

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.¹ After the forced separations began, former Attorney General Jeff Sessions confirmed that the goal was deterrence.² 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*.”³ 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.”⁴

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.⁵ And recent reports indicate that the number of families separated may have been much higher.⁶ The victims of this cruel and unconstitutional policy include L.G. and her seven-year-old daughter, B.G., whose forced separation lasted for more than two months.

A. **The Forced Separation of L.G. from Her Seven-Year-Old Daughter**

On or around May 16, 2018, L.G., a twenty-four-year-old Guatemalan national, and her seven-year-old daughter, B.G., came to the United States through an official port of entry near San Luis, Arizona, seeking refuge from life-threatening violence. L.G. and

¹ 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.

² *Id.*

³ *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).

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

⁵ 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].

⁶ *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.”).

her daughter B.G. fled L.G.'s partner, a member of the Guatemalan military, who regularly abused both of them and refused to let L.G. end their relationship. U.S. Customs and Border Protection ("CBP") agents escorted L.G. and B.G. through the port of entry and L.G. told the officers that she had come to this country because she feared for her safety and the safety of her daughter.⁷ The officers did not ask follow-up questions; they merely asked for her identification documents, which she provided, and then sent L.G. and B.G. to a nearby short-term detention center—a type of detention center so notorious for its frigid temperatures that it is called *la hielera* or "the icebox."

L.G. and B.G. arrived at the *hielera* in the evening. As soon as they arrived, an officer told L.G. that government officials would take B.G. away from her. When she asked why, the officer shouted at her that she crossed the border, and that crossing the border was a crime (even though she presented herself at a legal port of entry). The officer accused L.G. of using her daughter as a free ride to gain entry to the United States. He told L.G. that the law had changed and, since she had entered illegally (which was not true), DHS would hold her in a jail, and officers would take B.G. to a "better place." L.G. was terrified.

Immigration officers then locked L.G. and B.G. in a large, already crowded, cell with a window facing into the area where the immigration officers worked. Because there were no beds, L.G. and B.G. had to sleep on mats on the concrete floor, with only aluminum foils to cover themselves, which did not keep them warm. The overcrowded holding cell had no bathing facilities, and only one toilet and sink in the corner for the more than 100 mothers and children crowded into this area.

DHS had already taken children away from some of the other mothers in the room. L.G. watched immigration officials callously ignore these heartbroken women as they begged for information about their children. Many women were crying. Some prayed. They told L.G. that immigration officers would take her daughter away, too. L.G. did not sleep that night. She cried the entire night, holding her daughter in her arms.

Around 10 A.M. the next morning, an immigration officer called L.G.'s name, and told her that they would be taking B.G. to "a better place" but would not give her any details. L.G. could not understand why they would do this, and she began to sob. She did not know how to explain to her daughter what was going to happen. L.G. wanted to put on a brave face for her daughter, but she was scared. She told B.G. that they would be apart for a little while, but she did not think her daughter understood what was going to happen.

In the afternoon, two male immigration officers began calling the names of children. L.G. and B.G., along with everyone else detained in the room, watched as the immigration officers took other children away from their mothers. Many people in the room were crying. One young boy, about five or six, cried and clung to his mother after one of the officers called his name. Because he refused to let go, the officer approached them and yanked him from his mother's arms. Watching this upset L.G. even more.

⁷ L.G. and B.G. only speak Spanish. All referenced conversations were in Spanish unless otherwise noted.

When B.G.'s name was called, she looked up at her mother. The officer ordered B.G. to come to him, and told them to say good-bye. L.G. told B.G. that they would not be apart long, and told her to be strong. L.G. watched, through the window, as the officers took away her child. When B.G. turned around and caught her mother's eye, L.G. could do nothing but cry. Approximately six or seven children were taken away with B.G., ranging in age from approximately five years to eight years old.

L.G. remained in the *hielera* for about nine days.⁸ Almost every day, and sometimes multiple times a day, the immigration officers took a new batch of children away from their parents. L.G. had to watch these separations and relive her trauma again and again. L.G. and the other mothers frequently asked the immigration officers about their children. The officers never answered their questions. L.G. did not know where B.G. was, nor did she have contact with her. During the nine days in the *hielera*, L.G. remained in the same room without access to soap and with no ability to bathe.

On or about May 26, 2018, immigration officers put L.G. in shackles and transported her to the Florence Detention Center in Arizona, where she and the other detained women with her were finally able to bathe. Later that day, immigration officials again put L.G. in shackles and transported her to a jail in Santa Cruz, Arizona. They provided her with a prison uniform which made her feel uncomfortable and humiliated. Again, L.G. asked the immigration officers about her daughter—where she was, how she was doing. The officers gave her no information.

