

## 8. Basis of Claim

This claim concerns an unprecedented policy issued at the highest levels of the federal government to separate parents from their children. The extraordinary trauma inflicted on parents and children alike was no incidental byproduct of the policy—it was the very point. The federal government sought to inflict so much distress on parents and children seeking asylum that other families would be deterred from trying to seek refuge in this country. Indeed, while serving as Secretary of the Department of Homeland Security (“DHS”), John Kelly stated that he “would do almost anything to deter people from Central America” from migrating to the United States, including separating children from their parents.<sup>1</sup> After the forced separations began, former Attorney General Jeff Sessions confirmed that the goal was deterrence.<sup>2</sup> In May 2018, Kelly, who had since become President Trump’s Chief of Staff, callously dismissed any concern about the government’s forced separation of a child from her mother, remarking: “[t]he children will be taken care of—put into foster care *or whatever*.”<sup>3</sup> Despite widespread condemnation and legal challenges, President Trump continued to defend the policy as a deterrent to migration from Central America when he tweeted, “[I]f you don’t separate, FAR more people will come.”<sup>4</sup>

In total, the U.S. government has admitted to separating more than 2,700 children from their parents or guardians after they crossed the Southwestern U.S. border.<sup>5</sup> And recent reports indicate that the number of families separated may have been much higher.<sup>6</sup> The victims of this cruel and unconstitutional policy include Elizabeth and her twelve-year-old son Antonio,<sup>7</sup> whose forced separation lasted for eighty-three days.

### A. The Forced Separation of Elizabeth from her Twelve-Year-Old Son, Antonio

At or around 6:00 PM on April 27, 2018, Elizabeth, a thirty-one-year-old Salvadoran national, entered the United States with her twelve-year-old son, Antonio, after fleeing El

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<sup>1</sup> Philip Bump, *Here Are the Administration Officials who Have Said that Family Separation Is Meant as a Deterrent*, WASH. POST, June 19, 2018, [https://www.washingtonpost.com/news/politics/wp/2018/06/19/here-are-the-administration-officials-who-have-said-that-family-separation-is-meant-as-a-deterrent/?utm\\_term=.367acbb619d7](https://www.washingtonpost.com/news/politics/wp/2018/06/19/here-are-the-administration-officials-who-have-said-that-family-separation-is-meant-as-a-deterrent/?utm_term=.367acbb619d7).

<sup>2</sup> *Id.*

<sup>3</sup> *Transcript: White House Chief of Staff John Kelly’s Interview with NPR*, NPR, May 11, 2018, <https://www.npr.org/2018/05/11/610116389/transcript-white-house-chief-of-staff-john-kellys-interview-with-npr> (emphasis added).

<sup>4</sup> Donald Trump (@realDonaldTrump), TWITTER (Dec. 16, 2018, 8:25 AM), <https://twitter.com/realDonaldTrump/status/1074339834351759363> (emphasis in original).

<sup>5</sup> Joint Status Report at 9, *Ms. L. v. Immigration and Customs Enforcement*, No. 18-cv-428 DMS MDD, (S.D. Cal. Dec. 12, 2018); *see also* OFFICE OF THE INSPECTOR GENERAL, U.S. DEP’T OF HEALTH & HUMAN SERVS., OEI-BL-18-00511, SEPARATED CHILDREN PLACED IN OFFICE OF REFUGEE RESETTLEMENT CARE at 11 (Jan. 17, 2019) [hereinafter HHS OIG REPORT].

<sup>6</sup> *See* HHS OIG REPORT, *supra* note 5, at 1, 6, 13 (reporting that “thousands of children may have been separated during an influx that began in 2017, before the accounting required by [the court in *Ms. L. v. Immigration and Customs Enforcement*], and HHS has faced challenges in identifying separated children.”).

<sup>7</sup> At the claimants’ request amid ongoing concerns for their safety, Elizabeth and Antonio are pseudonyms.

Salvador in fear for their safety. Before leaving, Elizabeth suffered years of physical, emotional, and sexual abuse, including a brutal rape orchestrated by three members of a notorious gang and witnessed by Antonio. After the rape, gang members made multiple direct threats against Elizabeth and Antonio. Fearing that both she and Antonio would be killed if they remained in El Salvador, Elizabeth fled El Salvador with Antonio in November 2017. Elizabeth was forced to leave a younger son behind in El Salvador with family. Initially, she and Antonio stayed in Hidalgo, Mexico, but they were forced to flee for their lives once again after Elizabeth saw a close relative of her rapist in Hidalgo.

