A "BINARY CHOICE" FOR FAMILIES IN ICE DETENTION: EXAMINING THE LEGITIMATION COSTS OF LITIGATING THE FLORES SETTLEMENT AGREEMENT

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ABSTRACT

In the spring of 2020, as the world came to terms with the dangers of the COVID-19 pandemic, immigrant advocates in the United States turned to the courts and the twenty-three-year-old Flores Settlement Agreement ("FSA") to argue for the release of immigrant children detained by Immigration and Customs Enforcement. But twenty-three years of litigating the FSA and consistent non-compliance with its terms had whittled away the FSA's protection for accompanied children. Rights under the FSA became a "binary choice:" parents could choose to allow ICE to release their children and separate their family or they could waive their children's right to freedom under the FSA and maintain family unity inside detention. Drawing on critical legal and socio-legal scholarship, this Note refutes parental "choice" and highlights how relying on formal legal tools has truncated advocates' aspirations for social change and legitimated the broader system of immigration detention. Instead of ending family detention, litigating the FSA has insulated it from critique. With President Biden signaling a willingness to end family detention, advocates must shift away from litigation towards advocating for durable legislation and formal regulation.

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When we first arrived at Karnes, on July 12, 2020, officers in blue uniforms went through various documents with us. . .They stated that. . .they were giving us an opportunity. . .I think that what they suggested to us is not a decision any family could be satisfied with. If ICE is only releasing part of the family, that means they are not actually releasing the family. We are a family and we have to be together.

—Declaration of C.M.[1]

I. INTRODUCTION

In the spring of 2020, as the world came to terms with the dangers of the COVID-19 pandemic, immigrant advocates in the United States turned to the courts and the twenty-three-year-old Flores Settlement Agreement ("FSA")[2] to argue for the release of immigrant children detained by U.S. Immigration and Customs Enforcement ("ICE"). Advocates filed a request for a temporary restraining order and a preliminary injunction to enforce the FSA on behalf of both unaccompanied immigrant children in the custody of the Office of Refugee Resettlement ("ORR") and accompanied immigrant children

1. Amicus Br. 51, Flores v. Barr, 2:85-cv-04544-DMG-AGR (C.D. Cal. Aug. 6, 2020), ECF No. 908.
2. Stipulated Settlement Agreement, Flores v. Reno, No. CV 85-4544-RJK(Px) (C.D. Cal. Jan. 17, 1997).

detained by ICE in "Family Residential Centers."[3] Since the FSA came into force, however, the government has disputed its applicability to accompanied children.[4] Rather than place accompanied children in the least restrictive setting and release them to family members and other eligible sponsors as mandated by the FSA, the government has placed accompanied children in family detention centers under deplorable, prison-like conditions.[5]

In response, advocates have repeatedly turned to the courts. They have asked the courts to enforce the FSA, uphold its application to accompanied children, and end the practice of family detention.[6] But efforts to obtain a court order calling for the release of parents alongside their children have failed.[7] Courts maintain that, as written, the FSA provides a right to release for children only, not their parents.[8] Under current law and policy, courts have merely encouraged the government to exercise its discretion in favor of releasing parents together with their children. With the government's refusal to do so, compliance with the FSA has become a "binary choice."[9] Presented with FSA waivers, parents may either allow ICE to release their children and separate their families or they may waive their children's right to freedom and maintain family unity inside detention. In the context of the COVID-19 pandemic, this "binary choice" has meant that parents must choose between family separation and indeterminate detention in settings that the District Court characterized as "on fire" due to the dangers of COVID-19.[10]

The practice of providing parents with FSA waivers is not a "choice." The language of "choice" ignores the structural forces of the U.S. immigration system and provides an illusion of freedom to a decision made in the confines of detention exacerbated by a global pandemic. As attorneys for the *Flores* class noted, "To the extent compliance with [U.S. District Court for the Central District of California's] prior orders [enforcing the FSA] may provide

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3. Pl.'s Emergency *Ex Parte* Appl., Flores v. Barr, 2:85-cv-04544-DMG-AGR (C.D. Cal. March 26, 2020), ECF No. 733. The official term for unaccompanied immigrant children in U.S. law and policy is "unaccompanied alien child." *See, e.g.*, 6 U.S.C. § 279(g)(2). This terminology dehumanizes immigrant children and furthers oppressive immigration policies. The Biden administration has proposed to eradicate the term "alien." *See* U.S. Citizenship Act, H.R. 1177, 117th Cong. § 3, Terminology with Respect to Noncitizens (2021). As the term "alien" is pejorative, this Note will refer to children as unaccompanied or accompanied *immigrant* children. This Note also calls "Family Residential Centers" what they are: family detention centers.

4. *See, e.g.*, Flores v. Johnson, 212 F. Supp. 3d 864, 871–72 (C.D. Cal. 2015) ("Defendants contend that the definition of a class member should be read narrowly to exclude accompanied minors because Plaintiffs' lawsuit originally challenged 'the constitutionality of INS's policies, practices, and regulations regarding the detention and release of unaccompanied minors.'").

5. *See, e.g.*, Gretchen Frazee, *A Look Inside the Facilities Where Migrant Families Are Detained*, PBS NEWSHOUR (Aug. 26, 2019, 5:44 PM), https://perma.cc/E9W4-EUSQ.

6. *See, e.g.*, *Johnson*, 212 F. Supp. 3d at 869.

7. *See, e.g.*, Flores v. Lynch, 828 F.3d 898, 909 (9th Cir. 2016).

8. *Id.*

9. This term first appeared in *Flores* litigation during the COVID-19 pandemic to refer to the practice of providing detained parents a choice to separate from their children or waive their Flores rights. *See, e.g.*, Resp. to Defs., Flores v. Barr, 2:85-cv-04544-DMG-AGR (C.D. Cal. May 20, 2020), ECF No. 796.

10. Order Re Updated Juvenile Coordinator Reports 9, Flores v. Barr, 2:85-cv-04544-DMG-AGR (C.D. Cal. June 26, 2020), ECF No. 833.

a binary choice for parents, the difficult choice they may face is brought about by defendants' heartless and largely irrational unwillingness to release parents with their children, regardless whether the parents are flight risks or a danger."[11] Analyzing the *Flores* litigation through a critical legal and socio-legal lens, this Note highlights the ways in which litigation has legitimated an oppressive immigration system. While litigating the FSA has achieved major pronouncements of government practice as illegal, it has not ended family detention nor led to practical compliance with the strict terms of the FSA. It has created a narrow "choice" for families at the cost of upholding the larger system of immigration detention and insulating it from critique.

This Note proceeds in four parts. After a description of the rights and obligations contained in the FSA and its enforcement mechanisms in Section II, this Note reviews existing critical legal and socio-legal scholarship on the promises of litigation and its legitimation costs in Section III. Section IV explores litigating the FSA to end family detention during COVID-19 and the "binary choice" between family detention and family separation that ensued. Section V then takes a step back and explains how the courts, advocates, and the government arrived at a "binary choice" model. This section reviews the history of family detention in the United States and the various legal battles fought to compel the government into compliance with the FSA, from the 2014 "surge" in child migration to the family separation policy adopted by President Trump and his administration's attempts to create regulations ending the FSA. The benefits and costs of litigating the FSA are then analyzed through socio-legal and critical legal frames. Noting high legitimation costs, this Note argues for a shift from litigation to political and legislative mobilization. Advocates should pressure the government to pass legislation and create regulations ending the practice of family detention. With a Democratic Executive and Congress, the time is ripe to push for such change.

II. THE FLORES SETTLEMENT AGREEMENT

The FSA derives from a lawsuit filed in U.S. District Court for the Central District of California in 1985 by the Center for Human Rights and Constitutional Law, the National Center for Youth Law, and the American Civil Liberties Union ("ACLU") of Southern California on behalf of four unaccompanied immigrant children, including 15-year-old Jenny L. Flores.[12] Immigration and Naturalization Service ("INS") had apprehended and arrested Jenny at the border, placed her in a juvenile detention center, strip-searched her, required her to share facilities with unrelated adults of both

11. Pl. Mem. in Supp. of Mot. 4, Flores v. Barr, 2:85-cv-04544-DMG-AGR (C.D. Cal. August 14, 2020), ECF No. 919.

12. Flores v. Meese, 681 F. Supp. 665, 666 (C.D. Cal. 1988).

sexes, and refused to release her to her aunt.[13] Plaintiffs challenged the conditions in the detention centers and the constitutionality of the INS's policy adopted the year prior, which prohibited the INS from releasing detained immigrant children to anyone other than "a parent or lawful guardian, except in unusual and extraordinary cases."[14]

After class certification of children in Jenny's position, back and forth in the District Court, Ninth Circuit litigation, and a new INS policy, the Supreme Court held that regulations permitting detained minor children to be released only to their parents, close relatives, or legal guardians, except in unusual and compelling circumstances, did not facially violate children's substantive due process rights.[15] The Supreme Court remanded the case to the District Court for further proceedings and, in 1997, the parties reached a settlement agreement.[16] The resulting settlement agreement, the FSA, established national standards for the detention, release, and treatment of children in INS custody and later the custody of the Department of Homeland Security ("DHS").[17]

The FSA applies to the certified class of "[a]ll minors who are detained in the legal custody of INS [now DHS]," defining minors as any person under the age of eighteen.[18] It requires the government to "hold minors in facilities that are safe and sanitary and that are consistent with INS's concern for the particular vulnerability of minors" and to "place each detained minor in the least restrictive setting appropriate to the minor's age and special needs."[19] Per the FSA, DHS must transfer a minor to a "non-secure"[20] facility "licensed by an appropriate State agency to provide residential, group, or foster care services for dependent children" within three to five days of apprehension.[21] DHS must release the apprehended minor to a parent, legal guardian, adult relative, or other qualified custodian "without unnecessary delay" if he does not present a flight or a safety risk.[22] DHS must make "prompt and

13. Lisa Rodriguez Navarro, *An Analysis of Treatment of Unaccompanied Immigrant and Refugee Children in INS Detention and Other Forms of Institutionalized Custody*, 19 CHICANO-LATINO L. REV. 589, 596 (1998).

