

No. 15-56434

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JENNY LISETTE FLORES, et al.,
Plaintiffs-Appellees,

v.

LORETTA E. LYNCH, Attorney General of the United States, et al.,
Defendants-Appellants.

ON APPEAL FROM A FINAL JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA
D.C. No. 2:85-cv-04544-DMG-AGR

**MOTION PURSUANT TO CIRCUIT RULES 27-12 AND 34-3 TO
EXPEDITE BRIEFING AND HEARING SCHEDULE FOR APPEAL**

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Defendants-Appellants (“Appellants” or the “Government”), through undersigned counsel, respectfully move to expedite the briefing and hearing of this appeal pursuant to Ninth Circuit Rules 27-12 and 34-3. Counsel for Plaintiffs-Appellees have stated that they anticipate opposing this motion but have reserved decision until they have the opportunity to review it.¹

This case implicates the United States’ ability to respond nimbly and effectively to a potential surge of migrants traveling as family units seeking to cross the southwest border. Migrant flows over the last 90 days suggest a significant surge of accompanied and unaccompanied migrant children.² The Government has a compelling interest in being prepared for and addressing such a surge, and in having available—if necessary—all of the legal authorities that Congress and the Constitution provide the Executive Branch to meet the substantial challenge that such a surge would present. Because the District Court

¹ On December 1 2015, in accordance with Ninth Circuit Rule 27-12, counsel for the Government spoke with counsel for the Plaintiffs-Appellees (“Appellees”) who stated that they anticipate opposing the Government’s motion to expedite this appeal, but will make a final determination upon being provided and reviewing the motion. This Court authorizes expedited consideration upon a showing of good cause, including a showing of irreparable harm. *See* Circuit Rule 27-12(3).

² *See* Declaration of Woody Lee, Chief of the U.S. Border Patrol’s Strategic Planning and Analysis Directorate (attached as Ex. A). *See also* Julia Preston, *Number of Migrants Illegally Crossing Rio Grande Rises Sharply*, New York Times, November 26, 2015, available at http://www.nytimes.com/2015/11/27/us/number-of-migrants-illegally-crossing-rio-grande-rises-sharply.html?_r=0.

Order significantly constrains that authority and flexibility based on what the Government submits is legal error, we respectfully request expedited consideration of this appeal.

BACKGROUND AND PROCEDURAL HISTORY

On August 21, 2015, the District Court held that the 1997 settlement agreement in this case—which resolved Appellees’ legal challenge to the authority of the legacy Immigration and Naturalization Service to hold *unaccompanied* minors in *discretionary* detention pending the outcome of their removal proceedings—must also be interpreted to govern and severely restrict the detention of family units during their removal proceedings, even if they are in statutorily mandated immigration detention. *See* Order, Aug. 21, 2015, District Court ECF No. 189. Although the District Court’s August 21, 2015 Order provides “some latitude” for the Government to detain family units for brief periods at its family residential facilities, the Order’s ruling that the 1997 Settlement now also applies to *accompanied* children, and thereby to their parents, creates significant operational burdens that impair the Government’s flexibility to respond to changing circumstances. For instance, the Order raises the threshold the Government must meet in order to detain accompanied children and their

parents; restricts the duration of such detention; limits the types of detention facilities that may be used for families; and imposes a legal requirement on the Government to process all members of family units—including adults—“as expeditiously as possible.” *Id.* at 10 n.7.³

Since the District Court’s Order was entered, the Government has come into compliance with the Court’s new requirements through a major undertaking to process and either release or return family units as expeditiously as possible. To do so, the Government has employed significant additional personnel and resources to the Southwest Border to complete interviews and assessments for credible and reasonable fear in a highly expedited manner. For the Government to sustain that level of expedition in the face of a new surge of children and families would almost certainly require the Department of Homeland Security (DHS) to divert substantial resources away from other critical immigration, humanitarian, national security, and border security-related operations.

ARGUMENT

Since the Government filed its notice of appeal on September 18, 2015, the number of family units apprehended while illegally crossing the Southwest Border has increased to a level that makes expedited resolution of this appeal imperative.