Upon crossing the border in California, Elizabeth and Antonio were apprehended by U.S. Customs and Border Protection (“CBP”) agents, who took them into custody at the Imperial Beach Border Patrol Station (“Imperial”). Elizabeth and Antonio immediately claimed asylum. At the *hielera*,<sup>8</sup> Elizabeth and Antonio were placed in a cell with other detained immigrants. The cell was freezing, and Elizabeth and Antonio had to sit on the cold floor. They were provided a single thin aluminum foil sheet to try to stay warm, and were not given anything to eat or drink.

Around 9:00 PM, approximately two hours after they arrived at Imperial, a CBP officer called Elizabeth’s name.<sup>9</sup> She and her son started to follow the officer out of the cell, but an officer indicated that Elizabeth must come alone. Confused and afraid, she followed the officer into a smaller room, where two officers interrogated her. Elizabeth was exhausted, and she could barely understand the officers’ questions. Elizabeth tried her best to explain to the officers that she and Antonio had fled El Salvador in fear for their lives.

After the officers finished interrogating Elizabeth, they returned her to the large cell, where Antonio nervously waited. After about five minutes, an officer called Elizabeth’s name again. She stood, and as Antonio watched, officers handcuffed Elizabeth. Officers informed her that because she had entered the United States illegally, she would be criminally charged and separated from her son for “days, months, or even years.” Antonio started to cry, and Elizabeth begged the officers for a moment to say goodbye to Antonio and give him important documents, including his identification card, his birth certificate, and contact information for a relative living in the United States. The officers told her that there was no time and dragged her away, saying that Antonio (who was twelve years old) was “no longer a child” and that he “knows what he’s doing.” One officer told Elizabeth to leave Antonio’s documents and the officer would give them to Antonio. Relying on the officer’s promise, Elizabeth left them behind, only to later learn from Antonio that he never received them.

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<sup>8</sup> It is common parlance to refer to a short-term immigration detention center like Imperial as an “*hielera*,” which means “icebox,” because of the freezing temperatures in these facilities.

<sup>9</sup> Elizabeth and Antonio only speak Spanish. All referenced conversations were in Spanish unless otherwise noted.

The officers then loaded Elizabeth into a van with four other immigrants. Although the other detained immigrants in the vehicle attempted to comfort her, Elizabeth hysterically wept the entire drive to a facility in San Diego, where she was incarcerated.<sup>10</sup> At this facility, Elizabeth was processed and placed in a room with seven other women. The room contained four bunk beds, and Elizabeth's bed did not have a mattress. The eight women shared a doorless bathroom, and there was no privacy. On or around April 30, 2018, Elizabeth was taken to the courthouse and charged with a misdemeanor, 8 U.S.C. § 1325.

Following their separation, officers put Antonio on an airplane. They did not give the frightened twelve-year-old boy any information about where they were taking him, and Antonio thought the government was going to give him away to another family. Antonio had never traveled on an airplane before, and felt particularly scared because he did not have his mom. Antonio was taken by the plane to another airport, where he was boarded onto another flight. When he got off the second airplane, Antonio was taken to a facility where there were other separated children. The other children were also scared and crying, and a person at the facility told Antonio and the other children that they had to call her "mom." Antonio felt very scared and thought he would never see his mother again.

### **1. Elizabeth Is Denied Information About Antonio and Is Forcibly Medicated**

From the moment Antonio was taken away, Elizabeth was consumed with fear and grief. Elizabeth repeatedly asked officers for even the smallest amount of information about Antonio. Despite her desperate pleas, officers gave her no information. Officers told Elizabeth that they did not know who or what she was talking about. She felt hopelessly disoriented and confused, and she wondered if she was losing her mind. She could not sleep or eat, and she was so distraught that she sometimes wanted to die.

Elizabeth was later transferred to another facility in San Diego.<sup>11</sup> Elizabeth continued to plead for information about Antonio. Some officials at this second facility told Elizabeth that Antonio's name was not in any immigration records, and one officer told her that she had entered the United States alone, without a child at all. Overwhelmed by fear for Antonio, Elizabeth could not stop crying. She was taken to see a doctor at the facility, who gave her a medication for her anxiety. Information obtained by counsel shows that Elizabeth was given a prescription drug, Hydroxyxine Pam (Vistaril).