14. Reno v. Flores, 507 U.S. 292, 296 (1993).

15. *See id*. at 302–03.

16. *See The Flores Settlement Agreement: A Brief History and Next Steps*, HUMAN RIGHTS FIRST (February 19, 2016), https://perma.cc/M64K-VZZ8.

17. With the passage of the Homeland Security Act of 2002 ("HSA"), INS ceased to exist, and its functions were transferred to U.S. Citizenship and Immigrations Services ("USCIS"), U.S. Immigration and Customs Enforcement ("ICE"), and U.S. Customs and Border Protection ("CBP") under the newly created Department of Homeland Security ("DHS"). The terms of the FSA now apply to DHS.

18. *See* Stipulated Settlement Agreement at 4, 7.

19. *Id*. at 7.

20. Non-secure is a less restrictive setting, in comparison to secure and staff-secure facilities. "Staff secure facilities provide a heightened level of staff supervision, increased communication, and services to control problem behavior and prevent escape. . . Secure care. . . [has] a secure perimeter, major restraining construction inside the facility, and procedures typically associated with correctional facilities." *See Placement in ORR Care Provider Facilities,* OFF. OF REFUGEE RESETTLEMENT (July 14, 2021), https://perma.cc/SU3D-K2WV.

21. *See* Stipulated Settlement Agreement at 4–5, 12.

22. *See id*. at 9–10.

continuous efforts on its part toward family reunification and the release of the minor."[23] Minors who cannot be immediately released shall be afforded a bond redetermination hearing before an immigration judge.[24] In the event of an "emergency" or "influx of minors into the United States," DHS may take longer three to five days to transfer minors to licensed facilities, provided that they transfer minors "as expeditiously as possible."[25] Under the FSA, an "influx of minors" occurs if "more than 130 minors" are awaiting placement in a non-secure licensed facility.[26]

The direct language of the FSA provides for its enforcement in the Central District of California, but allows individual challenges to placement or detention conditions to be brought in any district court with jurisdiction and venue.[27] Paragraph 24A of the FSA indicates that an INS Juvenile Coordinator in the Office of the Assistant Commissioner for Detention and Deportation will monitor compliance with the FSA and maintain an up-to-date record of all minors who are placed in proceedings and remain in INS custody for longer than three days.[28] As the District Court noted 20 years later, however, "[i]t is unclear to the Court whether a Juvenile Coordinator has ever existed . . . and if one did, whether he or she ever fulfilled any of the duties identified in Paragraph 24A."[29] The FSA was originally set to terminate no later than 2002, but in 2001, the parties stipulated that the FSA would terminate "[forty-five] days following defendants' publication of final regulations implementing this Agreement."[30] Final regulations have yet to be promulgated. Today, the FSA continues to be overseen by the Central District of California, under the supervision of District Court Judge Dolly Gee.[31] It is enforced as a consent decree and requires parties' substantial compliance with its terms.[32] The Center for Human Rights and Constitutional Law remains official class counsel.[33]

Since the FSA, Congress has codified several of the FSA protections for unaccompanied children. In 2002, Congress enacted the Homeland Security

23. *Id*. at 12.
24. *See id*. at 14.
25. *Id*. at 8.
26. *Id*. at 9.
27. *Id*. at 20, 14–15.
28. *Id*. at 16–17.
29. Flores v. Sessions, 394 F. Supp. 3d 1041, 1072 (C.D. Cal. 2017).
30. Stipulated Settlement Agreement at 40; Flores v. Rosen, 984 F.3d 720, 727 (9th Cir. 2020).
31. The case was reassigned to Judge Dolly M. Gee when the case's original District Court judge, Robert J. Kelleher, died.
32. Flores v. Barr, 407 F. Supp. 3d 909, 915–16 (C.D. Cal. 2019) (quoting Wells Benz, Inc. v. United States, 333 F.2d 89, 92 (9th Cir. 1964) (describing that substantial compliance "does imply something less than a strict and literal compliance with the contract provisions but fundamentally it means that the deviation is unintentional and so minor or trivial as not 'substantially to defeat the object which the parties intend to accomplish.'").
33. *See* CTR. HUM. RTS. & CONST. L., https://perma.cc/PZC2-NTTA ("Under the settlement, CHRCL is the only non-governmental organization in the country permitted to inspect every detention site where children are held and to interview and assess the treatment of all detained children. CHRCL continues to monitor the government's compliance with the Flores Settlement and will file motions if violations of the settlement terms are found.").

Act ("HSA") and transferred the responsibility for the care and custody of unaccompanied immigrant children to the ORR within the Department of Health and Human Services ("HHS").[34] In 2008, Congress enacted further protections for unaccompanied children with the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 ("TVPRA").[35] The TVPRA partially codified the FSA by creating statutory standards for the treatment of unaccompanied minors, requiring the government to promptly place unaccompanied children "in the least restrictive setting that is in the best interest of the child" subject to considerations of flight and danger.[36] Accompanied children have not been afforded such legislative protections.

III. THE PROMISES AND PITFALLS OF LITIGATION

Critical legal and socio-legal scholars have long acknowledged the limitations of litigation as a means of achieving social and political change. On the one hand, scholars have praised litigation for exposing abuses and raising the "rights consciousness" of aggrieved groups.[37] Specifically, the process of litigating exposes wrongdoings of institutional actors and mobilizes activists and social movements to win grassroots support, lobby politicians, and advocate for change.[38] By framing injustice in legal discourse, litigation lends legitimacy to claims of marginalized groups and signals to group members that they have rights that they can assert to demand change.[39] Once a decision or settlement has been reached, litigation gives activists formal tools to press for compliance and pursue policy implications.[40] While courts lack "the pen" and "the purse" to enforce their decisions, court functions prevent powerful groups from implementing policy behind closed doors.[41] Monitoring and oversight ensures policies are subject to a level of standard procedure, substantive guidelines, or judicial supervision.[42]

But several scholars contend that litigation is a conservative enterprise. Litigation is constrained by an existing body of law that shapes the types of available legal claims and determines their persuasiveness.[43] According to

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34. Homeland Security Act of 2002, 6 U.S.C. § 279(a), (b)(1)(A), (g)(2).
35. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 § 235, Pub. L. No. 110–457, 122 Stat. 5044 (codified at 8 U.S.C. § 1232).
36. 8 U.S.C. § 1232(c)(2).
37. *See* Michael McCann, *Law and Social Movements: Contemporary Perspectives*, 2 ANN. REV. L. SOC'Y. SCI. 17, 25–29 (2006).
38. *Id.*; *See also* MICHAEL MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION (1994); AUSTIN SARAT & STUART A. SCHEINGOLD, CAUSE LAWYERS AND SOCIAL MOVEMENTS (2006).
39. STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE (Yale Univ. Press, 1974).
40. McCann, *supra* note 37.
41. GERALD ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (Univ. of Chi. Press, 2d ed. 2008).
42. McCann, *supra* note 37.
43. Chris Hilson, *New Social Movements: The Role of Legal Opportunity*, 9(2) J. EUR. PUB. POL'Y 238–54 (2002).

feminist legal scholar Robin West, "aspirational visions of what justice requires get truncated as they get litigated: they are cut to size so as to fit the demands of doctrine, of standing requirements, of what the fifth Justice might believe, and of the principles laid down by the past."[44] Confined to existing precedent, policies, and institutional arrangements, victories achieved through the court often reflect existing social hierarchies.[45] Litigation is thus plagued by severe "legitimation costs," where "legal change legitimates a deeper or broader injustice" and "further insulat[es] the underlying or broader legal institution from critique."[46] For example, regarding *Brown v. Board of Education*,[47] scholars have argued that the narrow win of ending *de jure* segregation obscured and insulated the evils of *de facto* segregation and unequal and underfunded education from critique.[48] Similarly, as West identifies, litigating a narrow right to be free from undue burdens in exercising one's right to abortion in *Roe v. Wade*[49] and *Planned Parenthood v. Casey*,[50] legitimated the coercive sex and patriarchal structures that might have led to pregnancy[51] and the wholly inadequate social welfare system available to poor people who decide to parent.[52]

Consensual legal transactions, often signaled by "choice" rhetoric, carry further legitimation costs. Consent insulates "the object of consent even from criticism, much less legal challenge."[53] Widespread norms against paternalism and the belief that individuals will always act rationally in their own self-interest, however flawed,[54] make questioning the value of the object of consent politically suspect.[55] In the case of abortion, consent legitimates the parental burdens to which a person consents: "A woman who is poor and chooses to parent . . . without a partner while she herself lives in poverty . . . has so chosen. The choice-based arguments for abortion rights strengthen the impulse to simply leave her with the consequences of her bargain."[56] As legal

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44. Robin West, *From Choice to Reproductive Justice: Deconstitutionalizing Abortion Rights*, 118 YALE L. J. 1394, 1422 (2009).

45. *Id.*

46. *Id.* at 1406.

47. Brown v. Bd. of Ed. of Topeka, 347 U.S. 483 (1954).

48. *See* Derrick Bell, *The Unintended Lessons in Brown v. Board of Education*, 49 N.Y.L. SCH. L. REV. 1053, 1054 (2005); Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978) (arguing that race discrimination law since Brown has served to legitimate racial subordination).

49. Roe v. Wade, 410 U.S. 113, 163–66 (1973).

50. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 876–888 (1992).

51. CATHERINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 94–95 (1988).

52. West, *supra* note 44, at 1409.

53. *Id.* at 1407.

54. *See, e.g.*, Robin West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384, 387 (1985) (critiquing the conflation of utility and autonomy with consent); West, *supra* note 44, at 1407 ("The capacity of countries, institutions, multinational corporations, social forces, or simply stronger parties to create in individual subjects a willingness to consent to transactions or changes that do not in fact increase their well-being is well documented.").