³ In response to the Court’s initial ruling on July 24, 2015, the Government unsuccessfully sought modification of

Accompanying this brief is the declaration of Woody Lee, Chief of the U.S. Border Patrol's Strategic Planning and Analysis Directorate. *See generally* Lee Decl., attached as Ex. A. As Chief Lee describes—and as the charts accompanying his Declaration show—the number of apprehensions on the Southwest Border has been rising steadily, and this rise has been the most pronounced when it comes to families. *See id.* ¶ 6; *see also generally id.* (including attached charts). While still lower than during the highest surge period of last summer (from approximately April to July 2014), the number of family units began to rise in July and August 2015, and has continued rising at a substantial rate through the date of filing of this motion. *See id.* at ¶ 7.

In August 2015, the number of individuals in family units apprehended while illegally crossing the Southwest Border was 5,159. *See id.* at ¶ 8. This was approximately 57% higher than August 2014, when the number was 3,296. In September 2015, the number of individuals in family units apprehended illegally crossing the Southwest Border increased further to 5,273, and this represented more than a doubling (approximately 129%) over September 2014, when the number was 2,301. *See id.* at ¶ 9. In October 2015, the number of individuals in family units apprehended illegally crossing the Southwest Border

again increased further to 6,026, which is approaching a 200% (nearly a 179%) increase from October 2014, when the number was 2,162. *See id.* at ¶ 10. Finally, through November 28, 2015, the number of individuals in family units apprehended illegally crossing the Southwest Border was approximately 6,000, which is nearly 165% more than the same period in 2014, when those apprehensions totaled 2,274. *See id.* at ¶ 11.

Even more concerning is that, within the last 15-20 days, there have been multiple days in which the number of individuals in family units apprehended at the Southwest Border has surpassed 300 in a single day. *See id.* at ¶ 12. On November 21, the number apprehended was 344, the highest single day number since July 2014. *See id.* at ¶ 13. This is especially concerning to the Government because it is typically the case that in fall/winter months, illegal migration on the Southwest Border is lower than spring/summer. If historical patterns continue, these numbers will only increase in the spring.

This case warrants expedited consideration because the decision below has severely constrained DHS's flexibility to respond to an increasing flow of illegal migration into the United States through the appropriate use of immigration detention, expedited removal, and the reinstatement of existing orders of removal.

See 8 U.S.C. §§ 1225, 1226, 1231. The Government is preparing for any anticipated increases, but also believes that having the full array of legal tools available is an essential component to addressing increased flows of family units seeking to unlawfully enter the United States. Moreover, a key part of any long term solution to the challenge of migrant children involves disrupting human trafficking and smuggling organizations; public information campaigns to combat misperceptions about U.S. immigration laws;⁴ and cooperative strategies to address the root “push” causes in the migrants’ countries of origin. To maintain and increase these necessary efforts—which may in some instances include the detention and return of family units to their countries of origins—the United States needs the full flexibility Congress provided to use legally-authorized detention as a tool of immigration enforcement. Past experience has shown the Government that it will be difficult to have and maintain a firm and humane response to the challenge of mass family migration, if we do not have the legal authority and nimbleness to strike the right balance in the face of a constantly changing landscape.

⁴ *See* Alicia Caldwell, *Immigrants caught at border believe families can stay in US*, Associated Press, October 31, 2015, *available at* http://www.denverpost.com/ci_29046254/immigrants-caught-at-border-believe-families-can-stay (stating that “Most of the immigrants interviewed, or 181 of them, said reports about the release of immigrant families influenced their decision to come to the United States”).