Initially, Elizabeth voluntarily took the medication, but wanted to stop after less than a week because the pills made her feel extremely tired and disoriented. She tried to stop taking the pills, but detention facility staff told her that she had no choice but to take the medication. Officers

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<sup>10</sup> Information obtained by counsel indicates that Elizabeth was likely taken to Metropolitan Correction Center.

<sup>11</sup> This facility was likely the Western Region Detention Facility, a prison operated by The GEO Group, Inc., and contracted to the federal government.

began to force Elizabeth to take two pills, three times per day, against her will. Elizabeth was physically forced to take the medication on more than one occasion. Other times, officers would berate and verbally threaten her until she took the pills.

The pills rendered Elizabeth unable to eat or stay awake at all. Others detained at the facility were concerned and would try to wake Elizabeth up for meals, but she was unable to get out of bed, and she quickly lost a significant amount of weight. To compound Elizabeth's humiliation and sense of violation, she was also forced to undergo a strip search before and after meeting with her lawyer or leaving the facility for a court hearing. Officers required her to strip completely naked each time, including underwear, and allow a gloved officer to search her orifices. Elizabeth felt completely powerless to protect herself.

## **2. Elizabeth Is Permitted a *Single Five-Minute Phone Call with Antonio***

After approximately a month with no information *at all* about Antonio, Elizabeth was finally permitted to speak to him after a court hearing in late May. As soon as Elizabeth heard Antonio's voice, she began to cry. During this phone call, which lasted approximately 5 minutes, Antonio cried and begged Elizabeth to come get him and take him back to El Salvador, and Elizabeth could not find the words to tell Antonio that she could not help him. All Elizabeth could tell Antonio was to be patient and that she loved him. Although Elizabeth was relieved to speak to Antonio, the call left her feeling helpless and guilty that she could not be there for her scared son.

The next day, Elizabeth was again shackled by her hands and feet. She was then loaded onto a bus with six other women. She was humiliated; when she came to the United States, all she had wanted was for her and Antonio to be safe, and instead she was ripped away from her son and treated like a criminal. After a long drive, the bus stopped at Otay Mesa Detention Center ("Otay Mesa"). Elizabeth was ordered to shower and change clothes. After she showered, Otay Mesa guards tried to give Elizabeth pills, but when she refused them, the officers did not force her to take them.

## **3. Elizabeth Becomes Violently Ill**

Around two weeks after Elizabeth arrived at Otay Mesa, she became extremely sick. She could not breathe, she vomited multiple times, she shook uncontrollably, and she felt extreme chest pain. Elizabeth had never experienced any illness like this before. She was examined by Otay Mesa medical staff and told that she needed to "breathe" and drink more water. For the duration of her time at Otay Mesa — and continuing to this day — Elizabeth experienced intermittent, excruciating chest pain. A doctor who Elizabeth has seen since her release has told her that her chest pains are symptomatic of her experiences in custody and may be related to Elizabeth's involuntary consumption of frequent, high dosages of Vistaril.

#### **4. Elizabeth Continues to Desperately Attempt to Contact Antonio with Little Success**

Beginning the day Elizabeth arrived at Otay Mesa, she continually asked officers about Antonio. Most officers would ignore Elizabeth or tell her that they knew nothing about Antonio. Finally, an officer told Elizabeth that he could help her find out where Antonio was and could provide her a phone number to call him, but that she would need money to make the calls. Elizabeth learned from other women detained at the facility that she could earn \$1 per day working as a janitor. Eager to speak with her son, Elizabeth began to work as a janitor. However, every time she called the phone number that was provided to her, no one answered.

Although Elizabeth made many calls to the shelter where Antonio was housed, she was only able to speak to her son two times. During the calls, Antonio would cry and plead with his mother to come get him. Elizabeth learned from the calls that Antonio was in New York, thousands of miles away. No one gave Elizabeth or Antonio any information about when, if ever, they would see each other again.

#### **5. Criminal Charges Against Elizabeth Are Dropped, and Elizabeth Is Released**

On or around June 27, 2018, Elizabeth learned that the government had dropped the criminal charges against her. Elizabeth was overjoyed, because she thought that she would be released and finally reunited with her son. Her happiness was short lived, however, because Elizabeth learned that because her immigration case was still pending, she would not be reunited with Antonio.

