

## 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 Elena and her thirteen-year-old son Luis, whose forced separation lasted for seventy-seven days.<sup>7</sup>

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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, Elena and Luis are pseudonyms.

### A. The Forced Separation of Elena from Her Twelve Year-Old Son

Elena is from Guatemala. She is thirty-five years old and the mother of a now thirteen-year old boy, Luis. In 2018, gang members repeatedly threatened Elena and Luis with violence in retaliation for Elena having reported to local police that the gang assaulted another woman. Gang members also told Elena and Luis that they would kill them both if Luis did not join the gang. Fearing for their lives, Elena and Luis (then twelve years old), fled Guatemala for the United States. On or about May 8, 2018, they crossed the border into Arizona, where they were apprehended by U.S. Customs and Border Protection (“CBP”) agents. While arresting Elena, an immigration officer told her that she would be separated from her son and taken to jail.<sup>8</sup>

Immigration officers escorted Elena and Luis to a *hielera*<sup>9</sup> and locked them in a crowded cell with around twenty people, where they remained for two days. The only food they were given was cold instant soup. Despite the very cold temperatures inside the cell, officers provided only a single foil sheet for Elena and Luis, which Elena gave to her son. There was no bed or bedding, and Elena and Luis were forced to sit on the cold floor. The cell was so crowded that it was impossible to lay down, and they sat all night with their legs pulled in because there was little space in the room. Elena did not sleep the first night because she was afraid and concerned for the well-being of her son. Elena and Luis also overheard guards telling mothers that they would be separated from their children, and this made them both very afraid. Several times, Luis said to his mother, “mommy, let’s go, we need to get out of here,” because he was frightened and did not understand why they were detained. Elena would sadly tell him, “I’m sorry but we cannot leave, the door is locked.”

The *hielera* was often filled with the sounds of crying children. On Elena and Luis’s second day of detention, an officer came to the cell and scolded the mothers, “why did you bring your children here?” The officers ominously told the mothers that they did not know what they had gotten themselves into, and that they would take the mothers’ children away and that the mothers would not know where to find them. Late that night, officers started entering the room and reading children’s names from a sheet of paper, starting with the youngest. A few at a time, children were taken to shower, and then dressed in identical blue uniforms and black shoes. The children were instructed to line up to leave. Because of the officers’ earlier comments, Elena knew that they were starting to take the children away. Luis was asleep on the floor when the officers called his name. Elena woke up her son and told him that the officers were calling him to be taken away. Attempting to comfort her terrified son, Elena told Luis not to cry, to eat well, and that it would not be long until they were reunited. She asked the officers where Luis would be taken, but they would not tell her. Elena asked what was going to happen next. An officer told Elena that she would be deported and her son would stay in the United States. At approximately 4 a.m., officers took Luis away. It was the last time

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<sup>8</sup> Elena and Luis only speak Spanish. Unless otherwise stated, all referenced conversations referenced in Section 8.A of this claim occurred in Spanish.

<sup>9</sup> It is common parlance to refer to a temporary immigration holding facility as “*la hielera*,” which means, “the icebox,” because of the consistently freezing temperatures in these facilities.

Elena saw him for 77 days. Although she did not know it at the time, the officers brought Luis to the airport to be sent to a Cayuga Center in New York, over 2,500 miles away from Elena.<sup>10</sup>

At or around 5 p.m. on the day the immigration officers forcibly separated Elena and Luis, Elena was transferred to a detention center in Eloy, Arizona. Every day, she asked officers where her son was and when she would be with him again, but they did not give her any information. Elena was heartbroken. She was so consumed with worry for her son that she could not eat.

After approximately two weeks at Eloy, an officer escorted Elena to a room with a telephone. Luis was on the line. The officer told Elena she had only five minutes to speak with him. Luis cried a lot during the call, which caused Elena to cry as well. When she began crying, the officers laughed at her and shook their heads. Elena learned from the other women at the facility that the officers would frequently laugh as crying mothers spoke with their separated children. Elena also spoke with a social worker on the telephone call. The social worker told Elena that Luis is “good here, he’s not missing anything.” Elena responded, “families need to be together.”

Over approximately the next month, Elena regularly tried calling Luis using money her brother-in-law had put into an account for her. Nearly every time Elena called, however, no one answered the phone. Finally, after weeks of unanswered phone calls, Elena finally spoke to Luis again. Elena tried to reassure him that they would soon be reunited. After this call, Elena went several more weeks without speaking to Luis. Most of the time, her phone calls went unanswered. One time, a woman answered and gave Elena a different phone number to try. When Elena called that number, a woman answered and told her that she had the wrong number, and that there were no children there. Elena panicked, thinking she had lost what little contact she had with her son.