The Government continues to believe that the District Court erred in its holding that the 1997 settlement addressing a case involving the detention of *unaccompanied* minors must now govern today's situation involving entire family units (including adults) that illegally enter the United States. Prompt resolution of that question is essential for DHS to plan and respond to evolving migration numbers and issues. But, regardless of how this Court may resolve the merits of this appeal, the Government no longer believes it is in a position to wait an additional 12-24 months to obtain a decision.⁵

For these reasons, the Government respectfully asks that the Court expedite the briefing, hearing, and consideration of this appeal under Ninth Circuit Rule 27-12. The Government notes that the transcripts for this appeal have already been filed by the court reporter, and proposes the following briefing and argument

⁵ The Government filed its notice of appeal of the District Court's order on September 18, 2015. *See* Order, Sept. 18, 2015, District Court ECF No. 191. On the same date, this Court entered a Time Schedule Order which set the deadline for Appellants' opening brief on February 29, 2016, and gave Appellees until March 30, 2016, to file their answering brief. Under the original schedule, assuming no extensions of time were sought and granted, all briefing would conclude sometime in mid-April 2016. *See* Order, Sept. 18, 2015, Ninth Circuit ECF No. 1-4. According to this Court's website, this means that oral argument, if granted, would likely occur sometime between January and April 2017. *See* Ninth Circuit Court of Appeals "Frequently Asked Questions," updated August 2015, *available at* <http://www.ca9.uscourts.gov/content/faq.php>, at Question 16 (stating that oral argument is typically held "approximately 9-12 months from completion of briefing."). A decision would likely be expected to issue sometime between July 2017 and December 2017. *See id.* at Question 17 (stating that "most cases are decided within 3 months to a year" from the time of argument).

schedule:

Fri., January 15, 2016

Defendants-Appellants' opening brief and excerpts of record shall be served and filed pursuant to FRAP 32 and 9th Cir. R. 32-1.

Mon., February 15, 2016

Plaintiffs-Appellee's answering brief and excerpts of record shall be served and filed pursuant to FRAP 32 and 9th Cir. R. 32-1.

Mon., February 29, 2016

Defendants-Appellants' reply brief shall be served and filed pursuant to FRAP 32 and 9th Cir. R. 32-1.

March-April 2016

Oral Argument

DATED: December 1, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 1, 2015, I electronically filed the foregoing motion with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

By: /s/ Sarah B. Fabian

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Attorney for Defendants-Appellants

**-IN THE UNITED STATES COURT OF APPEALS
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Jenny L. Flores, <i>et al.</i> ,)	
<i>Plaintiffs-Appellees,</i>)	
)	
)	No. 15-56434
v.)	
)	
Loretta E. Lynch, <i>et al.</i> ,)	
<u><i>Defendants-Appellants.</i></u>)	

DECLARATION OF WOODY LEE

I, Woody Lee, hereby make the following declaration with respect to the above-captioned matter:

1. I am the Chief of the U.S. Border Patrol's Strategic Planning and Analysis Directorate, a component of U.S. Customs and Border Protection (CBP) within the U.S. Department of Homeland Security (DHS). I have been employed in this capacity since January 2015, and I have been a Border Patrol agent for 27 years. Prior to this current assignment, I served as the Border Patrol's Acting Chief and also as Deputy Chief of Law Enforcement Operations.
2. I make this declaration on the basis of my own knowledge, as well as information made available to me in the course of my official duties.
3. In my capacity as the Chief of the Strategic Planning and Analysis Directorate, I am responsible for the daily collection of statistical data and information, and my directorate performs the analysis of this information to provide strategic recommendations to the Chief of the U.S. Border Patrol and other senior leadership. I assist the Chief of the Border Patrol in planning nationwide enforcement and administrative operations. I develop internal policy for the Chief and represent the U.S. Border Patrol in strategic policy meetings requiring Border Patrol subject matter expertise. These responsibilities extend to oversight of field sectors that carry out the front line mission of CBP.