On or about June 30, 2018, Elizabeth attended a bond hearing in her immigration case with her pro bono immigration attorney. At the hearing, Elizabeth's attorney informed the immigration judge that she had been separated from her son for several months. The judge set a \$1,500 bond, which was far beyond any amount that Elizabeth could post. After approximately one week, Elizabeth found a sponsor for her in Florida who could post the bond. After over two months of detention, Elizabeth was finally released.

Elizabeth arrived in Florida on or around July 7, 2018 and moved into an apartment near her sponsor. After arriving, Elizabeth called the facility where Antonio was being held. She called every day, and sometimes she was able to speak to Antonio. Other days, a man named Orlando would answer the phone and tell her that Antonio could not come to the phone. No one would give Elizabeth any information about when she would be reunited with her son. Elizabeth felt overwhelmed by anxiety and uncertainty, and she went days without sleep. She did not understand why she could not be reunited with her son in Florida, and she did not have the resources to travel to New York.

## **6. Elizabeth and Antonio are Reunited After Almost Three Months of Forced Separation**

On or around July 20, 2018, Elizabeth received a phone call from a woman who had helped care for Antonio in New York. The woman told Elizabeth that Antonio would arrive at the Miami airport the next day. The woman also said that Elizabeth should be proud, because Antonio was an “excellent kid.” The following day, Elizabeth went to the Miami airport with her sponsor, and anxiously waited for Antonio to arrive. When Elizabeth finally saw Antonio, she rushed towards him and hugged him. She felt like it had been years since they were apart. Together, she and Antonio cried and cried.

Elizabeth suffered extreme emotional distress during her separation from her son, and she continues to experience symptoms of that distress today. After taking Antonio to his first day of seventh grade in Florida, Elizabeth had a debilitating panic attack. She is often overwhelmed by thoughts that Antonio will be taken away from her and that she will never see him again. Because of her experiences while in custody, Elizabeth experiences intermittent, excruciating chest pain and suffers from insomnia and persistent fatigue.

Antonio also experiences ongoing anxiety as a result of the government’s actions. While Antonio was detained in New York, he was plagued by thoughts that he would never see his mother again, and that she might die while they were apart. He struggled to eat and sleep, and would lay awake thinking about his mother. Antonio was given no information about his mother’s whereabouts for at least a month of his separation, nor was he told whether he would ever see her again. He felt extremely alone, and all he wanted was to be with his mother.

To this day, Antonio continues to worry about being “arrested again,” and the possibility he will be separated from his mother. He has nightmares about his experience, and described the months-long separation from his mother as “the worst thing that has ever happened.”

### **B. The Trump Administration’s Family Separation Policy**

#### **1. The Purpose of the Policy**

Curbing asylum has been a central focus of the Trump Administration’s immigration policy.<sup>12</sup> On April 6, 2018, President Trump issued a memo entitled “Ending ‘Catch and

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<sup>12</sup> See, e.g., *US Judge Bars Trump Administration From Enforcing Asylum Ban*, CNBC, Nov. 20, 2018, <https://www.cnbc.com/2018/11/20/immigration-policy-judge-bars-us-from-enforcing-trump-asylum-ban.html>; Shaw Drake & Edgar Saldivar, *Trump Administration Is Illegally Turning Away Asylum Seekers*, ACLU, Oct. 30, 2018, <https://www.aclu.org/blog/immigrants-rights/trump-administration-illegally-turning-away-asylum-seekers>; Emma Platoff, Alexa Ura, Jolie McCullough & Darla Cameron, *While Migrant Families Seek Shelter From Violence, Trump Administration Narrows Path to Asylum*, TEXAS TRIBUNE, July 10, 2018, <https://www.texastribune.org/2018/07/10/migrant-families-separated-border-crisis-asylum-seekers-donald-trump/>; Glenn Thrush, *U.S. to Begin Blocking Asylum Seekers From Entering Over Mexican Border*, N.Y. TIMES, Jan. 24, 2010, <https://www.nytimes.com/2019/01/24/us/politics/migrants-blocked-asylum->

Release’ at the Border of the United States and Directing Other Enhancements to Immigration Enforcement.”<sup>13</sup> The memo, among other things, directs the Secretary of Homeland Security, the Secretary of Defense, the Attorney General, and the Secretary of Health and Human Services to submit a report to the President that details all of the measures their respective departments have pursued or are pursuing to end “‘catch and release’ practices.”<sup>14</sup> “Catch and Release” refers to a federal policy that allows people who are seeking asylum to wait for their hearings in the community, not in government custody.<sup>15</sup>