55. West, *supra* note 44, at 1409.

56. *Id.* at 1411.

scholar and reproductive justice advocate Dorothy Roberts explains, "women without sufficient resources are simply held responsible for making 'bad' choices."[57] The state need not step in or fix the system to which a woman consents. The language of "choice" also obscures how consent is obtained and the structural inequalities that prevent low-income people and people of color from accessing and exercising a choice between reproductive options.[58] Recognizing the costs and constraints associated with litigation, West recommends turning to political and legislative advocacy in the abortion context.[59] She points to the "right" to social security, the "right" to be free of a military draft, and women's equality more generally, as rights which have been achieved through political protest and legislative lobbying, rather than judicial pronouncement.[60]

In contrast to scholarship on legal mobilization for women's rights, such as abortion, LGBTQIA+ rights, and civil rights, few critical and socio-legal theorists have examined the legal advocacy in the immigration context. Susan Bibler Coutin is one of the only scholars who has applied socio-legal theory to immigration advocacy in the United States.[61] In her work, Coutin details the relationship between Salvadoran refugees, political activists, and lawyers.[62] She describes a myriad of ways in which litigating *American Baptist Churches v. Thornburgh*[63] mobilized activists to fight for change and push Congress to create Temporary Protected Status ("TPS") and pass the Nicaraguan Adjustment and Central American Relief Act.[64] A combination of grassroots organizing and political and legal advocacy achieved these legislative changes, although the fight to recognize TPS of Central Americans remains.[65]

In the case of the FSA, much has been written about its promise and the battle to uphold it. Scholars have praised the FSA and lauded twenty-three

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57. Dorothy Roberts, *Reproductive Justice, Not Just Rights*, DISSENT MAG. (2015), https://perma.cc/FT8M-7F6E.

58. *Id.*

59. West, *supra* note 44, at 1394.

60. *Id.* at 1404.

61. Few scholars have conducted empirical studies applying legal mobilization theory to asylum policy in Europe and other democratic regions. *See, e.g.,* Gina Starfield, *Forging Strategic Partnerships: How Civil Organisers and Lawyers Helped Unaccompanied Children Cross the English Channel and Reunite with Family Members*, REFUGEE STUD. CTR., WORKING PAPER SERIES 133 (2020) (examining the fight for unaccompanied children's right to family reunification and asylum in the UK through a socio-legal lens).

62. SUSAN BIBLER COUTIN, LEGALIZING MOVES: SALVADORAN IMMIGRANTS' STRUGGLE FOR U.S. RESIDENCY (2000); Susan Bibler Coutin, *Cause Lawyering and Political Advocacy: Moving Law on Behalf of Central American Refugees,* in SARAT, *supra* note 38.

63. 760 F. Supp. 796. This case also resulted in a settlement that secured *de novo* adjudication for many Guatemalan and Salvadoran immigrants and granted them a stay from deportation and work authorization while they waited for new interviews.

64. Coutin, *supra* note 62.

65. The Trump administration made several attempts to end TPS for nationals of several countries, including El Salvador and Honduras. The end of TPS was challenged and enjoined in court. *See* Ramos v. Nielsen, 321 F.Supp.3d 1083 (N.D. Cal. 2018); Bhattarai v. Nielsenl, 3:19CV00731 (N.D. Cal. 2018).

years of litigation.[66] Some have also acknowledged the weakness of the FSA as a settlement agreement and called for its codification.[67] Yet few, if any, liberal scholars have examined the FSA and accompanying *Flores* litigation through a critical lens. Much like *Roe v. Wade,* liberals have largely praised the FSA for getting so much right and for achieving real gains for immigrant children; but liberals have also likely latched onto the FSA and avoided criticism because of its vulnerability.[68] Since it was signed, the FSA has been in perpetual and great danger of abandonment, particularly as it relates to accompanied children. Nonetheless, it is important to examine the FSA and accompanying litigation with a critical lens. If litigating the FSA has upheld the status quo, legitimated an unfair immigration system, and insulated it from critique, turning away from the courts in favor of political and civil mobilization might be warranted.

IV. IMPLEMENTING A "BINARY CHOICE" DURING THE COVID-19 PANDEMIC

When COVID-19 infections soared in March 2020, imprisoned populations, including those in ICE family detention centers, were at high risk for infection. The poor sanitation, high population density, and increased comorbidities in family detention centers put families at severe risk of catching the virus.[69] The government was out of compliance with the FSA by detaining children with their parents in secure, non-licensed family detention centers for prolonged periods. With new dangers to detention, *Flores* counsel filed a request for a temporary restraining order ("TRO") and preliminary injunction to enforce the FSA on behalf of both unaccompanied children in ORR custody and accompanied children in family detention.[70] Judge Gee immediately recognized the risk of the emergent COVID-19 crisis and issued a TRO ordering the government to: (1) make every effort to promptly and safely release children in accordance with the FSA and the Court's prior orders; (2) submit to inspections by the ICE Juvenile Coordinators; (3) provide evidentiary snapshots to the Court, the Independent Monitor, and *Flores* counsel; and (4) show cause by April 10, 2020, why the Court should not grant Plaintiffs' motion for preliminary injunction.[71] She stopped short of ordering parents to

66. *See, e.g.*, Lindsay M. Harris, *Contemporary Family Detention and Legal Advocacy*, 21 HARV. LATINX L. REV. 135, 135–64 (2018) (highlighting heroic advocacy and calling on advocates to continue to provide legal services to detained immigrant families).

67. *See, e.g.*, Rebeca M. López, *Codifying the Flores Settlement Agreement: Seeking to Protect Immigrant Children in U.S. Custody*, 95 MARQ. L. REV. 1635, 1635 (2012).

68. *See* West, *supra* note 44, at 1400–02 (describing why *Roe v. Wade* remains largely insulated from "friendly critique.").

69. Janus Rose, *Thousands of Doctors Demand ICE Release Detainees to Stop a COVID-19 Disaster*, VICE (Mar. 18, 2020, 12:54 PM), https://perma.cc/E7QW-8BVE.

70. Pl. Emergency *Ex Parte* Appl. 3, ECF No. 733. On March 21, advocates also filed suit in the U.S. District Court for the District of Columbia, seeking release for all families in family detention due to the risk of COVID-19. Compl., O.M.G. v. Wolf, 1:20-cv-00786 (D.D.C. March 21, 2020).

71. Order Granting TRO 13–14, Flores v. Barr, 2:85-cv-04544-DMG-AGR (C.D. Cal. March 28, 2020), ECF No. 740.

be released with their children, the rights to joint release of parents with their children under the FSA already whittled away.

At a hearing conducted on April 24, 2020, *Flores* counsel, the government, and the Court agreed that a parent could exercise or waive their child's release rights under the FSA.[72] In mid-May, ICE began conducting "binary choice" interviews to secure parents' waivers of their children's right to release under the FSA:

- without notice to *Flores* counsel;
- without parents or their children having any opportunity to consult with counsel;
- without counsel being present;
- without providing parents or children with an oral or written notice of children's rights under the FSA;
- without providing parents or children with a notice of children's rights under the FSA in a language parents or their children understood;
- without advising parents or children that any decision they made could be reversed prior to their children being released;
- without explaining what steps ICE would take, if any, to assess the ability of designated sponsors to safely care for released children; and
- without advising parents that they could apply for parole so that they could possibly be released with their children under 8 CFR 212.5(b)(3)(ii).[73]

Judge Gee found that these "did not qualify as formal waivers" and specifically noted "those conversations caused confusion and unnecessary emotional upheaval and did not appear to serve the agency's legitimate purpose of making continuous individualized inquiries regarding efforts to release minors."[74] She ordered the government and *Flores* counsel to meet and jointly agree on protocols for informing detained guardians and parents about their children's rights under the FSA and obtain information about suitable sponsors.[75]

As the parties conferred, COVID-19 gripped detention facilities and ICE began reporting confirmed infection of officers, parents, and children in family detention centers. ICE maintained that it could not release accompanied children as it had no protocol to "obtain information regarding, and

72. Pl. Mem. in Supp. of Mot. 21, ECF No. 919.

73. Pl. Resp. to Def.s' Notice of Filing of ICE Juvenile Coordinator Report, Flores v. Barr, 2:85-cv-04544-DMG-AGR (C.D. Cal. May 20, 2020), ECF No. 796.

74. Order Re Updated Juvenile Coordinator Reports 2, Flores v. Barr, 2:85-cv-04544-DMG-AGR (C.D. Cal. May 22, 2020), ECF No. 799.

75. *Id.*

procedures for placement with, available and suitable sponsors."[76] On June 26, 2020, Judge Gee concluded that the family detention centers "[were] 'on fire' and there [was] no more time for half measures."[77] ICE and *Flores* counsel began negotiations regarding *Flores* waivers for parents and guardians to waive their children's rights under the FSA.[78] Dismayed that *Flores* counsel would endorse a "binary choice" model and negotiate with ICE, the Refugee and Immigrant Center for Education and Legal Services ("RAICES"), Proyecto Dilley, and Aldea–the People's Justice Center ("Aldea") filed a motion to intervene on behalf of class members on July 20, 2020.[79] They argued that counsel should be pushing the government to promptly release children, rather than working with the government to implement for the first-time "a completely untested and unvetted waiver protocol during a pandemic."[80] Judge Gee denied their request, stating that counsel and proposed intervenors' different stances on waivers were merely "a disagreement on litigation strategy."[81] Counsel and ICE continued to negotiate and reached agreement on "virtually every aspect" of a *Flores* waiver with an advisal for rights and procedure for releasing children whose parents exercised their *Flores* right.[82]

Meanwhile, without *Flores* counsel's consent, ICE continued to "cause[] confusion and unnecessary emotional upheaval" by approaching newly detained families with the former waiver methods used in May 2020.[83] On the day he was transferred to detention with his wife, five-year-old, and two-year-old daughters, C.M. was approached by ICE officers who said they were giving him "an opportunity:" "They said that they could give us a paper to sign, and that if we signed, our children would be liberated and no longer be with us."[84] C.M. and his wife immediately told the officers "no."[85] ICE did not give them time to consult with each other or an attorney and instead, forced them to sign a paper in English that C.M. did not understand.[86] In describing the process to the Court, C.M. shared:

> I think that what they suggested to us is not a decision any family could be satisfied with. If ICE is only releasing part of the family, that means

76. Pl. Mem. in Supp. of Mo. 24, ECF No. 919 (quoting Judge Gee's June 26, 2020 order).
77. Proposed Intervenors' *Ex Parte* Appl. for Leave to Intervene 13, Flores v. Meese, 2:85-cv-04544-DMG-AGR (C.D. July 20, 2020), ECF No. 854 (quoting Judge Gee's June 26, 2020 order).
78. Joint Report in Resp. to Court Orders, Flores v. Barr, 2:85-cv-04544-DMG-AGR (C.D. Cal. July 31, 2020), ECF No. 898.
79. Proposed Intervenors' *Ex Parte* Appl. for Leave to Intervene 13, ECF No. 854.
80. *Id*. at 16.
81. Order re *Ex Parte* Appl. to Intervene, Flores v. Meese, 2:85-cv-04544-DMG-AGR (C.D. Cal. July 29, 2020), ECF No. 896.
82. Pl. Mem. in Supp. of Mot. 24, ECF No. 919.
83. Amicus Br. 31, ECF No. 908.
84. *Id*. at 51 (declaration of C.M.).
85. *Id*.
86. *Id*.