4. I am familiar with the policies and procedures that govern the apprehension, processing, and temporary detention of aliens. As Chief of the Strategic Planning and Analysis Directorate, I am responsible for ensuring that those policies and procedures are implemented and adhered to throughout the entire Border Patrol.
5. I receive all of the daily apprehension information provided to the senior leadership of the U.S. Border Patrol.
6. The number of apprehensions of all aliens along the Southwest Border has been rising steadily, and this rise is most pronounced with respect to family units.
7. Earlier this year, between January 1, 2015, and July 31, 2015, the number of border crossers apprehended while seeking to enter illegally (both in terms of family units and unaccompanied minors) was, with very few exceptions, substantially lower than on the same day in 2014; but, starting in August 2015, that trend reversed itself such that, in the last three months, the average daily apprehensions of individuals in family units illegally crossing the southwest border have been substantially increasing and are now 124% higher per day when compared to the same day in 2014. The number of individuals in family units apprehended started to rise in July and August of 2015, and has since continued to rise at a substantial rate.
8. Specifically, in August 2015, the numbers of individuals in family units apprehended while illegally crossing the Southwest Border was 5,159. This was approximately 57% higher than August 2014, when the number was 3,296.
9. In September 2015, the number of individuals in family units apprehended while illegally crossing the Southwest Border was 5,273. This was approximately 129% higher than September 2014, when the number was 2,301.
10. In October 2015, the number of individuals in family units apprehended while illegally crossing the Southwest Border increased to 6,026, which is nearly a 179% increase from October 2014, when the number was 2,162.

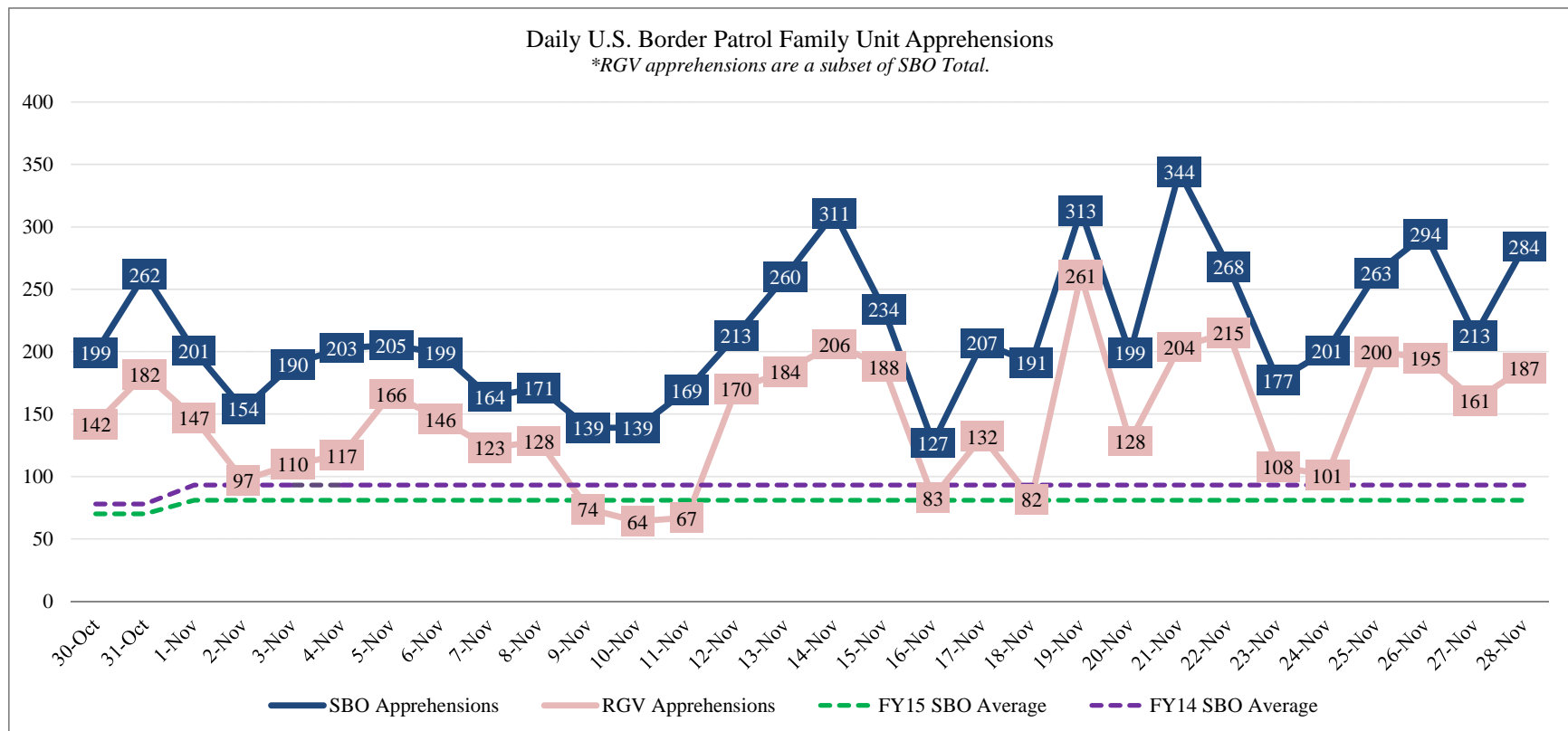
11. For the month of November, through November 28, 2015, U.S. Border Patrol apprehended approximately 6,000 individuals in family units crossing the Southwest Border, which is nearly 165% more than the same period in November 2014 (through November 28, 2014), when the number was 2,274.
12. Further, within the last 15-20 days, there have been several days in which the numbers of individuals in family units apprehended along the Southwest Border has topped 300 in a single day.
13. For example, on November 21, 2015, U.S. Border Patrol apprehended 344 individuals in family units, the highest number of apprehensions on a single day since July 2014.
14. Illegal migration along the Southwest Border is typically lower during the fall and winter seasons. As such, it is especially concerning that the numbers of family units apprehended by Border Patrol are increasing.
15. I have attached four charts to this declaration to further illustrate the number of apprehensions of individuals in family units and also of unaccompanied children along the Southwest Border. Specifically, attached are two charts showing the daily number of apprehensions of individuals in family units and apprehensions of unaccompanied children, respectively, over the last month, as well as the fact that those daily apprehension rates now regularly exceed the daily averages for both Fiscal Years 2014 and 2015. The other two charts show a comparison of the daily number of apprehensions of individuals in family units and apprehensions of unaccompanied children, respectively, from January 1 to November 28 in both 2014 and 2015.
16. I declare that the foregoing is true and correct to the best of my knowledge, information and belief.