On the same day that President Trump issued his directive, then-Attorney General Jeff Sessions announced that the government would institute a “Zero Tolerance” policy, mandating the prosecution of all persons who cross the United States border between ports of entry. The purpose of the “Zero Tolerance” policy was to deter Central Americans from seeking asylum or otherwise coming to the United States.<sup>16</sup> Through this policy, the United States intentionally inflicted trauma on immigrant parents and their children who crossed the border, by separating the children from their parents in violation of the United States Constitution.<sup>17</sup> The U.S. Government has admitted to forcibly separating more than 2,700 children from their parents and placing them in government custody.<sup>18</sup> A recent HHS OIG report, however, indicates that the actual number is “thousands” higher.<sup>19</sup>

Administration officials at the highest levels knew well before implementing the policy that it would harm the people it affected.<sup>20</sup> Yet, once the separations began to generate public outrage and condemnation, administration officials changed their tune. They insisted that their

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[trump.html?action=click&module=Top%20Stories&pgtype=Homepage](https://www.reuters.com/article/us-usa-immigration-asylum/trump-administration-moves-to-curb-migrants-asylum-claims-idUSKCN1ND35K); Yeganeh Torbati & Kristina Cooke, *Trump Administration Moves to Curb Migrants’ Asylum Claims*, REUTERS, Nov. 8, 2018, <https://www.reuters.com/article/us-usa-immigration-asylum/trump-administration-moves-to-curb-migrants-asylum-claims-idUSKCN1ND35K>.

<sup>13</sup> 83 Fed. Reg. 16,179 (Apr. 13, 2018).

<sup>14</sup> *Id.*

<sup>15</sup> Stacy Sullivan, *We Shouldn’t Take the Bait on ‘Catch and Release’*, ACLU, July 20, 2018, <https://www.aclu.org/blog/immigrants-rights/immigrants-rights-and-detention/we-shouldnt-take-bait-catch-and-release>.

<sup>16</sup> *60 Minutes, Chaos on the Border, Robots to the Rescue, To Kill a Mockingbird* (CBS Television Broadcast Nov. 25, 2018) (revealing an un-redacted copy of the memo implementing the “Zero Tolerance” policy that stated that the policy’s purpose was deterrence).

<sup>17</sup> See *Ms. L. v. U.S. Immigration and Customs Enforcement*, 302 F. Supp. 3d 1149, 1162-67 (S.D. Cal. 2018); *Ms. L. v. U.S. Immigration and Customs Enforcement*, 310 F. Supp. 3d 1133, 1142-46 (S.D. Cal. 2018).

<sup>18</sup> Joint Status Report, *supra* note 5, at 9; HHS OIG REPORT, *supra* note 5, at 11.

<sup>19</sup> The HHS OIG Report notes that the figure reported in the *Ms. L* litigation does *not* include children whom, beginning in mid-2017, DHS forcibly separated from their parents but were released from HHS custody prior to the June 26, 2018 order in *Ms. L* enjoining the practice of child separation. HHS estimates that there are “thousands of children whom DHS separated during an influx that began in 2017 and whom ORR released prior to *Ms. L. v. ICE*.” HHS OIG REPORT, *supra* note 5, at 13. The figure is understated because it also does *not* include children who were apprehended with and separated from a family member other than a parent, such as a grandparent or older sibling. *Id.* at 7.

<sup>20</sup> Jeremy Stahl, *The Trump Administration Was Warned Separation Would Be Horrific for Children, Did It Anyway*, SLATE, July 31, 2018, <https://slate.com/news-and-politics/2018/07/the-trump-administration-was-warned-separation-would-be-horrific-for-children.html>. Commander White, a former HHS senior official, testified before Congress that he had warned the administration that implementing a family separation policy would involve a significant risk of harm to children. The policy was launched a few weeks after he raised his concerns. *Id.*

hardline stance on prosecuting border crossings was not intended to discourage immigration, and, shockingly, even denied the existence of a family separation policy.<sup>21</sup> The administration, however, could not expunge the numerous statements made by high-level officials confirming that family separation was the express policy and that its purpose was deterrence.