> they are not actually releasing the family. We are a family and we have to be together.[87]

Other immigrants described feeling confused, anxious and distraught. When A.C. arrived at the detention center, ICE officers asked if she wanted to stay with her one-year-old baby. As she attests:

> I did not understand why I was being asked this question. I was stunned. My daughter is a baby—just over a year old. The person that is my sponsor in the United States is my partner's uncle. He has agreed to welcome us and support us into his home, but I cannot imagine sending my baby to him alone. The officer then gave me a piece of paper and told me to sign if I didn't want to be separated from my daughter. I was scared, so I signed right away.[88]

G.P. described a similar experience on her first day at the detention center and a week later:

> I was very weak, because we got to Miami in a boat, and then flew to PA, I was barely conscious. ICE showed me two papers and asked me to sign them. I started crying, so they left, telling me to contact them when I'm ready to let my kids go with someone else . . . [when they came again] I couldn't handle the pressure, and I started crying again. ICE did not explain what these papers were. I don't remember what ICE did or didn't tell me, because I was very disoriented and extremely upset about being asked to separate from my children.[89]

Despite nearing the end of negotiations with *Flores* counsel, the government abruptly switched course. On August 5, 2020, ICE refused to continue to meet and confer, and objected "to the implementation of any protocol that would potentially provide for the separation of a parent and child who are currently housed together in an ICE family residential center."[90] ICE refused to release children from family detention and told the Court that it would "not voluntarily agree to any protocol" addressing accompanied children's release rights under the FSA.[91] Accompanied children languished with their families in family detention at the height of the pandemic well beyond the twenty-day influx period for transfer or release. As of August 5, 2020, the government had reported 121 cases of COVID-19 in family detention centers.[92] Children as young as two-years-old had been detained for 148 days in

87. *Id.*
88. *Id.* at 64 (declaration of A.C.).
89. *Id.* at 69–70 (declaration of G.P.).
90. Joint Status Report 6, *Flores v. Barr*, No. CV 85-4544-DMG (C.D. Cal. Aug. 5, 2020).
91. *Id.* at 3.
92. Order re *Ex Parte* Appl. to Intervene 37, ECF No. 896 (declaration of Bridget Cambria).

one facility.[93] A three-year-old girl and an eleven-year-old boy had been detained for 357 days in another, with a total of forty-six children detained in that facility for more than 300 days.[94]

V. TURNING TO THE COURTS TO UPHOLD THE FSA'S PROMISE TO ACCOMPANIED CHILDREN AND CREATING A "BINARY CHOICE"

Prolonged detention of accompanied children and parents in family detention centers in violation of the FSA was common practice by the time COVID-19 reached the United States. In fact, the government has never been in compliance with the FSA as it relates to accompanied immigrant children.[95] For twenty-three years, advocates have attempted to compel the government to follow the FSA by filing motions to enforce the FSA before Judge Gee and bringing new class action lawsuits in other districts. Reviewing the history of family detention and these multiple attempts to vindicate the FSA rights in court, this section reveals how litigating the FSA in court has narrowed its promise and transformed its contents from obligations to children in detention to a "choice" exercised by their parents.

A. *The Start of Family Detention*

In the wake of September 11, 2001, immigration policy became more restrictive and at odds with the government's prior practice of releasing families apprehended at the border.[96] INS created its first family detention center in Berks County, Pennsylvania ("Berks"), converting an old nursing home to house eighty-five beds for families detained for alleged immigration violations.[97] In 2006, ICE officially changed its policy of releasing families and created a second family detention facility, the Don T. Hutto Family Residential Center ("Hutto") in Taylor, Texas.[98] A former medium security prison, Hutto was run by Corrections Corporation of America and began detaining immigrants under a contract of $2.8 million per month.[99] The

93. *Id.* (regarding detention at Berks County Residential Center).

94. *Id.* at 44 (declaration of Shalyn Fluharty regarding detention at South Texas Family Residential Center, Dilley).

95. The government has also violated unaccompanied children's rights under the FSA, and advocates have turned to the courts to defend their rights on multiple occasions. *See, e.g.*, Flores v. Sessions, 862 F.3d 863, 881 (9th Cir. 2017) (reaffirming unaccompanied children's right to a bond hearing); Order Re Pls.' Mot. to Enforce Class Action Settlement 22, Flores v. Sessions, No. CV 85-4544-DMG (C.D. Cal. July 30, 2018) (ordering the government to obtain parental consent before administering psychotropic medication to unaccompanied children in ORR custody); and Order Re Defs.' Mot. to Dismiss and Pls.' Mot. of Class Certification 1, 3, Lucas R. et al v. Alex Azar, No. CV 18-5741-DMG (C.D. Cal. Nov. 2, 2018) (granting class certification to unaccompanied children challenging placement, length of stay, and conditions in ORR facilities).

96. *See* Bunikyte, *ex rel.* Bunikiene v. Chertoff, No. A-07-CA-164-SS, 2007 WL 1074070, at *1 (W.D. Tex. Apr. 9, 2007). Prior to 2001, families apprehended for crossing the border were most often released due to a lack of bed space. *Id.*

97. *Id.*

98. *Id.* at *4.

99. Ralph Blumenthal, *U.S. Gives Tour of Family Detention Center That Critics Liken to a Prison*, N.Y. TIMES (Feb. 10, 2007), https://perma.cc/2VUV-U7GR.

facility had capacity to house 400 immigrants, and housed an average of 170 children with their families.[100] While Berks was monitored and licensed by state authorities at the time, Hutto was never licensed to detain children by any local government agency as required by the FSA.[101]

Seeking to challenge this new practice of detaining families, ACLU filed suit in the Western District of Texas in 2007. ACLU contended that the conditions of Hutto were clear violations of the FSA, which required children to be released or placed in non-secure facilities.[102] Relying on the FSA, ACLU argued for children to be released from Hutto with their parents.[103] According to the government, however, the FSA did not apply to accompanied children—it could detain accompanied children without any regard to the terms of the FSA.[104] The District Court rejected the government's argument, holding that "by its terms, [the FSA] applies to all 'minors in the custody' of ICE and DHS, not just unaccompanied minors."[105] But the Court stated that the FSA granted enforceable rights for children *only*.[106] The Court reasoned that joint release of children with their parents was an inappropriate remedy because it "would gravely undermine the entire family detention program."[107] After the District Court's ruling, the parties reached a settlement applicable exclusively to children detained in the Hutto facility,[108] and in 2009, the Obama administration stopped housing children and families in Hutto altogether.[109] But the limits of the FSA as a legal mechanism providing for family release were made clear. The FSA alone was unlikely to end family detention.

B. *The "2014" Surge in Families Crossing the Border*

In 2014, the number of families crossing the U.S.-Mexico border vastly increased.[110] The government opened three more family detention centers in Karnes City and Dilley, Texas and Artesia, New Mexico under the name "Family Residential Centers" to "handle" the influx.[111] The Artesia center

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100. *Id.*
101. *Id.*
102. *Bunikyte*, 2007 WL 1074070, at *12–13; *See also* Margaret Talbot, *The Lost Children*, NEW YORKER (Feb. 24, 2008), https://perma.cc/9JGL-Z5H7.
103. *Bunikyte*, 2007 WL 1074070, at *16.
104. *Id.* at *5–6.
105. *Id.* at *9 (quoting Stipulated Order Extending Settlement Agreement).
106. *Id.* at *50.
107. *Id.* at *61.
108. *ACLU Challenges Prison-Like Conditions at Hutto Detention Center*, ACLU (Mar. 6, 2007), https://perma.cc/J62K-8GBF.
109. *See* López, *supra* note 67, at 1661.
110. For example, in Customs and Border Patrol ("CBP") sectors Del Rio and Rio Grande Valley, the number of apprehended families increased over 500 percent from 2013 to 2014. U.S. BORDER PATROL SW. BORDER SECTORS, *Family Unit and Unaccompanied Alien Children (0-17) Apprehensions FY 14 Compared to FY 13*, https://perma.cc/WE92-QHUX.
111. *See* Dora Schriro, *Weeping in the Playtime of Others: The Obama Administration's Failed Reform of ICE Family Detention Practices*, 5 J. MIGRATION HUM. SEC. 2, 452, 460–62 (2017).

closed later that year.[112] But the Karnes County Residential Center ("Karnes") and the South Texas Family Residential Center ("Dilley") remain open.[113] In 2014, DHS began placing family units, primarily consisting of mothers and their children, in expedited removal proceedings[114] and detaining them in Berks, Karnes, and Dilley without taking steps towards their release.[115] Neither Dilley nor Karnes were licensed by a state agency to provide residential, group, or foster care services for dependent children[116] and Berks soon lost its license when the Pennsylvania Department of Human Services refused to renew it in 2016.[117]

In an attempt to stop the government from detaining mothers and children in these facilities, *Flores* counsel filed a motion to enforce the FSA in the U.S. District Court of Central California. *Flores* counsel argued that DHS had adopted a blanket policy of detaining all female-headed families, including children, in secure, unlicensed facilities for the duration of their immigration proceedings in clear violation of the FSA.[118] In response, the government argued yet again that the FSA did not apply to accompanied minors. Government counsel further contended that, even if the FSA had applied to accompanied minors in 1997, the "surge in family units" crossing the border and the passage of the TVPRA and HSA had modified the FSA such that it was no longer necessary to release accompanied children.[119]

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112. *Id.* at 460, 462.