DATED: December 1, 2015 Wurda Lee



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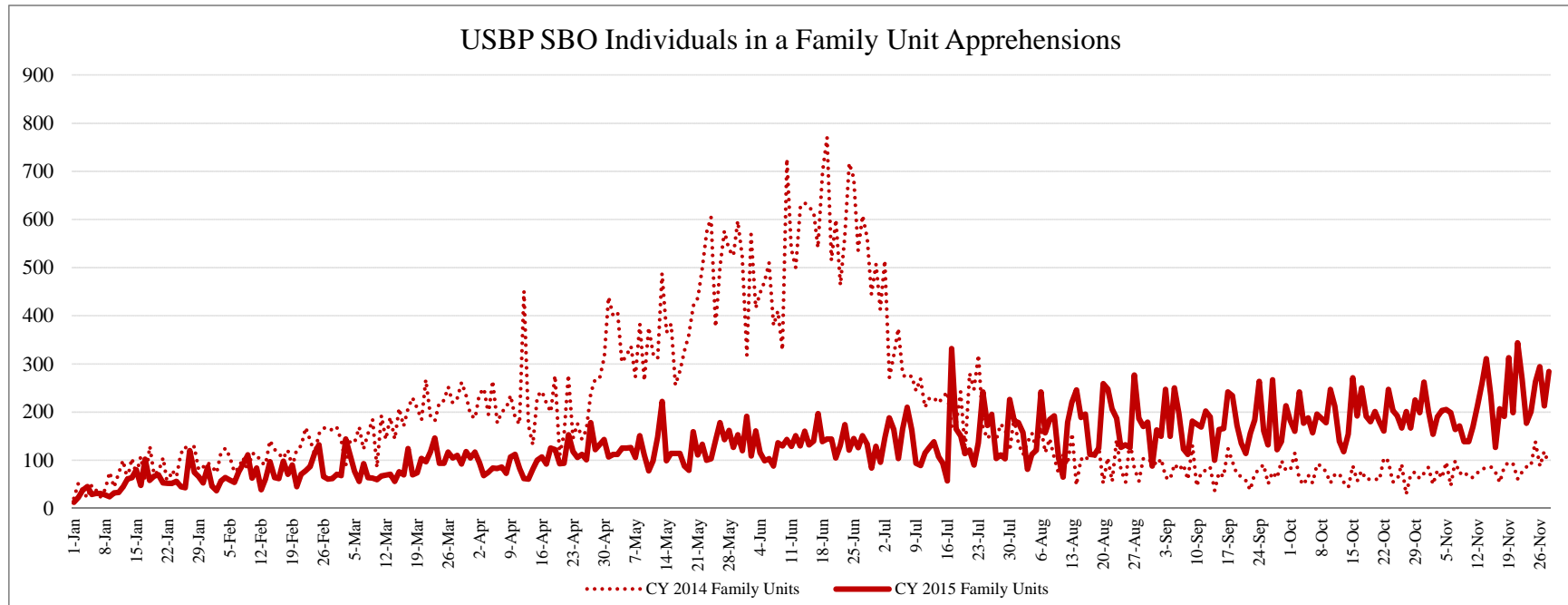
Family Unit Apprehensions along the Southwest Border