In a December 16, 2017 memorandum exchanged between senior officials at DOJ and DHS, the officials proposed a “Policy Option” of “Increased Prosecution of Family Unit Parents.” Under the proposal, “parents would be prosecuted for illegal entry . . . and the minors present with them would be placed in HHS custody as [unaccompanied alien children].” The memorandum asserted that “the increase in prosecutions would be reported by media and it would have substantial deterrent effect.”<sup>22</sup>

When asked about the policy by NPR on May 11, 2018, John Kelly, President Trump’s Chief of Staff, responded that “a big name of the game is deterrence . . . It could be a tough deterrent—would be a tough deterrent.”<sup>23</sup> As for the children affected, he said: “[t]he children will be taken care of—put into foster care *or whatever*.”<sup>24</sup>

On Fox News’ “The Ingraham Angle,” host Laura Ingraham asked then-Attorney General Jeff Sessions, “is this policy in part used as a deterrent? Are you trying to deter people from bringing children or minors across this dangerous journey? Is that part of what the separation is about?” Sessions replied, “I see that the fact that no one was being prosecuted for this was a factor in a fivefold increase in four years in this kind of illegal immigration. So yes, hopefully people will get the message and come through the border at the port of entry and not break across the border unlawfully.”<sup>25</sup>

Steven Wagner, Assistant Secretary of the U.S. Department of Health and Human Services (“HHS”), told reporters that “[w]e expect that the new policy will result in a deterrence effect, we certainly hope that parents stop bringing their kids on this dangerous journey and entering the country illegally.”<sup>26</sup>

And President Trump himself has indicated that deterrence was the motivation behind his Justice Department’s “Zero Tolerance” policy. When speaking with reporters at the White House on October 13, 2018, he said “If they feel there will be separation, they don’t come.”<sup>27</sup>

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<sup>21</sup> Christina Wilkie, *White House Denies Separating Families Is “Policy,” but Insists it Is Needed “to Protect Children,”* CNBC, Jun. 18, 2018, <https://www.cnbc.com/2018/06/18/white-house-denies-separating-families-is-policy.html>.

<sup>22</sup> *Policy Options to Responder to Border Surge of Illegal Immigration*, (Dec. 16, 2017), <https://www.documentcloud.org/documents/5688664-Merkleydocs2.html>.

<sup>23</sup> *Id.*

<sup>24</sup> *Transcript of White House Chief of Staff John Kelly’s Interview with NPR*, *supra* note 3 (emphasis added).

<sup>25</sup> Bump, *supra* note 1.

<sup>26</sup> *Id.*

<sup>27</sup> David Shepardson, *Trump Says Family Separations Deter Illegal Immigration*, REUTERS, Oct. 13, 2018, <https://www.reuters.com/article/us-usa-immigration-trump/trump-says-family-separations-deter-illegal-immigration-idUSKCN1MO00C>.

On December 16, 2018, the President tweeted, “[I]f you don’t separate, FAR more people will come.”<sup>28</sup>

Thus, the trauma inflicted by the family separation policy was entirely intentional and premediated. This point cannot be overstated: the most senior members of the U.S. government intentionally chose to cause parents and *small children* extraordinary pain and suffering in order to accomplish their policy objectives. The unspeakable pain and suffering experienced by parents and small children was seen as a useful device by the most senior members of the U.S. Government to accomplish their policy objective of deterring Central Americans from seeking asylum in the United States.

## 2. The Implementation of the Policy

Once the policy was implemented and immigration officers separated children from their parents, DHS deemed separated children to be unaccompanied and transferred them to the HHS Office of Refugee Resettlement (“ORR”), which is responsible for the long-term custodial care and placement of “unaccompanied [noncitizen] children.”<sup>29</sup> But DHS failed to take even the most basic steps to record which children belonged to which parents, highlighting the government’s utter indifference to the dire consequences of the policy on the separated families. The DHS Office of Inspector General (“DHS OIG”) noted that the “lack of integration between [U.S. Customs and Border Protection] CBP’s, [U.S. Immigration and Customs Enforcement] ICE’s and HHS’ respective information technology systems hindered efforts to identify, track, and reunify parents and children separated under the Zero Tolerance policy” and that “[a]s a result, DHS has struggled to provide accurate, complete, reliable data in family separations and reunifications, raising concerns about the accuracy of its reporting.”<sup>30</sup>

Generally, CBP officers—the first to encounter individuals entering the United States—were the officers who separated parents and children. Following the separation, CBP transferred many of the parents into ICE custody.<sup>31</sup> When the “Zero Tolerance” policy went into effect, ICE’s system “did not display data from CBP’s systems that would have indicated whether a detainee had been separated from a child.”<sup>32</sup> As a result, when ICE was processing detained individuals for removal, “no additional effort was made to identify and reunite families prior to removal.”<sup>33</sup> Even more alarming, in order to keep track of the children, ICE manually entered the child’s identifying information into a Microsoft Word document, which was then e-mailed as

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<sup>28</sup> Donald Trump, *supra* note 4 (emphasis in original).