Elena appeared before an immigration judge two times while she was detained at Eloy. At her first hearing, the immigration judge asked her whether she had anyone who could sponsor her for her release, but Elena did not have anyone. On or about June 21, 2018, Elena appeared before an immigration judge for the second time. An officer posted at the hearing room door instructed Elena that she could not say anything to the judge other than “yes” or “no” to his questions. Although she tried her best, Elena could not focus on what the judge was saying. All Elena could think about was whether her son was safe, but she did not believe she was permitted to talk to the judge about Luis. The immigration judge ordered Elena’s deportation at that time.

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<sup>10</sup> According to its website, Cayuga Center contracts with the U.S. Office of Refugee Resettlement (“ORR”) to provide foster care programs for unaccompanied children, and is “the largest provider of transitional foster homes for Central American children taken into custody while crossing the U.S. southern border.” See <http://cayugacenters.org/news/2018/06/cayuga-centers-provides-foster-care-and-services-unaccompanied-children/>; <http://cayugacenters.org/news/2017/03/cayuga-centers-awarded-expanded-grants-us-office-refugee-resettlement/>. Cayuga operates several facilities in New York. The specific facility that housed Luis is not known at this time.

Approximately a week after this hearing, an officer told Elena that she needed to sign some papers. He asked her if she wanted to be deported alone or with her son. Elena insisted that Luis go with her, but the officer then told Elena that she would be reunited with him only after she left the United States. Elena began to panic, but the officers would not answer her questions. She finally signed the papers because she believed that she would only be reunited with her son if she did so.

On or about July 25, 2018, immigration officers told Elena that she would be leaving Eloy that day. Elena was terrified she would be deported without her son. She asked about Luis, but was told only that she would receive more information when she arrived at her destination. She was devastated and began to cry, feeling like her “soul had left her body.” The immigration officers placed her in shackles and put her in a van which took her to an *hielera*. Elena repeatedly asked the immigration officers there what was happening and whether she and the other women in the *hielera* would get their children back. The immigration officer did not answer and kept calling women out of the cell until she was the last person left. Elena was terrified and convinced that she would be deported without her son, who was turning thirteen years old that day. She wanted badly to hug him, to comfort him, and to wish him a happy birthday.

After a long and sleepless night, at around 10 a.m., officers escorted Elena to another room, where Luis was waiting. Elena was so happy to be able to hug him again. The next day, she and Luis were transferred to the South Texas Family Residential Center in Dilley, Texas (“Dilley”), where they remained until their release from immigration detention on November 30, 2018. While Elena was detained at Dilley, the Department of Homeland Security (DHS) moved to reopen Elena’s removal proceedings in light of pending litigation challenging the family separation policy.<sup>11</sup> The immigration court subsequently reopened Elena’s case. She and Luis now live with family in Massachusetts while they await an asylum hearing.

Throughout Elena’s detention, particularly during the extended periods in which she was unable to speak with her son, she was extremely stressed. She struggled to think clearly or concentrate on even basic tasks, and she was easily startled. Elena suffered persistent insomnia. She had no interest in eating and lost a lot of weight. Sleep deprivation and stress triggered excruciating headaches and pain in her eyes.

Even after being reunited with her son, Elena continued to suffer from headaches, difficulty concentrating, and insomnia. A person working at the medical center at Dilley told her that it was a symptom of her stress and her continued anxiety and fear that she would be separated from her son again. Elena was constantly nervous when Luis went anywhere without her while at Dilley. When he would leave for the children’s classroom within Dilley, Elena worried he would not return. Her anxiety was so severe that she vomited regularly. A group of mothers, including Elena, went to an officer at Dilley and asked how much longer they would be detained, and an officer respond by saying, “stop

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<sup>11</sup> See *Ms. L. v. U.S. Immigration and Customs Enforcement*, 302 F. Supp. 3d 1149 (S.D. Cal. 2018); *Ms. L. v. U.S. Immigration and Customs Enforcement*, 310 F. Supp. 3d 1133 (S.D. Cal. 2018).

asking, or we will take your kids away again.” With each new threat, Elena faced another bout of insomnia.

Following a mental health evaluation at Dilley, a psychologist diagnosed Elena with post-traumatic stress disorder (“PTSD”), finding that after the forced separation from her son, Elena lived “in a constant state of fear and worry.” To this day, Elena continues to experience symptoms consistent with PTSD, such as problems with memory and concentration.

While at Dilley, Luis also experienced symptoms tied directly to the trauma of his forced separation from his mother. He often refused to eat and would become suddenly and inexplicably angry, sometimes storming out of the room when Elena tried to talk to him about their separation. Luis is still unable to speak at length with Elena about their separation or his time at the Cayuga Center, and Elena has noticed that he is much angrier and more rebellious than before the separation.

## **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 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>

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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-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>.

<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>.

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 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

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<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.*, 302 F. Supp. 3d at 1162-67; *Ms. L.*, 310 F. Supp. 3d at 1142-46.

<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.*

<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>.

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> 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.

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<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>.

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

## 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 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

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<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.

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

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>

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,

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<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)).

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

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

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

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<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 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.