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Family Unit SBO Daily Apprehensions CY14 vs CY15 YTD

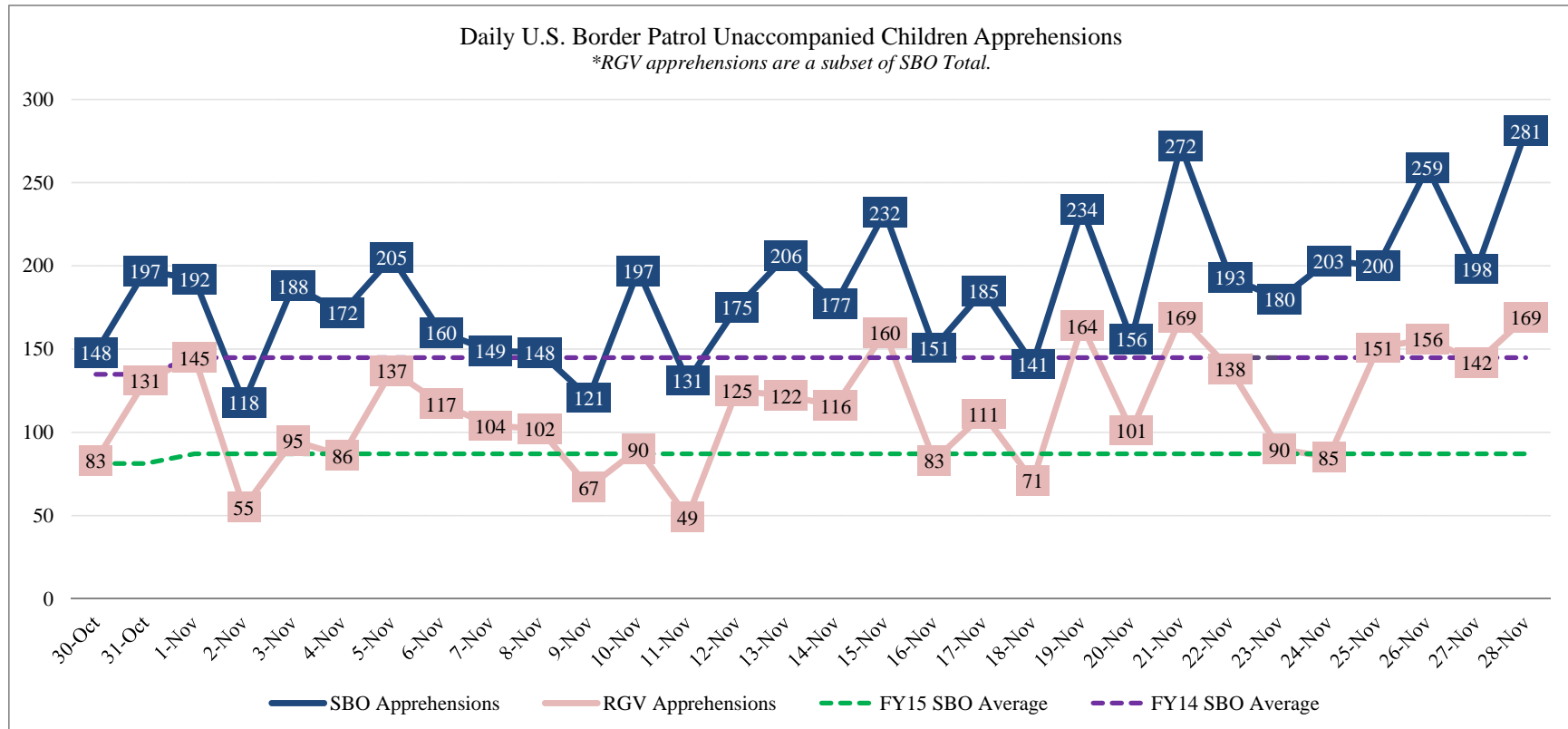


*As of 28 November 2015.



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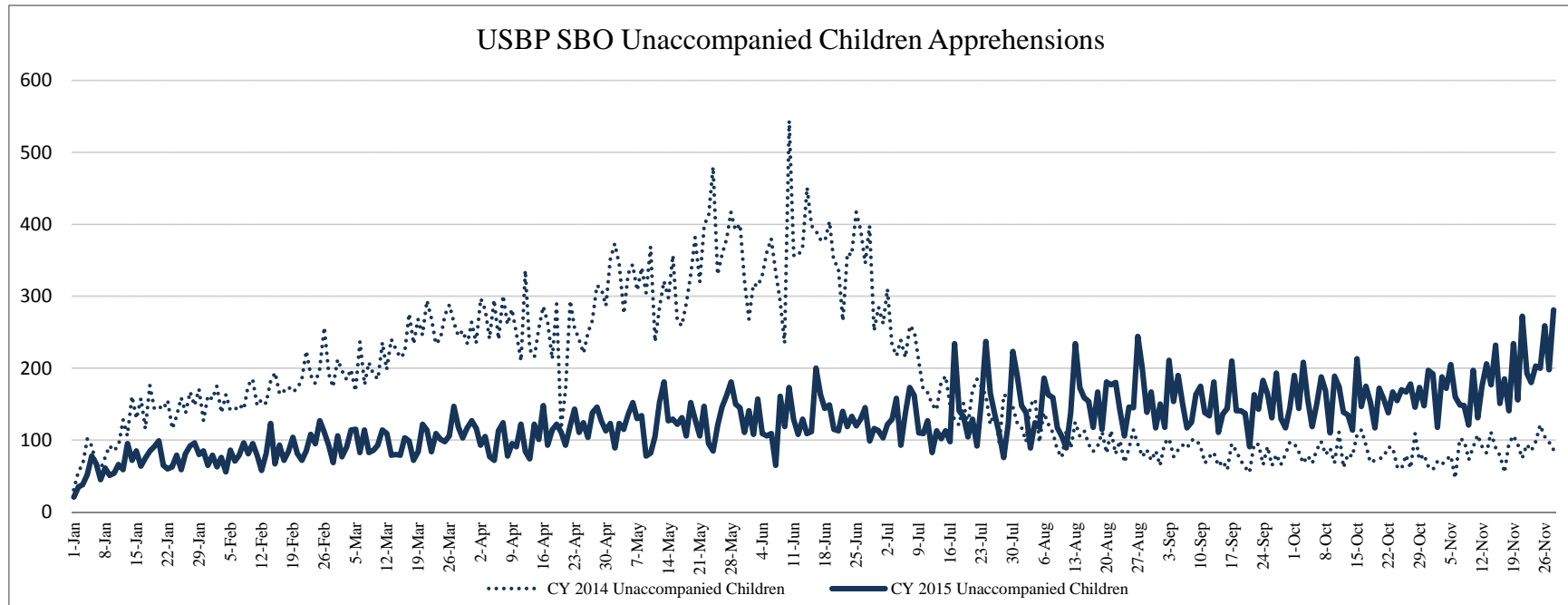
Unaccompanied Children Apprehensions along the Southwest Border





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Unaccompanied Children SBO Daily Apprehensions CY14 vs CY15



**As of 28 November 2015.*