113. *Id.* at 462, 466; Karnes and Dilley are run by private prison groups Geo Group and CoreCivic, respectively. *See Our Locations, Karnes Family Staging Center*, GEO GROUP, https://perma.cc/GC6R-H6MR (last visited Oct. 4, 2021); *South Texas Family Residential Center*: *A Safe, Humane and Appropriate Environment*, CORECIVIC, https://perma.cc/GCP9-W35Q (last visited Oct. 4, 2021).

114. Created by the 1996 Illegal Immigration Reform and Immigration Responsibility Act ("IIRAIRA"), expedited removal authorizes low-level immigration officers to quickly deport noncitizens who are undocumented or have committed fraud or misrepresentation. Expedited removal expanded greatly in 2004 to allow immigration officers to deport immigrants arriving at the border, as well as those who entered without authorization if they were apprehended within two weeks of arrival and within 100 miles of the Canadian or Mexican border. *See* Designating Aliens for Expedited Removal, 69 Fed. Reg. 48877–81 (Aug. 11, 2004). On January 25, 2017, President Trump issued an executive order directing DHS to dramatically expand the use of expedited removal. On July 22, 2019, DHS announced that they would carry out the full expansion. *See also* Designating Aliens for Expedited Removal, 84 Fed. Reg. 35409–10 (July 23, 2019).

115. *See* Schriro, *supra* note 111, at 463.

116. *Id.* at 454, 462–63. In 2016, Texas was enjoined from issuing childcare licenses to Karnes and Dilley. *See* Grassroots Leadership, Inc. v. Tex. Dep't of Family and Protective Servs., No. D-1-GN-15-004336, 2016 WL 9234059 (Tex. Dist. Dec. 16, 2016). This decision was overturned in 2018 and is currently pending review. *See* Tex. Dep't of Family and Protective Servs. v. Grassroots Leadership, Inc., No. 03-18-00261-CV, 2018 WL 6187433, (Tex. App. Nov. 28, 2018). As of the date of writing, Karnes and Dilley remain unlicensed.

117. *See* Letter from Pa. Dept. of Human Servs. to Diane Edwards, Exec. Dir., Berks Cnty. Comm'r (Jan. 27, 2016), https://perma.cc/T9SG-T32Y (informing Defendants of decision to "non-renew and revoke" the previously-issued certificates of compliance because Berks County Residential Center is not a child residential facility under state regulations, but rather a "residential center for the detention of immigration families, including adults.").

118. *Johnson,* 212 F. Supp. 3d at 864, 870. Central American immigrants in the U.S. District Court of Colombia also filed a class action against the government, challenging their detention under Due Process Clause. *See* R.I.L–R v. Johnson, 80 F. Supp. 3d 164, 170, 172 (D.D.C. 2015).

119. *See Johnson,* 212 F. Supp. 3d at 882.

Judge Gee rejected the government's argument outright.[120] She went beyond the Texas District Court's reasoning and held that the FSA *required the release of a minor's accompanying parent*, "as long as doing so would not create a flight risk or a safety risk."[121] She added that, based upon an individualized review of the facts, the government could conclude in certain cases that it would be in the best interests of an accompanied minor to remain with a parent who is in detention, where for example, a mother chooses to stay in detention or has been deemed a flight risk.[122] On August 21, 2015, in response to the government's motion to reconsider, Judge Gee filed a remedial order.[123] She held that, in the event of an emergency or influx, as envisioned by Paragraph 12 of the FSA, a twenty-day period between apprehension and release or transfer to a non-secure, licensed facility was reasonable and in accord with the FSA.[124] The government could take more than three or five days, but after twenty days, families could no longer remain in unlicensed, secure family detention centers.[125]

Judge Gee's ruling was a significant victory for immigrant advocates. Under her order, the FSA required the government to release *both* parent and child if neither was a danger nor a flight risk. The end to family detention was in sight. But on appeal, the Ninth Circuit narrowed Judge Gee's order. The Ninth Circuit held that the FSA "unambiguously" applied both to unaccompanied minors and those accompanied by their parents, and that the District Court had correctly refused to amend the FSA to accommodate family detention.[126] However, citing the Hutto decision as persuasive authority, the Ninth Circuit ruled that the District Court had erred in interpreting the FSA to provide an affirmative right to release for accompanying parents.[127] The court reasoned that "parents were not plaintiffs in the Flores action, nor are they members of the certified classes. The FSA therefore provides no affirmative release rights for parents."[128] Parents would *not* be released with their children under the FSA.

With the Ninth Circuit narrowing Judge Gee's Opinion, family detention continued. But the government was still required to arrange for unaccompanied children's release or transfer to non-secure facilities. In violation of the Ninth Circuit's order, the government continued to detain families in unlicensed facilities without making efforts to release children or place them in

120. *See id.* at 884–86.
121. *Id.* at 875.
122. *Id.* at 875 n.5.
123. 212 F. Supp. 3d at 907, 909.
124. *Id.* at 914 ("At a given time and under extenuating circumstances, if [twenty] days is as fast as Defendants, in good faith and in the exercise of due diligence, can possibly go in screening family members for reasonable or credible fear, then the recently-implemented DHS policies may fall within the parameters of Paragraph 12A of the Agreement, especially if the brief extension of time will permit the DHS to keep the family unit together.").
125. *Id.*
126. *Lynch,* 828 F.3d at 898, 901.
127. *Id.* at 909.
128. *Id.*

non-secure, licensed facilities. So in the Fall of 2016, *Flores* counsel again filed a motion to enforce the FSA and asked the District Court to appoint an Independent Monitor to oversee the government's compliance with the FSA.[129] Judge Gee granted an evidentiary hearing that January, where counsel presented over 100 declarations and depositions indicating government breaches of the FSA.[130] This time, the government replied that the FSA did not require them to release accompanied minors in expedited removal proceedings because they were subject to mandatory detention under the expedited removal statute.[131] The Court again rejected the government's argument. Judge Gee found that the government was failing to comply with its obligations under the FSA due to the excessive length of detention of accompanied children with their parents—up to eight months in Berks, Dilley, and Karnes, well beyond the five-day time limit or the twenty-days exception previously authorized in times of emergency or influx.[132] Additionally, the Court held that the expedited removal statute, which provided the government with discretion to parole children, did not negate the government's obligation to make an individualized determination about the release of a minor under the FSA.[133] Citing her previous orders, Judge Gee reiterated that in some individualize cases, it could be in the child's best interests to remain in detention with his or her mother.[134] Pursuant to Paragraph 24A of the FSA, the Court ordered the government to finally appoint an internal Juvenile Coordinator to oversee compliance with the FSA, which the government finally did in 2019.[135] The Court warned that if conditions did not improve to reach substantial compliance with the FSA within one year, the Court would reconsider the *Flores* counsel's request to appoint an Independent Monitor.[136]

C. *President Trump's Zero Tolerance Policy*

In perverse compliance with the FSA, the government began releasing accompanied children by way of forcibly separating them from their parents and transferring them to ORR custody as "unaccompanied children".[137] This practice was officially announced on May 7, 2018 as a "zero tolerance policy:" all adults entering the United States unauthorized would be subject to criminal prosecution, and if accompanied by a minor child, the child would

129. Flores v. Sessions, 394 F. Supp. 3d 1041, 1048 (C.D. Cal. 2017).
130. *Id.* at 1050.
131. *Id.* at 1063.
132. *Id.* at 1070.
133. *Id.* at 1064–65.
134. *Id. at* 1067.
135. *Id.;* Flores v. Barr, 934 F.3d 910 (9th Cir. 2019); Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 84 Fed. Reg. 44, 392–44, 535 (Aug. 23, 2019).
136. *Id.* at 1072.
137. *See* Ms. L. v. ICE, 302 F. Supp. 3d 1149 (S.D. Cal. 2018).

be separated from the parent.[138] In utter horror, advocates rallied the public and filed class actions on behalf of parents forcibly separated from their children, such as *Ms. L v. ICE*.[139] The zero-tolerance policy was met with widespread public outcry as well.

As the court noted in its preliminary injunction halting family separation, elected officials spoke out, Congress threatened action, and seventeen states filed a complaint against the federal government challenging the practice.[140] In response, President Trump signed an Executive Order on June 20, 2018 ending forcible separation.[141] The Order called for preservation of the "family unit" by keeping immigrant families together during criminal and immigration proceedings to "the extent permitted by law," while also maintaining "rigorous" enforcement of immigration laws.[142] The order required the Attorney General to "promptly file a request with [Judge Gee] to modify the [FSA], in a manner that would permit the Secretary [of Homeland Security], under present resource constraints, to detain alien families together throughout the pendency of criminal proceedings for improper entry or any removal or other immigration proceedings."[143] For the government, ending forcible family separation meant terminating the FSA to allow for family detention. Advocates could not have it both ways. It was either forcible separation or family detention.

The government soon filed a request before the District Court asking for an exemption from the FSA licensing requirements and release provisions so that ICE could detain child immigrants with their parents or legal guardians together in ICE family detention centers.[144] The government also filed a Notice of Compliance contending that the preliminary injunction ordered in *Ms. L.*, which prevented the government from separating parents and children, nullified the release and state licensure provisions of the FSA.[145] The government asserted that detaining parents with their children complied with the FSA's command to release children from custody "without unnecessary delay" because separating an accompanied child from a parent would violate the *Ms. L.* Order.[146] Judge Gee rejected the government's application. She called the motion a "cynical attempt [. . .] to shift responsibility to the Judiciary for over 20 years of Congressional inaction and ill-considered Executive action that have led to the current stalemate."[147] She found no

138. *See* U.S. ATT'Y. GEN., *Attorney General Sessions Delivers Remarks Discussing the Immigration Enforcement Actions of the Trump Administration,* DEP'T OF JUSTICE (May 7, 2018), https://perma.cc/EA4F-57CP.

139. *Id.*

140. Ms. L. v. ICE, 310 F. Supp. 3d 1133 (S.D. Cal. 2018).

141. *See* Affording Congress an Opportunity to Address Family Separation, Exec. Order No. 13841, 83 Fed. Reg. 29435, 29435 (June 20, 2018).

