well-intentioned statutory requirements left loopholes that require immediate fixes.

These weaknesses in our laws now represent the most significant factors affecting border security and include:

- The asylum gap—Approximately 80 percent of individuals pass the initial credible fear (of torture or persecution on account of race, religion, nationality, membership in a particular social group, or political opinion) standard threshold screening during the expedited removal process, but only 10-15 percent of such aliens are found to have valid asylum claims at the end of immigration court proceedings;
- The disparate treatment of UAC based on their country of origin under the *Trafficking Victims Protection Reauthorization Act of 2008*, which allows for certain UAC from Mexico and Canada to withdraw their application for admission and be quickly repatriated, but not children from other countries, including those from Central America; and
- The *Flores* Settlement Agreement that has led to challenges in keeping families detained together for the time it takes to complete expeditious and fair immigration proceedings,

All of these things encourage crossing the border with a child as a near guarantee of a speedy release and an indefinite stay in the United States.

### ***Flores Settlement Agreement***

The 1997 *Flores* Settlement Agreement, as interpreted by the courts, provides certain standards governing the treatment, detention, and release of all alien minors in U.S. Government custody. The Agreement requires the government to release alien minors from detention without unnecessary delay, or, if detention is required, to transfer them to non-secure, licensed programs “as expeditiously as possible.” *Flores* also sets certain standards for the holding and detention of minors, and requires that alien minors be treated with dignity, respect, and special concern for their particular vulnerability. CBP complies with the *Flores* Settlement Agreement and treats all alien minors in its custody in accordance with its terms.

In 2014, in response to the surge of alien families crossing the border, DHS increased the number of family detention facilities. Soon after, the U.S. District Court for the Central District of California interpreted *Flores* as applying not only to unaccompanied minors who arrive in the United States, but also to those children who arrive with their parents or legal guardians.<sup>1</sup> The court also stated that ICE’s family detention facilities are not licensed and are secure facilities. These rulings limited DHS’s ability to detain family units for the duration of their immigration proceedings. Pursuant to this and other court decisions interpreting the *Flores* Settlement Agreement, DHS rarely detains accompanied children and their parents or legal guardians for longer than approximately twenty days.

In part as a consequence of the limitations on time-in-custody mandated by *Flores* and court decisions interpreting it, custody determinations for adults who arrive in this country alone are different than those for adults who are parents or legal guardians who arrive with a child.

On August 23, 2019, DHS and HHS published a final rule promulgating regulations that implement the relevant and substantive terms of the *Flores* Settlement Agreement. The rule

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<sup>1</sup> *Flores v. Johnson*, 212 F. Supp. 3d 864 (C.D. Cal. 2015).

allows for termination of *Flores* and allows DHS to respond to significant statutory and operational changes that have occurred since the agreement has been in place. This rule also codifies CBP's National Standards on Transport, Escort, Detention, and Search. The rule is scheduled to take effect on October 22, 2019.

### ***UAC Provision of Trafficking Victims Protection Reauthorization Act of 2008***

The Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), Public Law 110-457, also requires that the U.S. government provide certain protections to UAC. Specifically, the TVPRA requires that, once a child is determined to be a UAC, the child must be transferred to HHS within 72 hours, absent exceptional circumstances, unless the UAC is a national or habitual resident of a contiguous country and is determined to be eligible to withdraw his or her application for admission voluntarily (i.e., not a trafficking victim, does not have a fear of return, and is able to make an independent decision to withdraw). UAC from countries other than Canada and Mexico are exempt from the TVPRA provision allowing for the withdrawal of application for admission of Canadian and Mexican UAC. Currently, more than 80 percent of UAC encountered by Border Patrol are from Guatemala, Honduras, and El Salvador; therefore, they fall outside the TVPRA expeditious withdrawal framework, cannot avail themselves of a voluntary withdrawal provision like UAC from Canada or Mexico, and further encumber the already-overburdened immigration courts.