On or around May 29, 2018, immigration officers brought L.G. and several other women to an airport in shackles. L.G. asked the immigration officers where she was going, but they said they did not know. She was distraught, frustrated and crying incessantly. They gave her no information, and she was convinced she was going to be deported without her daughter. L.G. finally learned from a flight attendant that the plane was heading to California. Upon arrival, a government van took L.G. and the others to an immigration detention center near Los Angeles.

The following day, immigration officers shackled and transported L.G. yet again, this time to the James A. Musick Facility in Irving, California ("Musick"). For two weeks, DHS had kept L.G. separated from B.G. and in the dark about her whereabouts or well-being. L.G. and the other mothers detained in Musick discussed how they might find their children, but none of them had any information. L.G. repeatedly asked immigration officers where her daughter was, and requested a call with her. Every time, the officers said that they had no information about her daughter, they did not know where she was, and they could not set up a call for her because then they would have to set up calls for every mother separated from her child.

One night, while she was staying at Musick, immigration officers transported L.G. to an immigration court where she saw a judge. The judge told her that she would be deported. Distraught, L.G. told the judge that her daughter was in the United States

⁸ L.G. and the other detainees were able to keep track of time by looking at the date and time on the immigration officers' clocks and computer screens through the interior window.

and that she could not be deported without her daughter. The judge gave her a piece of paper in English and said good luck. The immigration officers then transported her back to Musick. L.G. was devastated. She did not know what the paper said but she was certain she would be deported without B.G..

On or about July 10, 2018, after nearly eight weeks of separation, immigration officers in Musick finally allowed L.G. a two-minute phone call with B.G. For the entire eight weeks up to that point, immigration officers had refused to tell her anything about her daughter, even though, in every place that she had been detained she repeatedly begged officers for information. Upon making the call, L.G. first spoke to a social worker and, for the first time since immigration officers took her daughter, L.G. was told that B.G. was at a shelter called the Hacienda del Sol in Arizona. L.G. then spoke to B.G. She was relieved to finally hear her daughter's voice again. However, she soon became upset - B.G. was barely speaking, only giving one-word answers to L.G.'s questions. Partway through the conversation, B.G. began to cry. L.G. spoke to B.G. for only five minutes before the social worker with B.G. ended the call because B.G. was so upset. This was the only time DHS allowed L.G. to talk to her daughter during the eight-and-a-half weeks the government forced them to be apart. After that phone call, L.G. had many moments of anguish and desperation. She was overcome with worry about her daughter.

On or about July 20, 2018, L.G. was shackled and transported to a detention center in Port Isabel, Texas. When she arrived in Port Isabel, an immigration officer told her she would be reunited with B.G.. She was asked to sign papers to be reunified with her daughter. The papers were in English and she does not know what she signed. Approximately four days later, around midnight, L.G. and B.G. were reunited after a forced separation of nearly two and a half months. L.G. was overjoyed to be reunified with B.G. L.G. and B.G. hugged each other for a long time and cried.

Later that night, immigration officers transported L.G. and B.G. in a car to the South Texas Family Residential Center in Dilley, Texas (Dilley). It was the first time in months that L.G. was transported without shackles. While in Dilley, B.G. had an interview with an asylum officer and established that she had a credible fear of persecution. After detaining them at Dilley for an additional four months, DHS released L.G. and B.G. in late November.

By forcibly separating mother and child, DHS caused L.G. and B.G. severe emotional distress. From the moment L.G. saw her daughter turn back to look at her through the cell window as the immigration officers led her away, L.G.'s trauma has been palpable. Immigration officers compounded her distress and depression by denying L.G. any information about B.G.'s whereabouts or well-being for months. L.G. thought about B.G. constantly for the entire eight-and-a-half weeks of separation, resulting in insomnia and loss of appetite.

L.G. suffers continuing harm as a result of the forced separation from her daughter. She suffers from near constant, uncontrollable worry, depressed mood,

difficulty sleeping and decreased energy. A psychological evaluation confirms that L.G. suffered, and continues to suffer, trauma as a result of the separation, and the lack of information regarding B.G.'s safety, well-being, and whereabouts. A doctor who evaluated L.G. during her detention in Dilley found that she exhibited symptoms consistent with post-traumatic stress disorder (PTSD), Generalized Anxiety Disorder, and Major Depressive Disorder. L.G. continues to experience migraines and trouble sleeping from the stress of the separation.

B.G. likewise suffered and continues to suffer severe emotional distress as a result of the traumatic separation from her mother. When an immigration officer told her that she would be separated from her mother, she was distraught and terrified because she did not understand what was going to happen to her. After removing her from her mother, immigration officers transported B.G. to Hacienda del Sol, a shelter near Phoenix, Arizona, that the government recently had to shut down in the wake of allegations of child abuse by staff members.⁹ While in the shelter, B.G. did not sleep well, and often cried because she was scared and missed her mom. She could not be happy without her mom. B.G. was happy to be reunited with her mother, but she continues to worry that she will be taken from her again. While in Dilley, L.G. sought help from a psychologist for B.G. The psychologist told L.G. that B.G. was suffering from severe stress. B.G. has changed since the separation. She cannot sleep unless her mother holds her. When L.G. and B.G. go on walks outside, B.G. is fearful and asks to return to the house because she is terrified that something bad is going to happen to them again.