142. *Id.*

143. *Id.*

144. Flores v. Sessions, CV 85-4544-DMG (C.D. Cal. July 9, 2018), ECF No. 455.

145. *Id.* (citing the preliminary injunction granted in *Ms. L. v. ICE*).

146. *See id.*

147. *Id.*

direct conflict between the *Ms. L.* Order and the FSA, noting that (1) "absolutely nothing" prevented the government from exercising their discretion to release parents and children together; (2) detained parents who were entitled to reunification under the *Ms. L* order could "affirmatively, knowingly, and voluntarily decline[] to be reunited" with their children; and (3) "all parties admitt[ed] that these parents may also affirmatively waive their children's right to prompt release and placement in state-licensed facilities."[148] As evidence of her third contention, Judge Gee cited to the government's Notice of Compliance that stated "plaintiffs in this case have always agreed that detention of the family together is permissible if the parent consents," and *Flores* counsel's response that accompanied children had the "right—subject to opt out by a parent—to be released or placed under the terms of the Agreement."[149] She rejected the government's binary choice between forcible separation and family detention, but in so doing, laid the groundwork for another.

Noting "persistent problems" with the government's compliance with the FSA, Judge Gee called for the appointment of a Special Master/Independent Monitor on July 27, 2018; and on October 5, 2018, she appointed Andrea Sheridan Ordin as the Independent Monitor tasked with ensuring the government's compliance with the FSA, court orders, and other oversight.[150] Ms. Ordin began monitoring FSA compliance but, when COVID-19 struck the United States and its ICE detention centers, the government was still out of compliance with the FSA. As mentioned before, the government was detaining children with their parents for prolonged periods in secure, non-licensed family detention centers with increased risks of COVID-19 exposure.[151]

D. *Regulatory Attempt to End the FSA*

Before the pandemic hit, the government had issued a notice of proposed regulations that would "parallel the relevant and substantive terms" of the FSA and supersede and terminate the FSA.[152] On August 23, 2019, the government formally published the final regulations in the Federal Register.[153] Seven days later it filed a Notice of Termination and Motion to Terminate the FSA before Judge Gee.[154] *Flores* counsel filed a Motion to Enforce the FSA in response and requested that the District Court enjoin the regulations from

148. *Id.* at *12–13.
149. *Id.* at *13.
150. Status Conf. and Pl.'s Mo. to Enforce Settlement, Flores v. Sessions, CV 85-4544-DMG (C.D. Cal. July 27, 2018), ECF No. 409; Order Appointing Special Master/Indep. Monitor (C.D. Cal. Oct. 5, 2018 Order).
151. *See* Pl.'s *Ex Parte* Appl., ECF No. 733.
152. Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 83 Fed. Reg. 45,486 (proposed Sept. 7, 2018) (to be codified at 8 C.F.R. pt. 212, 236; 45 C.F.R. pt. 410).
153. 84 Fed. Reg. 44, 392–44, 535 (Aug. 23, 2019) (to be codified at 8 C.F.R. pt. 212, 236; 45 C.F.R. pt. 410).
154. Flores v. Barr, 407 F. Supp. 3d 909, 914 (C.D. Cal. 2019).

taking effect.[155] Among other actions, the new regulations eliminated the FSA's requirement that a child be released if a custodian was available and detention was not required for flight risk or safety reasons.[156] The new regulations also adopted a new definition of "licensed facility" to allow ICE to detain families in facilities not licensed by a state.[157] The regulations stated, "by modifying the literal text of the FSA in limited cases to reflect and respond to intervening statutory and operational changes, DHS ensures that they retain discretion to detain families . . . to meet its enforcement needs."[158] Judge Gee immediately enjoined the new regulations from taking effect and the government appealed.[159]

On December 29, 2020, the Ninth Circuit affirmed in part and reversed in part.[160] The Ninth Circuit rejected the government's argument that an unprecedented increase in the number of child immigrants arriving annually at U.S. borders warranted terminating the FSA.[161] The court held that the FSA "flatly preclude[ed]" the government from detaining families together in unlicensed family detention centers, reiterating that the FSA requires DHS (1) to release rather than detain minors who do not present a safety or flight risk, as long as a suitable custodian is available, and (2) to place minors who are not released in a non-secure, state-licensed facility.[162] The Court noted that, "if the only problem were a lack of licensed facilities to hold accompanied minors who could not be released, either because they presented a safety or flight risk or because a suitable custodian was not available, then modification of the [FSA] would perhaps be warranted."[163] Jettisoning the FSA's mandate to release accompanied children who did not present a flight risk nor a safety risk, however, was clearly prohibited.[164]

In its decision, the Ninth Circuit also reinforced the legality of the "binary choice" model. The Court held that, "[i]f the government does not release parents, the parents have a choice, albeit a difficult one: they may choose to exercise their children's right to release under the Agreement, provided a suitable sponsor is available, or they may waive their children's rights and keep their children with them."[165] The Court distinguished this "consensual" model from family separation under Trump's zero tolerance policy, stating "the litigation [the government] cites relates to the government's recent

155. *Id*. at 914.
156. 84 Fed. Reg. 44, 44393–96.
157. *Id*. at 44394.
158. *Id*. at 44398.
159. Flores v. Barr, 407 F.Supp.3d 909, 914 (C.D. Cal. 2019).
160. *Rosen*, 984 F.3d 727, 727 (9th Cir. 2020).
161. *Id*. at 742.
162. *Id*.
163. *Id*.
164. *Id*. ("To the extent the Agreement precludes keeping parents and children together based solely on a lack of state licensing schemes that the parties to the Agreement may not have anticipated, then an appropriate modification of the Agreement, permitting placement in non-state-licensed facilities meeting specified standards, might be justified. But the government seeks a much more comprehensive change.").
165. *Id*. at 729.

practice of *forcibly* separating parents and children . . . Nothing in the [FSA] requires the government to take children from their parents against the parents' will."[166] With a clear pronouncement from a circuit court that *Flores* waivers were legal and vastly different from forcible family separation, the rights of detained children under the FSA were firmly reduced to a "choice" exercised by their parents.

VI. THE LEGITIMATION COSTS OF LITIGATING THE FSA

Reviewing the FSA and twenty-three years of *Flores* litigation, it is clear that litigation mobilized accompanied children and immigrant advocates and exposed abuses occurring in family detention. The FSA inspired decades of litigation and gave accompanied children and immigrant advocates the legal tools necessary to access the courts and seek a remedy. Through the FSA, advocates utilized the courts to name and shame the government and condemn family detention. The practice of detaining families in ICE Family Residential Centers was not solely unjust or immoral, but it violated the FSA and was therefore *illegal*. Like the case of *ABC v. Thornburgh*, pronouncements of illegality from the courts framed the issue, lent legitimacy to advocate's concerns, and inspired future litigation and public advocacy. Ongoing litigation also kept government action from occurring behind closed doors. Discovery, orders to report and update the court, and the eventual appointment of an ICE Juvenile Coordinator and Independent Monitor publicized government action in court records. Monitoring mechanisms enabled advocates to closely observe the government, although their experiences working with immigrants in family detention provided the most insight into on-the-ground policy, as evidenced by advocates' discovery of non-reported continuation of "binary choice" interviews in July 2020.

For all its benefits, litigation never compelled the government to meet its obligations under the FSA. To this day, the government has not adopted procedures to comply with the FSA for accompanied children. District Court findings that the government has been in breach of the FSA for detaining children with their parents in family detention centers from as early as July 24, 2015[167] to the present have not prompted the government to safeguard accompanied children's rights. Ninth Circuit holdings that the FSA "unambiguously" applies to accompanied children and requires the government to release children to available custodians or place them in non-secure, state-licensed facilities have not changed the status quo.[168] In the twenty-three years since the FSA, the government has not even come up with a plan to release apprehended accompanied children to family members and eligible sponsors or transfer them to facilities that are licensed and non-secure. There has been

166. *Id.* at 743.
167. *Johnson,* 212 F. Supp. 3d at 886–87.
168. *Lynch*, 828 F.3d at 901–08.

no attempt to create non-secure, licensed family facilities that could house both parent and child. As RAICES, Proyecto Dilley, and Aldea attest, "[a]t no time . . . has the Government considered any other avenues for it to be in compliance with the Agreement other than forcing a binary choice between family separation or exposure to COVID-19 upon them."[169]

Ultimately, litigating the FSA has produced severe legitimation costs. As the Ninth Circuit acknowledged, the FSA itself "gave inadequate attention" to the "housing of family units."[170] There is no doctrine that bans family detention outright; no existing legal precedent, policies, nor institutional arrangements that mandate the release of parents and children together. Judge Gee's 2015 ruling that the FSA required the release of a minor's accompanying parent, "as long as doing so would not create a flight risk or a safety risk"[171] was narrowed by the Ninth Circuit, which firmly held that there is no affirmative right to release for parents.[172] Advocates relying on the FSA to argue against family detention have thus "truncated" their aspirations, "cut[ing them] to size so as to fit the demands of doctrine . . . and of the principles laid down by the past."[173] They have framed their arguments in the illegality of accompanied child detention, rather than the injustice of family detention more broadly. Similarly constrained, judges have been able only to encourage the government to exercise its discretion to jointly release parents and children, and signal to Congress that parents *could* have a right to release under future legislation.[174]

Litigating the FSA has produced merely a narrow right with discretionary application that serves to legitimize the broader system of immigration enforcement and the detention of adults. Akin to *Roe v. Wade,* litigating a right for accompanied children to be free from detention obscures the system which has led to children and adults in detention in the first place. The process of apprehending children and adults and placing them in expedited removal for simply crossing the border is left unexamined and legitimated. Courts evade the question of why children have come into DHS custody and focus narrowly on their release. The detention of adults is also legitimated by holdings that provide a right to release only for children. Their detention is left not just unexamined but upheld as lawful under the FSA and insulated from further legal challenge.