### ***Asylum Claims***

In recent years, CBP has seen a significant increase in the number and percentage of aliens who seek admission or unlawfully enter the United States, are processed for expedited removal, and then assert an intent to apply for asylum or express a fear of return, torture or persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. This dramatic increase strains border security resources, immigration enforcement, courts, and other federal resources.

CBP carries out its mission of border security while adhering to legal obligations for the protection of vulnerable and persecuted persons. The laws of the United States, which are consistent with international treaties to which we are a party, allow people to seek asylum on the grounds that they have suffered persecution or have a well-founded fear of persecution in their country of nationality (or of last habitual residence, if stateless) on account of their race, religion, nationality, membership in a particular social group, or political opinion. Our laws also prohibit the removal of individuals to countries where it is more likely than not that they would be tortured. CBP understands the importance of complying with the law and takes its legal obligations seriously.

CBP has designed policies and procedures based on these legal standards to protect vulnerable and persecuted persons in accordance with these legal obligations.

If a CBP officer or agent encounters an alien who is subject to expedited removal at or between ports of entry, and the person expresses an intention to apply for asylum, a fear of persecution or torture, or a fear of being returned to his or her home country, CBP processes and refers the

individual for a credible fear screening interview with an asylum officer to determine whether the individual possesses a “credible fear” of torture or persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

Congress must address the asylum gap—where approximately 80 percent of individuals pass the initial credible fear standard threshold screening to the expedited removal process, while only 10-15 percent of such aliens are found to have valid asylum claims at the end of immigration court proceedings.

### **We Need Congress to Act**

These legal and statutory requirements have significant ramifications. Central American families are coming to our border now because they know that DHS must release them quickly—generally after no more than 20 days—and that they will be allowed to stay in the United States indefinitely while awaiting inevitably protracted immigration court proceedings. To be clear, these families, and those posing as families, are generally not concerned with being caught by the Border Patrol—they are actually turning themselves in, knowing that they will be processed and released rather expeditiously with a court date years in the future, often obtaining permission to work while their case is pending. Smugglers are exploiting this dynamic to encourage more illegal migration and are financially benefiting from it every day under the current, outdated laws that are encouraging migration.

The perception that our system will allow families to stay in the United States indefinitely is clearly a major pull factor used by smugglers to convince individuals to make the dangerous journey to our border. Migrating in pursuit of improved economic opportunities is not, and has never been, a basis for asylum, and those who exploit the low credible fear threshold deprive qualified individuals of the asylum, and the humanitarian protection they deserve.

Along with important push factors, which include high levels of insecurity, limited economic opportunity, and weak governance in many parts of Central America, this perception about our immigration system incentivizes migrants to put their lives in the hands of smugglers and make the dangerous trek north to our southwest border. We see the cost of these pull and push factors every day in profits derived by transnational criminal organizations, in the lives lost along the journey, and in the flight of generations of youth from El Salvador, Guatemala, and Honduras.

Additionally, regardless of whether an alien who has entered illegally has made a credible fear claim, aliens—particularly family units—are increasingly unlikely to be repatriated quickly. Near-assurance of release due to court rulings, compounded by a multi-year immigration court backlog, means that there has been virtually no meaningful immigration enforcement for family units crossing illegally in a timely fashion. While DHS and its components are taking every possible measure to address the illegal border crossing crisis and the absence of immigration consequences for family units, it is simply no substitute for substantial congressional action.

## **Conclusion**

CBP is a law enforcement agency that will continue to uphold the laws of the United States. While we treat every migrant in our care humanely, our primary responsibility is protecting the nation by enforcing the law.

We have seen a marked decrease in levels of illegal border crossing this summer. To see lasting change, we must continue to collaborate with our international partners and seek targeted solutions to our immigration laws. We must also ask Congress to help us by taking legislative action in support of CBP, our partners, and the rule of law.

Thank you for the opportunity to testify. I look forward to your questions.