<sup>29</sup> OFFICE OF THE INSPECTOR GENERAL, U.S. DEP’T OF HOMELAND SECURITY, OIG-18-84, SPECIAL REVIEW - INITIAL OBSERVATIONS REGARDING FAMILY SEPARATION ISSUES UNDER THE ZERO TOLERANCE POLICY 3 (Sept. 27, 2018) [hereinafter DHS OIG REPORT].

<sup>30</sup> *See id.* at 9-10 (noting, among other things, that agencies’ incompatible computer systems erased data that connected children with their families); *see also* HHS OIG REPORT, *supra* note 5, at 2, 13 (reporting that the lack of an integrated data system to track separated families across HHS and DHS added to the difficulty in HHS’s identification of separated children).

<sup>31</sup> DHS OIG REPORT, *supra* note 29, at 2.

<sup>32</sup> *Id.* at 9-10.

<sup>33</sup> *Id.* at 10.

an attachment to HHS, a process described by the DHS OIG as particularly “vulnerable to human error,” and one which “increase[ed] the risk that a child could become lost in the system.”<sup>34</sup>

As emphasized by Judge Sabraw in *Ms. L. v. Immigration and Customs Enforcement*, the agencies’ failure to coordinate tracking of separated families was a “startling reality” given that:

[t]he government readily keeps track of personal property of detainees in criminal and immigration proceedings. Money, important documents, and automobiles, to name a few, are routinely catalogued, stored, tracked and produced upon a detainee’s release, at all levels—state and federal, citizen and alien. Yet, the government has no system in place to keep track of, provide effective communication with, and promptly produce alien children. The unfortunate reality is that under the present system migrant children are not accounted for with the same efficiency and accuracy as *property*. Certainly, that cannot satisfy the requirements of due process.<sup>35</sup>

The government’s inhumane treatment of separated families described by Judge Sabraw was not merely the result of indifference or incompetence. Commander Jonathan White, a former senior HHS official, testified before Congress that he repeatedly warned those devising the policy that separating children from their parents would have harmful effects on the children, including “significant potential for traumatic psychological injury to the child.”<sup>36</sup> But those in charge willfully disregarded Commander White’s warnings. Imposing trauma on these parents and children was their very goal.

Only after the family separation policy garnered widespread condemnation and became bad politics did President Trump, on June 20, 2018, sign an executive order (“EO”) purporting to end it. The EO states that it is the “policy of this Administration to maintain family unity, including by detaining alien families together where appropriate and consistent with law and available resources.”<sup>37</sup> The EO, however, did not explain whether or how the federal government would reunify children who had been previously separated. In fact, on June 22, 2018, the government admitted that it had no reunification procedure in place.<sup>38</sup>

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<sup>34</sup> *Id.*

<sup>35</sup> *Ms. L.*, 310 F. Supp. 3d at 1144 (emphasis in original).

<sup>36</sup> Stahl, *supra* note 20.

<sup>37</sup> Affording Congress an Opportunity to Address Family Separation, Exec. Order No. 13,841, 83 Fed. Reg. 29,435 § 1 (June 20, 2018).

<sup>38</sup> See *Ms. L.*, 310 F. Supp. 3d at 1140–41. See also U.S. GOV’T ACCOUNTABILITY OFF., GAO-19-163, UNACCOMPANIED CHILDREN: AGENCY EFFORTS TO REUNIFY CHILDREN SEPARATED FROM PARENTS AT THE BORDER 21 (Oct. 2018) [hereinafter GAO REPORT] (“HHS officials told [the GAO] that there were no specific procedures to reunite children with parents from whom they were separated at the border prior to the June 2018 court order.”). The only procedure in place capable of reuniting children with their parents was the procedure developed to place unaccompanied children with sponsors in compliance with the Trafficking Victims Protection Reauthorization Act. Under this procedure, however, a parent could only be reunited with his or her child if the government deemed them eligible to be a sponsor. *Id.* Judge Sabraw noted that this procedure was inadequate because it was created to address “a different situation, namely what to do with alien children who were apprehended without their parents at the border or otherwise,” and further, that the procedure was not developed to address situations such as this one where family units were separated by government officials after they crossed the border together. *Id.* at 27, (quoting Order Following Status Conference, *Ms. L. v. Immigration and Customs Enforcement*, No. 18-0428 DMS MDD (S.D. Cal. July 10, 2018)).