Even accompanied children's narrow right to release under the FSA has been hollowed out through litigation. By refusing to release parents and children and forcibly separating them, the government backed *Flores* litigation

169. Proposed Intervenors' *Ex Parte* Appl. for Leave to Intervene 1, ECF No. 854.
170. 828 F.3d at 906.
171. *Johnson*, 212 F. Supp. 3d at 866.
172. *Lynch*, 828 F.3d at 909.
173. West, *supra* note 44, at 1422.
174. *See* 828 F.3d at 909 n.4 ("In so holding, we express no opinion whether the parents of accompanied minors have a right to release, or if so, the nature of that right . . . We hold only that the Settlement is not the source of any affirmative right to release.").

into a corner. They created a false dichotomy whereby compliance with the FSA meant either family separation or family detention. The response by legal advocates and the courts to contrast the FSA from f*orcible* family separation by emphasizing voluntary parental consent, created and entrenched a "binary choice" model. As Judge Gee held in 2018, "all parties admitt[ed] that these parents may also affirmatively waive their children's right to prompt release and placement in state-licensed facilities."[175] And as the Ninth Circuit confirmed:

> [n]othing in the [FSA] requires the government to take children from their parents against the parents' will . . . If the government does not release parents, the parents have a choice, albeit a difficult one: they may choose to exercise their children's right to release under the Agreement, provided a suitable sponsor is available, or they may waive their children's rights and keep their children with them.[176]

This transformed the right to release under the FSA from a right to a *choice*. It was no longer inherent, inalienable, or non-derogable, but an option presented as an "opportunity" to families in detention in every circumstance—not just the limited circumstances first recognized by Judge Gee in 2015.[177]

The consensual nature of a parent's choice legitimates both the object of consent and the consensual mechanism itself. With parents choosing to remain in detention with their children, family detention becomes insulated from critique. The state doesn't need to step in and reform the system of family detention because parents have opted-in. As in the case of parental care in the context of abortions, parents can now simply be held responsible for making "bad" choices. The consequences of family detention become their own and the government is absolved of all responsibility. The consensual nature of *Flores* waivers also obscures how consent is obtained and the inherent power dynamics and structural inequalities that prevent parents from accessing and exercising a choice. When RAICES, Proyecto Dilley, and Aldea attempted to dispute *Flores* waivers altogether as nonconsensual and forcible —the choice between staying in a center in crisis due to COVID-19 or separating from one's children—they were turned away. Organizations opposing the binary choice could either work with the government to create a waiver that respected the dignity of immigrants in detention, or watch as the government conducted harmful "binary choice" interviews or failed entirely to notify parents and children of their rights. *Flores* waivers were framed as the "just" way forward because they were consensual. As lead *Flores* counsel

175. *Sessions* 12–13, ECF No. 455.
176. *Rosen*, 984 F.3d at 729.
177. *Johnson*, 212 F. Supp. 3d at 875 n.5 ("in some cases, based upon an individualized review of the facts, the government may conclude that it is in the best interests of an accompanied minor to remain with a parent who is in detention.").

Peter Schey attested, "[w]hile a parent's decision to have their child released from detention is a difficult one, we have always believed it's a decision that solely rests in the hands of parents who are in the best position to decide what's in their child's best interest."[178]

But, is there ever a situation in which choosing between family detention and family separation while in the confines of detention under the watchful eye of an immigration officer speaking a foreign language is *not* forcible? Twenty-three years of litigating the FSA has achieved major pronouncements of government practice as illegal, but it has also upheld the system of immigration detention and insulated it from critique. Rights under the FSA have become narrow protections which families can opt into, and the process of opting-in and the object of consent—family detention itself—are now isolated from critique. The time has come to step back from litigation and turn more forcibly to the streets and the Hill.

VII. TURNING TO THE STREETS AND THE HILL

Throughout *Flores* litigation, advocates have partnered with civil society and led grass-roots campaigns to condemn family detention. At the height of the *Flores* litigation this past July, for example, 120 non-governmental organizations, including Amnesty International, the Women's Refugee Commission, Physicians for Human Rights, National Youth Law Center and many others signed a letter addressed to Acting DHS Secretary Chad Wolf and Acting ICE Director Matthew Albence calling for accompanied children detained in family detention centers to be released with their parents, citing the dangers of COVID-19 and the harm of family separation.[179] That same day, advocates arranged for ninety-four child welfare, health, and safety experts to sign onto another letter to Albence calling upon the government to safely and immediately release all children together with their families from family detention.[180] The level of political advocacy and public outrage, however, never reached that of the response to family separation under President Trump's zero tolerance policy.[181] Elected officials did not speak out in the same numbers; Congress did not threaten action; and states did not file suits to end family detention during COVID-19.

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178. Tina Vásquez, *Tensions Persist among Attorneys Representing Detained Children: A Judge Denied Nonprofits' Attempt to Intervene in a Class Action on Behalf of Detained Children*, PRISM (July 31, 2020), https://perma.cc/S26L-VJSR.

179. *Leading NGOs Call on ICE to Stop Family Separation*, AMNESTY INT'L (July 17, 2020), https://perma.cc/SQZ2-GNLE.

180. *Appeal from Experts in Child Welfare, Child Health, and Child Development: Free the Families and Promote Family Unity* (July 17, 2020), https://perma.cc/2USY-KB9U (last updated July 24 to include additional signatories).

181. *See, e.g.*, Juan E. Méndez & Kathryn Hampton, *Forced Family Separation During COVID-19: Preventing Torture and Inhumane Treatment in Crisis*, JUST SECURITY (July 8, 2020), https://perma.cc/S8NX-G9P6 (noting and contrasting the immense public outcry in response to forcible separation under the Zero Tolerance Policy).

However, with a new Congress and new Executive, stronger political and legislative advocacy that avoids the legitimation costs associated with litigating the FSA may achieve practical change. Of course, legislative and executive changes carry their own costs and are often difficult to achieve.[182] Comprehensive immigration reform has not passed since the Illegal Immigration Reform and Immigration Responsibility Act of 1996. And for twenty-three years, neither regulations nor legislation ending family detention and providing for the transfer of accompanied children out of detention have been adopted. It is quite notable then that since President Biden began running for office, he has signaled a willingness to end family detention and correct the errors of the immigration policy under the Obama administration.[183] For example, on June 27, 2020, President Biden tweeted, "[c]hildren should be released from ICE detention with their parents immediately. This is pretty simple, and I can't believe I have to say it: Families belong together."[184] He linked to a New York Times article citing Judge Gee's June 26th Order to stop "half measures" and release children from detention due to the horrors of the COVID-19.[185] Focusing resources on political advocacy, given President Biden's signaling of political will, may likely achieve an end to family detention.

On February 26, 2021, ICE did in fact release all families from the Berks detention and confirmed that the facility is empty.[186] In March 2021, there were several news media reports of the Biden administration planning to turn all family detention centers into seventy-two-hour processing hubs. The Washington Post was the first to break the story, citing DHS draft plans it had obtained and anonymous DHS official sources.[187] According to the Washington Post, DHS is considering turning Berks into a women-only center, and Karnes and Dilley into quick-release intake facilities that would screen immigrant families, check their backgrounds and release them pending an immigration court hearing, enrolling some into alternatives to detention programs, such as ankle-monitoring.[188] However, the article also reported that the administration had told a federal judge the week prior that

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182. *See, e.g.*, LINA NEWTON, ILLEGAL, ALIEN, OR IMMIGRANT: THE POLITICS OF IMMIGRATION REFORM (2008). Scholars often highlight the difficulties of achieving political change in the immigration sector, as newly arriving immigrants do not have the political power of a vote. They are not regarded as part of the *demos* and their presence is often perceived as threatening to national sovereignty. *See, e.g.*, MATTHEW GIBNEY, THE ETHICS AND POLITICS OF ASYLUM: LIBERAL DEMOCRACY AND THE RESPONSE TO REFUGEES (2004).

183. *See, e.g.,* Glenn Thrush & Matt Stevens, *5 Policy Issues Where Trump and Biden Diverged at Final Debate,* N.Y. TIMES (Oct. 23, 2020), https://perma.cc/9HHU-5E4L.

184. *See* @JoeBiden, Twitter (Jun. 27, 2020, 7:42 PM), https://perma.cc/HX54-2RMY.

185. Miriam Jordan, *U.S. Must Release Children from Family Detention Centers, Judge Rules*, N.Y. TIMES (June 26, 2020), https://perma.cc/YLP2-UL6C.

186. Maria Sacchetti, Nick Miroff & Silvia Foster-Frau, *Texas Family Detention Centers Expected to Transform into Rapid-Processing Hubs*, WASH. POST (Mar. 4, 2021, 12:23 PM), https://perma.cc/7WE3-MP8W.

187. *Id.*

188. *Id.*

detention policies had not changed.[189] In a contrasting interview with NBC that same day, Homeland Security Secretary Alejandro Mayorkas confirmed, "[a] detention center is not where a family belongs."[190] Two days later, NBC News reported that ICE had indicated in federal court filings that week that it was transitioning family detention centers to short-term facilities that will release families after no more than seventy-two hours.[191] Yet on March 9, 2021, NBC News reported that, according to a senior ICE official, DHS was *not* ending family detention.[192] No official plans have been published, and families remain in detention. In April 2021, the government was still holding nearly 500 parents and children in detention daily.[193]

Releasing families from detention and turning family detention centers into short-term facilities are and will be, if accomplished, immense victories for ending family detention. But a durable end to family detention must be the goal. Advocates should leverage political pressure and press for more than an internal policy, memorandum, or pronouncement in federal court filings. Internal DHS, HHS, ICE, or CBP policies do not carry the force and effect of law. While they provide persuasive authority, internal policies are not binding on immigration judges nor the Board of Immigration Appeals ("BIA").[194] This means that an immigration judge reviewing the custody determination of a family in detention would not be bound by internal memoranda ending family detention. Internal policies also lack durability. Internal guidelines, memoranda and policies can easily be changed in upcoming administrations. So too can Executive Orders. And as years of litigating the FSA attest, court orders, let alone court filings indicating internal plans cannot guarantee an end to family detention. Advocates should push for formal notice and comment regulations ending family detention. Notice and comment regulations are binding on immigration judges and BIA.[195] They are less subject to the whims of future administrations and must undergo specific timelines of public notice and commenting periods before being changed.