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.¹⁰ On April 6, 2018, President Trump issued a memo entitled "Ending 'Catch and Release' at the Border of the United States and Directing Other Enhancements to Immigration Enforcement."¹¹ The memo, among other things, directs

⁹ *Arizona Shelter Shut in Latest Case of Alleged Migrant Child Abuse*, CBS NEWS, Oct. 10, 2018, <https://www.cbsnews.com/news/arizona-shelter-shut-in-latest-case-of-alleged-migrant-child-abuse/>.

¹⁰ *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-trump.html?action=click&module=Top%20Stories&pgtype=Homepage>; 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>.

¹¹ 83 Fed. Reg. 16,179 (Apr. 13, 2018).

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.”¹² “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.¹³

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.¹⁴ 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.¹⁵ The U.S. Government has admitted to forcibly separating more than 2,700 children from their parents and placing them in government custody.¹⁶ A recent HHS OIG report, however, indicates that the actual number is “thousands” higher.¹⁷

Administration officials at the highest levels knew well before implementing the policy that it would harm the people it affected.¹⁸ Yet, once the separations began to generate public outrage and condemnation, administration officials changed their tune. They insisted that their hardline stance on prosecuting border crossings was not intended to discourage immigration, and, shockingly, even denied the existence of a family

¹² *Id.*

¹³ 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>.

¹⁴ *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).

¹⁵ *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).

¹⁶ Joint Status Report, *supra* note 5, at 9; HHS OIG REPORT, *supra* note 5, at 11.

¹⁷ 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.

¹⁸ 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.*

separation policy.¹⁹ 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.”²⁰

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.”²¹ As for the children affected, he said: “[t]he children will be taken care of—put into foster care *or whatever*.”²²

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.”²³

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.”²⁴

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.”²⁵ On December 16, 2018, the President tweeted, “[I]f you don’t separate, FAR more people will come.”²⁶

¹⁹ 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>.

²⁰ *Policy Options to Responder to Border Surge of Illegal Immigration*, (Dec. 16, 2017), <https://www.documentcloud.org/documents/5688664-Merkleydocs2.html>.

²¹ *Id.*

²² *Transcript of White House Chief of Staff John Kelly’s Interview with NPR*, *supra* note 3 (emphasis added).

²³ Bump, *supra* note 1.

²⁴ *Id.*

²⁵ 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>.

²⁶ Donald Trump, *supra* note 4 (emphasis in original).

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.”²⁷ 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.”²⁸

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.²⁹ 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.”³⁰ As a result, when ICE was processing detained individuals for removal, “no additional effort was made to identify and reunite families prior to removal.”³¹ 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 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.”³²

²⁷ 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].

²⁸ *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).

²⁹ DHS OIG REPORT, *supra* note 27, at 2.

³⁰ *Id.* at 9-10.

³¹ *Id.* at 10.

³² *Id.*

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.³³

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."³⁴ 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."³⁵ 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.³⁶

³³ *Ms. L.*, 310 F. Supp. 3d at 1144 (emphasis in original).

³⁴ Stahl, *supra* note 18.

³⁵ Affording Congress an Opportunity to Address Family Separation, Exec. Order No. 13,841, 83 Fed. Reg. 29,435 § 1 (June 20, 2018).

³⁶ 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

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.³⁷ 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.”³⁸ According to the DHS OIG, whatever data was collected was incomplete, contradictory, and unreliable.³⁹ 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.⁴⁰ 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 parent⁴¹ 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.⁴² 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.”⁴³ 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.”⁴⁴

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.⁴⁵ The government instituted and implemented

Following Status Conference, *Ms. L. v. Immigration and Customs Enforcement*, No. 18-0428 DMS MDD (S.D. Cal. July 10, 2018)).

³⁷ *Ms. L.*, 310 F. Supp. 3d at 1149-50.

³⁸ DHS OIG REPORT, *supra* note 27, at 10.

³⁹ *Id.* at 11-12.

⁴⁰ GAO REPORT, *supra* note 36, at 23-25.

⁴¹ *Id.* at 24.

⁴² *Id.* at 23.

⁴³ *Id.* at 27.

⁴⁴ 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).

⁴⁵ *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, Arizona and Texas. And HHS employees are responsible for supervising and managing the detention of unaccompanied children, including at facilities in New York. DHS and HHS employees are federal employees for the purposes of the Federal Tort Claims Act.

this policy to intentionally inflict emotional distress on the parents and children who were separated. It succeeded, with devastating consequences for parents and children like L.G. and B.G.