It was not until a federal judge ordered the government on June 26, 2018 to reunify families that the government began taking steps to do so.<sup>39</sup> What followed was chaos. DHS claimed that DHS and HHS had created a centralized database containing all relevant information regarding parents separated from their children; however, the DHS OIG found “no evidence that such a database exists.”<sup>40</sup> According to the DHS OIG, whatever data was collected was incomplete, contradictory, and unreliable.<sup>41</sup> Because no single database with reliable information existed, the Government Accountability Office found that agencies were left to resort to a variety of inefficient and ineffective methods to determine which children were subject to Judge Sabraw’s injunction.<sup>42</sup> These methods included officers hand sifting through agency data looking for any indication that a child in HHS custody had been separated from his or her parent<sup>43</sup> and calling in the Office of the Assistant Secretary for Preparedness and Responses, an HHS agency whose normal prerogative involves response to hurricanes and other disasters, to review data provided by CBP, ICE, and ORR.<sup>44</sup> The method for determining which family units required reunification changed frequently, sometimes more than once a day, with staff at one ORR shelter reporting that “there were times when [they] would be following one process in the morning but a different one in the afternoon.”<sup>45</sup> Judge Sabraw harangued the agencies for their lack of preparation and coordination at a status conference proceeding on July 27, 2018: “What was lost in the process was the family. The parents didn’t know where the children were, and the children didn’t know where the parents were. And the government didn’t know either.”<sup>46</sup>

The government’s cruel policy of separating children from their parents, and its failure to track the children once they were separated, violated the claimants’ Constitutional right to family integrity.<sup>47</sup> The government instituted and implemented this policy to intentionally inflict

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<sup>39</sup> *Ms. L.*, 310 F. Supp. 3d at 1149-50.

<sup>40</sup> DHS OIG REPORT, *supra* note 29, at 10.

<sup>41</sup> *Id.* at 11-12.

<sup>42</sup> GAO REPORT, *supra* note 38, at 23-25.

<sup>43</sup> *Id.* at 24.

<sup>44</sup> *Id.* at 23.

<sup>45</sup> *Id.* at 27.

<sup>46</sup> Transcript of Joint Status Report at 58, *Ms. L. v. Immigration and Customs Enforcement*, No. 18-cv-00428 DMS MDD (S.D. Cal. July 27, 2018).

<sup>47</sup> See *Ms. L.*, 302 F. Supp. 3d at 1161-67 (finding that plaintiffs had stated a legally cognizable claim for a violation of their substantive due process rights to family integrity under the Fifth Amendment to the United States Constitution based on their allegations that the Government had separated them from their minor children while they were held in immigration detention and without a showing that they were unfit parents or otherwise presented a danger to their children); *Ms. L.*, 310 F. Supp. 3d at 1142-46 (finding that plaintiffs were likely to succeed on their substantive due process claim when assessing their motion for a preliminary injunction). See also *Smith v. Organization of Foster Families*, 431 U.S. 816, 845 (1977) (liberty interest in family relationships has its source in “intrinsic human rights”). DHS employees are responsible for supervising and managing detainees at CBP and ICE facilities, including those located in California. And HHS employees are responsible for supervising and managing the detention of unaccompanied children, including at facilities in New York. The Bureau of Prisons (“BOP”) is responsible for supervising and managing detainees at BOP facilities and, in some circumstances, directing operations at federally contracted facilities, including those located in California. See, e.g., *Edison v. U.S.*, 822 F.3d 510, 518-19 (9th Cir. 2016); *Greenland v. United States*, 661 F. App’x 210, 214 (3d Cir. 2016). BOP, DHS and HHS employees are federal employees for the purposes of the Federal Tort Claims Act. Contractors are subject to

emotional distress on the parents and children who were separated. It succeeded, with devastating consequences for parents and children like Elizabeth and Antonio.

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the Federal Tort Claims Act where the Federal Government retains the power “to control the detailed physical performance of the contractor.” *Logue v. United States*, 412 U.S. 521, 528 (1973).