Legislation is also more resilient to changing tides. Within his first 100 days in office, President Biden introduced a comprehensive immigration bill

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189. *Id.*

190. Jacob Soboroff & Julia Ainsley, *Mayorkas Gives Strongest Clue Yet That Biden Administration Hopes to Stop Detaining Migrant Families*, NBC NEWS (Mar. 4, 2021, 1:52 PM), https://perma.cc/5FES-QV2J.

191. Julia Ainsley, *In Court Filing, ICE Says It Is Effectively Ending Use of Family Detention*, NBC NEWS (Mar. 6, 2021, 12:34 PM), https://perma.cc/2VRZ-4K2W. At the moment, March 2021 court filings are under seal and/or only available to parties of record and not the public.

192. Julia Ainsley, *Despite Court Filings and Public Rhetoric, Official Says Biden Administration Is 'Not Ending Family Detention*,' NBC NEWS (Mar. 9, 2021, 4:00 PM), https://perma.cc/UTK3-WL6G.

193. Julia Ainsley, *Five Major Immigration Promises Biden Has Yet to Keep,* NBC NEWS (Apr. 21, 2021, 1:00 PM), https://perma.cc/349L-3LQR.

194. *See* Matter of M-A-C-O-, 27 I. & N. Dec. 477 (BIA 2018) (citing Matter of Briones, 25 I. & N. Dec. 355, 365 n.7 (BIA 2007)) ("DHS policy memoranda that have not been embodied in regulations are not binding on Immigration Judges or this Board, although the policies contained in such memoranda can be adopted by the Board when appropriate.").

195. *See id.* at 477.

that would create an eight-year pathway to citizenship for several undocumented immigrants currently living in the United States, among many other reforms.[196] The bill specifically prohibits "the removal of a child from a parent or legal guardian for the purpose of deterring individuals from migrating to the United States or promoting compliance with the United States immigration laws."[197] It provides for expanding and developing community-based alternatives to detention programs, including expanding family case management programs for families apprehended at the border.[198] Yet, none of the bill's numerous sections end family detention outright or call for the release of parents and children together when neither presents a flight risk or danger.

In 2018, Senators Cory Booker (D-NJ), Patrick Leahy (D-VT), Elizabeth Warren (D-MA), Mazie Hirono (D-HI), Richard Blumenthal (D-CT), Tammy Duckworth (D-IL), Bernie Sanders (D-VT), Kirsten Gillibrand (D-NY), Jeff Merkley (D-OR), and Ron Wyden (D-OR) introduced a bill targeting family detention and the harsh and inhumane conditions of immigration detention centers.[199] The bill, "Dignity for Detained Immigrants Act," was a companion to a House bill introduced earlier that session by Representatives Pramila Jayapal (D-WA) and Adam Smith (D-WA).[200] Among other initiatives, like ending the use of private prisons and county jails for immigration detention, the bill provided for increasing alternatives to detention; individual custody determinations within forty-eight hours of apprehension for all immigrants, with DHS imposing the "least restrictive" conditions if it determines that an immigrant is not a flight risk nor a safety risk; and bond hearings within seventy-two hours before an immigration judge to challenge any custody determination.[201] Under the bill, DHS could place only "vulnerable"[202] immigrants in detention upon an affirmative showing that "it is unreasonable or not practicable to place the individual in a community-based supervision program."[203] Unfortunately, the bill did not make it to the

196. *See* H.R. 1177.

197. *Id.* at § 2402 (section outlining "Child Welfare at the Border.").

198. *Id.* at § 4101, § 4305 (section outlining "Expanding Alternatives to Detention" and "Alternative to Detention." respectively). The Family Case Management Program was implemented from January 2016 through June 2017 as an alternative to family detention and release with electronic monitoring. The program provided intensive case management support to families and achieved a 99 percent compliance rate with ICE and immigration court requirements. *See* WOMEN'S REFUGEE COMM'N, THE FAMILY CASE MANAGEMENT PROGRAM: WHY CASE MANAGEMENT CAN AND MUST BE PART OF THE US APPROACH TO IMMIGRATION (June 13, 2019), https://perma.cc/48FH-AATV.

199. Press Release, Cory Booker, Senator, U.S. Senate, Senators Introduce Bill Targeting Family Detention, Inhumane Conditions of Immigration Detention Centers, Flawed Detention Processing System (June 22, 2018), https://perma.cc/7CDM-X6NQ.

200. Dignity for Detained Immigrants Act of 2017, H.R. 3923, 115th Cong. (2017).

201. *Id.*

202. Defined as those under twenty-one years of age or over sixty years of age; pregnant; identify as lesbian, gay, bisexual, transgender, or intersex; are a victim or witness of a crime; have filed a non-frivolous civil rights claim in federal or state court; have a serious mental or physical illness or disability; have been determined by an asylum officer to have a credible fear of persecution; or have been determined by an immigration judge or the Secretary of Homeland Security to be experiencing severe trauma or to be a survivor of torture or gender-based violence. *Id.*

203. *Id.*

floor.[204] It was reintroduced in 2019,[205] and again on March 25, 2021 by Representatives Jayapal and Smith, and Senator Booker.[206]

A comprehensive bill like the Dignity for Detained Immigrants Act is needed to ban family detention outright and provide for specific oversight and compliance. Parents need affirmative rights to joint release and placement in least restrictive settings with their children. Relying on an exclusive right for accompanied children's release has left children languishing in detention with their parents and diminished their own right to release. However, because the FSA is enforced as a consent decree, any legislation or regulation that gives effect to the rights contained in the FSA will be its demise. As agreed upon in 2001, the FSA will terminate through publication of final regulations that actually implement its requirements.[207] Additionally, courts have also held that legislation codifying certain rights contained in the FSA, specifically the TVPRA and HSA, has partially terminated the FSA with respect to unaccompanied children.[208] Legislation providing for accompanied children's release will likely be found to do the same. Are there dangers to abolishing something advocates have worked hard to preserve? Advocates have been holding onto the FSA and shielding it from criticism for good reason. It is the strongest legal tool ensuring the rights of accompanied children to be released from detention. Yet it has turned into a hollow promise, upheld largely by one District Court Judge whose tenure will not last forever. Advocates should let go of the tight grip around the FSA and push for a different mechanism for change.

VIII. CONCLUSION

As this Note has demonstrated, the FSA has been a critical tool for immigrant advocates protecting immigrant children's rights. The FSA has provided a legal hook for advocates seeking to vindicate children's rights in court, and it has allowed courts to condemn government action as illegal. But the FSA and subsequent litigation has never prompted the government into actual compliance. Since the opening of the Hutto family detention center in the wake of September 11, the carceral system of family detention has only grown. While advocates succeeded in reforming Hutto and ultimately closing it down for families and children, the government opened new family detention centers to combat the influx of families and children crossing the border in 2014. Advocates returned to court and obtained a court order from Judge Gee to release parents and children together,[209] but the Ninth Circuit

204. *Id.*
205. Dignity for Detained Immigrants Act of 2019, H.R. 2415, 116th Cong. (2019).
206. *See* Press Release, Pramila Jayapal, Congresswoman, House of Representatives, Jayapal, Booker, and Smith Reintroduce Dignity for Detained Immigrants Act (Mar. 25, 2021), https://perma.cc/32B3-N44K.
207. *See Rosen*, 984 F.3d at 727.
208. *See, e.g.*, *Lynch*, 828 F.3d at 904.
209. *Johnson*, 212 F. Supp. 3d at 875.

narrowed this ruling.[210] Children's right to release to a parent or eligible sponsor did not mean that children *and* their parents were entitled to release under the FSA. When the government continued to detain children with their parents in prison-like facilities, advocates again went to court to champion children's release and transfer to less restrictive settings. But appointments of a Juvenile Coordinators and Independent Monitor did little to compel compliance. To comply with the FSA for accompanied children, the government employed a zero-tolerance policy of forcibly separating parents from children and turning children over to ORR. When challenged, the government ended this policy, but a second one emerged—a "binary choice" shaped by litigation and sanctioned by the courts, most recently in the Ninth Circuit's December 29, 2020 decision.

During the height of the COVID-19 pandemic, parents could either choose between family separation and indeterminate detention in facilities Judge Gee described as "on fire." The government implemented *Flores* waivers that caused "confusion and unnecessary emotional upheaval." As C.M. described, "I think that what they suggested to us is not a decision any family could be satisfied with. If ICE is only releasing part of the family, that means they are not actually releasing the family. We are a family and we have to be together."[211] Refusing to negotiate with *Flores* counsel to create a more trauma-sensitive, reasoned *Flores* waiver, the government ignored the Court's order to create *Flores* waivers and take all steps necessary to release children from detention centers plagued with COVID-19.

Through twenty-three years of litigation, the rights promised by the FSA have become optional. Parents can allow ICE to release their children and separate their family or waive their children's right to freedom and maintain family unity. No longer are children guaranteed placement in the least restrictive setting in accordance with their age and special vulnerabilities. Litigation has narrowed the FSA's protections and promise. Despite exposing government abuse and mobilizing advocates to vindicate child immigrant's rights, litigation has carried high legitimation costs. Through the lens of critical legal and socio-legal scholarship, this Note has argued that litigating a narrow right for accompanied children to be free from detention, or presented with a waiver, has concealed the system that led to children and adults being detained in the first place. The process of apprehending children and adults is left unexamined and legitimated. The consensual nature of *Flores* waivers has removed accountability. With parents opting in, the responsibility for the horrors of family detention falls on the parents, not the government. The language of "choice" serves to further insulate the structural inequalities under which the detained parents make their "choice."

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210. *Lynch*, 828 F.3d at 909.
211. Amicus Br. 51, ECF No. 908 (declaration of C.M.).

Given these high legitimation costs, advocates should shift away from litigating the FSA towards political and legislative mobilization. President Biden has signaled a willingness to end family detention and release accompanied children from prison-like settings with their parents. As of March 2021, the Biden administration has indicated that family detention centers may likely cease operating in their current form. But an end to family detention must be durable and withstand changes to the Executive Branch. Advocates should press for adopting legislation like the Dignity for Detained Immigrants Act or Notice and Comment Regulations that will end family detention outright.

Children and families deserve lasting change.